More Direct Director Responsibility: Much Ado About...What?

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MORE DIRECT DIRECTOR RESPONSIBILITY: MUCH ADO ABOUT . . . WHAT?

H.J. Glasbeek*

I. INTRODUCTION

The private accumulation process central to capitalism always has been, and continues to be, contested. Nonetheless, it is fair to say that, these days, the debate about the theoretical acceptability of our political economy is a muted one, certainly in our part of the world. Capitalism’s hegemony seems well-secured, especially after the dramatic events in the East European bloc and the clear changes in directions in China and (to a lesser extent) Vietnam, as well as in Nicaragua and Cuba. This does not mean, however,

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Marxists reject it because it is based on the exploitation of labour, rendering workers into wage slaves by means of the pretence of freedom of contract. Various schools of feminists object to it, either because they too see it as a class-based system which, in addition, is a gendered system or because, while they do not take the class analysis approach, capitalism embodies the evils of hierarchical relationships; see for instance Marilyn Waring, If Women Counted: A New Feminist Economics (San Francisco, Harper & Row, 1988); Dorothy E. Smith, “Women, The Family and Corporate Capitalism” in Mary Lee Stephenson, ed., Women in Canada, (General Publishing, 1977), p. 17; Marion G. Crain, “Feminizing Unions: Challenging the Gendered Structure of Wage Labour” (1991), 89 Mich. L. Rev. 1155. For an overview, see Kathleen A. Lahey and Sarah W. Salter, “Corporate Law in Legal Theory and Legal Scholarship: From Classism to Feminism” (1985), 23 O.H.L.J. 543. Some legal-political analysts argue that one of the major presuppositions of the private wealth accumulation system, viz. that wealth maximization is a value in its own right, is unacceptable to them. For a convenient overview, see R. Dworkin, “Is Wealth a Value?” (1980), 9 J. Leg. Stud. 191; A.T. Kronman, “Wealth Maximization as a Normative Principle” (1980), 9 J. Leg. Stud. 227 and the response by R. Posner, “The Value of Wealth: A Comment on Dworkin and Kronman” (1980), 9 J. Leg. Stud. 243. Some theologians are concerned because capitalism is based on selfishness and greed and is capable of leading to inequalities which are hard to justify. See, for example, the Episcopal Commission for Social Affairs for the Canadian Conference of Catholic Bishops, Ethical Reflection on the Economic Crisis, 1983. For a discussion of some of these and other writings, see H.J. Glasbeek, “Commercial Morality through Capitalist Law: Limited Possibilities” (1993), 27 Thémis 263.

All of this has led to a much-cited declaration that this kind of debate has come to an end. See Francis Fukuyama, “The End of History”, National Interest 1, Summer 1989. Of
that what people continue to perceive as the contradictory, oppressive or immoral outcomes of working capitalism, do not provide the bases for diverse forms of resistance. Typically, however, the ensuing battles are fought at a more concrete level, that is, where the activities which embody and concretize the values of capitalism take place. As the corporation is a legally engineered device which has become one of the most important working tools employed in the furtherance of the accumulation process, these struggles always put both its * raisons d'être * and its legitimacy under scrutiny.

One of the key tenets of capitalism is that private individuals are expected to maximize the opportunities provided by their resources and abilities. Guided by rational self-interest, they will calculate the potential benefits and costs of their activities. They know that the fruits of their endeavours will be theirs to keep. Similarly, if they fail, they understand that the losses are to be borne by them. They must pay for the debts they leave and are obliged to set right any wrong done to others as they seek to maximize their opportunities. This attribution of responsibility, both for one's own welfare and for the results of the behaviour engaged in pursuit of it, supports political values which go a long way towards off-setting the alleged amoral and immoral aspects of the private accumulation system.

The personal and legal accountability of individuals for their self-promoting economic acts, that is, for acting as Rational Economic Men, reflects the logic of a legal-political system based on the principles of * de jure * equality, individual sovereignty and the primacy of the exercise of free will. These liberal political values are seen as being integral to the political economic model which we call capitalist relations of production. Our legal system has helped develop this kind of political economy and reflects and continues to promote its values.

Thus it is that when a person engages in business and, say, pollutes the environment, that person will be held personally responsible for the damage that has been done. Similarly, if the same event occurs as a result of the conduct of business by a firm constituted by a number of joint-venturers or partners, the firm

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course, this is not the first time such a triumph has been announced. Cf. Daniel Bell, * The End of Ideology* (Glencoe, Illinois, Free Press, 1960); and see also Chaim I. Waxman, Ed., * The End of Ideology Debate* (New York, Simon & Schuster, 1969).
and each of the partners may be held accountable for the damage. The logic is straightforward: these people invested their capital and made efforts to make a personal profit; the economic model, as well as the political one based on it, expects them to be personally responsible for the outcomes of their conduct. The law endorses these understandings.

As is well known, all of this changes if the same investors pool their resources to form a corporation and the corporation engages in the same conduct with the same harmful results. This time the investors will not be held directly responsible for the damage done by the business they set up to maximize their opportunities. Something has happened. The doctrine of separate legal personality, an essential characteristic of the corporation, a vehicle designed to facilitate capitalist activities, has put a protective shield around investors.

It is not an impermeable shield. If the corporation's injurious activities require compensation to be paid and/or clean-up activities to take place, the corporation, as the legal person responsible, may be held to account. This, in turn, may well reduce the value of the shareholders' investment in the corporation and, if this imposition of enterprise liability leads to the insolvency of the corporation, may result in the loss of the whole of the shareholders' investment. But no more than that. This is the well-known consequence of another characteristic of this vehicle designed to facilitate capitalist activities, namely, limited liability.

Much effort has been expended on countering the attacks on the legitimacy of the corporate vehicle which arose as soon as the possibility of limited liability was put on the legislative table. In more recent times, the law and economics scholars have provided the most persuasive and sophisticated arguments to justify limited liability. Basically, they argue that economic efficiency supports the grant of limited liability to investors.

3 There are circumstances in which the corporate veil will be pierced and major shareholders and corporate actors will be held personally responsible. The need for special treatment emphasizes the point made in the text.


5 While economic efficiency has several meanings and the reasoning varies accordingly,
Still, despite these very plausible arguments, the suggestion of lack of legitimacy which arises from the shielding effects of the use of the corporate vehicle has never been totally resolved. The difference in treatment of those who invest in, and become members of, a corporation, as opposed to that meted out to other kinds of risk-takers and risk-creators, remains an irritant to many people precisely because the tenets of liberalism demand that, if the fetters of personal responsibility are to be put on individuals in order to serve the collective good, all individuals should be equally fettered. This is especially strongly felt if the restraints are stringent ones. This draws attention to one aspect of the imposition of legal responsibility which economic-based efficiency arguments find it awkward to address.

When a risk-taker and risk-creator causes a loss to another, the nature of the loss and the way in which it was inflicted may lead us to demand more than that the loss be made good. For instance, a breach of a contractual obligation could be set right by compensation and/or specific performance. Sometimes, if the breach is the result of a bad practice, say, a failure to monitor the quality of the goods or services rendered, it might lead to an administrative sanction being imposed on the violator in addition to requiring him/her to make reparation for the harm inflicted. Such a sanction could take the form of a reprimand, the suspension of a licence, a fine and even imprisonment. And, if the violation of the contract is due to, say, a fraudulent or deceitful practice, punitive damages may be exacted and/or a criminal sanction may be imposed against the perpetrator, in addition to the payment of compensation to the victim.

While it is not always analytically clear which remedy or sanction ought to be attached to what conduct, it is clear that we, as members of a liberal democratic capitalist society, want to have all these possibilities open to us. There are occasions when the
publicized personal stigmatization and punishment of a wrongdoer are seen as appropriate remedies for the violation of one of our consensually generated limitations on the individual's right to do as s/he pleases.

It is obvious that a corporation, like any human being, may be made to pay punitive damages, be subjected to an administrative sanction and even be criminally convicted. Such punitive sanctions may very well have denunciatory and condemnatory effects, yet this may not satisfy our perceived needs in the same way as the imposition of punishment on human beings does. This is so because a personalized sanction satisfies some of our more visceral notions which demand that, on occasion, there should be personal damnation, personal shame, personal hurt and humbling contriteness. The difficulty of attaining these goals when corporations, rather than their owners, are punished, is manifest. The disillusionment this may spawn is likely to be deepened by the fact that the twin key attributes of a corporation — its legal personality and limited liability for its shareholders — provide the investors with an incentive not to take responsibility. They are induced to be passive profiteers who, rationally, will rarely show much interest in how the corporate vehicle in which they have invested pursues profit.

This is not to say that individual actors within the corporate envelope cannot be legally stigmatized and corporally punished. Employees, agents and officers may be subjected to such sanctions, just as the employees, agents and officers of businesses run by sole entrepreneurs or joint-venturers can be. But, unlike the investors in an unincorporated business, individuals who invest equity capital continue to escape the direct application of state disapproval while enjoying the full membership benefits bestowed by the corporate form. It is in this setting that the notoriety given to the recent convictions of high profile directors (Bata) and the mass resignation of directors of large publicly traded corporations because they might be held civilly responsible for corporate conduct (the directors of the subsidiaries of PWA, the directors of Westar), can be understood. A different class of people than usual was being held responsible for corporate conduct.

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6 While they may be contractually indemnified or protected by insurance, this protection will not always be available and will not save them from imprisonment if they are convicted of an offence.
That this was seen as a new departure can be gleaned from such headlines as: "New challenges for directors";7 "Don't drive directors from boards";8 "Liability chills heads for liability freeze";9 "Why would anyone be a director?";10 and "The Fall Guys".11 There was a feeling that something important was brewing and it was something the world of corporate directors and their supporters did not like. This is not surprising. From their perspective, their lives seemed to have become markedly more risky. What is perhaps more intriguing is that this position, namely that the increasing personal responsibility of corporate directors was an unwelcome development, has attracted considerable scholarly support. This raises many issues, some of which this article seeks to explore.

The starting point is that there is nothing legally new about holding corporate directors personally responsible for harms done and costs incurred arising out of corporate activities. If anything is new it is the number of situations in which, and the kinds of actions for which, directors are now potentially personally responsible. I will argue that the expansion of the ambit of responsibility does not of itself raise a conceptual difficulty for the legal model of the corporation, although the wisdom of these developments may well be questioned. It is done most insightfully by the theorists of the law and economics school. They issue warnings about the inefficiencies which may result from the seemingly out-of-control expansion of directors' responsibility. Their arguments are elegant and plausible and are likely to have a good deal of resonance with policy-makers.12 But in the absence of clear empirical evidence to support them, the arguments that the increasing imposition of personal responsibility on corporate directors is bound to be inefficient are not conclusive. The debate about the analytical appropriateness and the economic utility of increased director responsibility, therefore, is not likely to go away and will lead to some intriguing twists and turns.

The imposition of direct personal responsibility on corporate

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12 Supported, as they will be, by the very important and influential people who believe that it is their ox which is being gored.
directors, that is, those persons who, in class terms, are most proximate to the investors who are shielded from direct personal responsibility, might be seen as going a long way towards countering the attacks on the legitimacy of the corporate vehicle. In particular, it might relieve some of the difficulties posed for the proponents of the system by the all-too-frequent, non-efficient use of the closely held corporation. The twin features of limited liability and separate legal personality are easily manipulated, and often are. This has led some law and economic scholars to argue that, perhaps, the grant of limited liability to these kinds of business vehicles is not warranted.\(^1\) Holding directors, who often are major shareholders in such a corporation, personally responsible would advance the cause of legitimacy which the shields provided by the corporate vehicle for investors tend to undermine. Resistance by the law and economic scholars to the increase in direct personal responsibility of directors, therefore, might renew the very questioning these scholars, more than anyone else, have done so much to dampen.

A (necessarily) speculative argument will be offered in this article as to why these theorists may be putting themselves in the uncomfortable position of reawakening what they have spent so much effort trying to put to sleep. In part, the argument is that these people have a set of unarticulated fears which have to do with the potential reconstruction of the markets by dint of this imposition of personal director responsibility. It might lead to reconstructions not empathetic with capital's fiercely held views that this is a time for deregulation rather than regulation. Relatedly, the argument continues (hesitantly), there also may be apprehension that while the direct imposition of responsibility on corporate directors is notionally compatible with the recent efforts put into saving the legitimacy of the unidimensional maximizer-of-profits corporate governance model favoured by the law and economics scholars, it may be too much of a good thing.

\(^{13}\text{Examples of what is becoming a burgeoning literature are P. Halpern, M. Trebilcock and S. Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980), 30 U.T.L.J. 117; H. Hansmann and R. Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991), 100 Yale L.J. 1878. For a discussion which also identifies the questions the abolitionists have raised but not answered, see Ziegel, supra, footnote 4. For a study which suggests a widespread and conscious use of the separate legal personality trait to avoid liability, see A. Ringleb & S. Wiggins, "Liability and Large Scale, Long-Term Hazards" (1990), 98 J. Pol. Eco. 574.}\)
II. PERSONAL LIABILITY OF DIRECTORS: TWO APPROACHES

1. The Legal Model

The Canadian statutory regime assigns a crucial role to the board of directors, which is elected by the shareholders. The board is to manage (or supervise, in Ontario) the management of the business affairs of the corporation. While the directors are elected by the shareholders, the directors' powers are not delegated ones. They are written into the statute. Even though in large corporations the board of directors is not an operational body, as a matter of law the corporate business can be carried on only as a result of the board of directors' decisions at properly constituted meetings. In practice, broad policy is determined by the board of directors and a system designed to have others operationalize the policies is instituted. From this idealized perspective, the daily functions and activities conducted by the corporation are mandated and overseen by the directors.

In carrying out their duties, the directors are to be guided by very widely stated statutorily imposed duties: the duty to act in good faith and in the best interests of the corporation and to act with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Over time, these provisions have been given a jurisprudential content shaping the way in which the board of directors is to exercise statutory powers. Obvious though the point may be, it is pertinent to this discussion to note that violations of these duties make directors personally responsible. Over and above these general checks on the exercise of the directors' governmental-type power which inheres in the statutory model, there are specific rules which make directors personally responsible if they use the power in a way which imperils the corporation, even though, notionally, such uses of power might be thought to offend the general strictures to act in good faith and in the best interests of the corporation (and/or with the care, diligence and skill required of a director). These precise proscriptions include voting for a resolution to pay out or lend corporate money or to enter into certain identified transactions or exchanges if a reasonable person might have understood that these actions could threaten the solvency of the corporation.

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15 CBCA, s. 122(3); OBCA s. 134(4); see also CBCA ss. 251 to 252; OBCA ss. 258 to 261.
16 See, eg., CBCA s. 118; OBCA s. 130. Apparently it is not enough that these kinds of corpo-
For the purposes of this article, this bare sketch of the legal model of the directors' powers and duties is offered to make the simple point that directors have had considerable exposure to personal liability for some time. This suggests that there has been a tacit agreement that: (i) the imposition of these kinds of responsibilities does not act as a serious barrier to the recruitment of competent boards of directors, and (ii) that it does not, in any important sense, undermine the legal understandings of the separate legal personality of the corporation. Thus, the contemporary anxiety about the increase in directors' personal responsibilities must stem from the fact that a host of qualitatively different kinds of responsibilities are being imposed. One obvious distinction between the “new” responsibilities and the ones which were written into the statutory model long ago is that the new responsibilities make directors personally liable for acts which impinge on persons external to the corporation. To make this distinction a meaningful one, the argument must run that this set of responsibilities to outsiders does not fit very well with the legal model of the corporation set out above. Such an argument can be made.

The reasoning is that the corporation is a full legal person but, physically and mentally, it requires human beings to conduct its business on its behalf. When this happens, such human beings act not as the corporation’s agent, but as the corporation. As Welling says of a salesman entering into a contract for the corporation: “He [the salesman] was not acting as himself, on behalf of his corporate principal; as a person in his own right he was not involved at all.” That is, the salesman was a tool for these purposes, not a person. Starting from this stringent approach, it is but a short step to argue that, inside a corporation, a director may owe duties to the corporation in respect of her/his conduct, but that, when the director causes the corporation to interact with outsiders, the relationships and obligations which ensue are those ration-imperilling activities could be corrected by shareholders themselves when they find out about the dereliction of the directors' general duty to the corporation. An additional, positive and detailed personal responsibility has been imposed because this is more efficient than waiting for shareholders to learn about the wrong.

And perhaps from the fact that, even though directors have always owed a large number of duties to the corporation, until relatively recently directors, as opposed to functioning managers, were rarely sued by disaffected members of the corporation.

between the corporation and the outsiders, not between the
director and the outsiders.\textsuperscript{19}

As a consequence of this conceptual framework, the question of
whether or not to impose tortious liability on directors for acts
done as directors has proved troublesome for the courts. In
Canada, the Federal Court of Appeal has suggested that, in cases
which do not require proof of some kind of advertence or intent,
such as breaches of copyright, patent violations, or corresponding
torts, such as passing-off, the director of a corporation will be held
tortiously liable if s/he had participated in a knowing, wilful way in
the decision-making which led to the alleged wrongful corporate
conduct.\textsuperscript{20} The Federal Court of Appeal reasoned that evidence of
some deliberateness was required because otherwise a director
engaged in routine tasks would be held personally liable, thereby
negating the separate legal personality model of the corporation.
In practice, this would make the conduct of business through the
corporate form a relatively useless vehicle for one person and
other small enterprises. And, the Federal Court of Appeal
reasoned, as the legal model did not differentiate between closely
held corporations and larger and more widely traded ones, even
though the impact on the utility of incorporation would be far less
dramatic in the larger corporate setting, the same principle ought
to apply in those cases.\textsuperscript{21}

The English courts do not require as much evidence of a wilful
or deliberate act by the directors. They seem to be willing to hold a
director personally liable in tort where a director has either
expressly or impliedly directed or procured the tortious act.\textsuperscript{22} The

\textsuperscript{19} This is neatly illustrated by the well-known criminal law cases which hold that where the
corporation's guilty mind is established because of a finding that a corporate director/
manager had the appropriate state of mind, the director/manager should not be held
guilty of having conspired with the corporation: see \textit{R. v. Canadian Dredge & Dock Co.}
not mean that the director/manager cannot be held responsible for a crime committed by
her/himself in respect of the same conduct: see \textit{infra}, text at \textsuperscript{footnote} 29.

\textsuperscript{20} \textit{Mentmore Manufacturing Co. Ltd. v. National Merchandise Manufacturing Co. Inc.}


\textsuperscript{22} See the much-cited judgment of Atkin L.J. in \textit{Performing Rights Society Ltd. v. Ciryl
Theatrical Syndicate Ltd.}, [1924] 1 K.B. 1 (C.A.) at pp. 14 et seq.; \textit{Yuille v. B. & B.}
\textit{Fisheries (Leigh) Ltd.}, [1958] 2 Lloyds Rep. 596; \textit{C. Evans and Sons Ltd v. Spritebrand
Ltd.}, [1985] 2 All E.R. 415 (C.A.); contrast \textit{White Horse Distillers Ltd. v. Gregson
difficulty of drawing a line between those situations in which the corporation, acting through a director/manager, should be the only person responsible and those in which the corporate conduct has been made that of the director/manager by deliberate, or some lesser form of express or implied adoption, is plain.

The cases seem to be somewhat easier when the tort requires some measure of advertence or proof of intent because a director with the appropriate knowledge and/or state of mind might more easily be seen to have adopted the wrongful conduct as her/his own. Occasionally the courts will finesse the issue by arguing that the director was not acting as such at all but was acting in a totally different capacity. Some of these types of arguments are conceptually troublesome. In McFadden, self-promoting directors were said not to be acting within the scope of their authority when, as a result of the directors' decision, the corporation breached its contract with one of its employees. They were held personally responsible in tort for inducing a breach of contract. Given the starting point, namely that the corporate acts are the result of formally correct decision-making by directors, this line of argument is much more convincing where the directors - often major shareholders - use the corporate vehicle to commit a wrong. Nevertheless, it may be difficult to draw the line between a director/manager's act taken bona fide for the corporation's benefit and one which is not.

At the end of the day, however, it is clear that the courts are willing to treat directors as persons in their own right when it can

23 For example, in Wah Tat Bank Ltd. v. Chan Cheng Kum, [1975] 2 All E.R. 257 (P.C.) (Chairman of the corporation agreed with X to convert goods meant for X's clients).
24 See Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd., [1921] 2 A.C. 465 (H.L.). (Directors held responsible as occupiers of the premises not as directors qua directors).
27 See Schouls v. Canadian Meat Processing Corp. (1983), 147 D.L.R. (3d) 81, 41 O.R. (2d) 600 (H.C.J.) and the critique of the decision in W. Augustus Richardson, "Making an End Run around the Corporate Veil: The Tort of Inducing Breach of Contract" (1984), 5 Adv. 103, 108 et seq. Richardson suggests that the line between bona fide conduct by the director and conduct which is not bona fide can be drawn with some precision, but this is problematic. See Lehndorff Canadian Pension Properties Ltd. v. Davis & Co. (1987), 10 B.C.L.R. (2d) 342, 39 C.C.L.T. 196 (B.C.S.C.) and compare case law dealing with criminal conspiracy, cited supra, footnote 19. For a general account of this area of tortious liability, see G.H.L. Fridman, "Personal Tort Liability of Company Directors" (1992), 5 Canter. L.R. 41.
be said that they made the conduct of the corporation they initiated their own in some way. While there are many evidentiary problems, analytically the courts feel confident that they will not be undermining the legal corporate governance model when they hold directors liable in this way. This is also reflected in the way in which these issues have been dealt with in the criminal law.

It is well-known that the attribution of criminal responsibility to a corporation rests on the Crown’s ability to identify a person who can be said to be the guiding mind and will of the corporation who had the necessary intent when the act was committed on behalf of the corporation. It is also established law that where the corporation’s criminal behaviour was engaged in by a person who can be characterized as the guiding mind of the corporation and that person had the capacity to make the conduct his/her own, either the corporation or that person can be held to be the principal criminal offender.

In short, the legal model of the corporation has permitted the imposition of responsibility and liability on directors/managers for corporate conduct which has inflicted losses and harms on the external world. The legal responsibility of directors has not been limited to the general duties of good faith and loyalty and of having to act in the best interest of the corporation with the requisite degrees of care, skill, and diligence specified by the governing statutes. From this legalistic perspective, the hue and cry which greeted the decision in Bata, where managers who were deemed to have made polluting acts of the corporations their own because they had the knowledge and the capacity to do something to prevent the harm, seems to be exaggerated.

Indeed, even within the corporate statutes there is evidence that the legislatures desire directors to be held responsible to outsiders for acts done on behalf of the corporation. Presumably, the

28 See Canadian Dredge, supra footnote 19.
30 See Ziegel, supra, footnote 4, at p. 1089, where he argues that “the legal doctrines developed by the courts in respect of corporate governance presuppose that the general principles of contract, agency, tort and other branches of law will continue to apply” to those whose conduct normally is identified to be that of the corporation.
31 See text at footnotes 14, 15.
assumption is that this can be done without imperilling the legal governance model created by those statutes. I have in mind particularly those provisions which make directors of a corporation responsible for unpaid employee wages. Inasmuch as employees, from the legal model perspective, are not members of the corporation, these are liabilities to outsiders with which boards of directors have had to live for a long time. Again, viewed solely from a legalistic perspective, the alarm created by the possibility that the directors of Westar and the directors of the subsidiaries of PWA might have to meet the unpaid bills owed to these corporations' employees was also exaggerated.

In sum, the idea that directors may be held personally liable for harms and costs inflicted while acting on behalf of the corporation, either when they have been given a specific duty to discharge and/or they have made a statutory or common law standard-violating corporate act their own, is far from new. Since both legislatures and courts support the notion that there should be this kind of responsibility, they are promoting the principle that individuals should be held responsible for their own conduct. Furthermore, they seem to believe that this goal can be achieved without seriously undermining the separate legal personality of the corporation. If there is a problem, then, because of the large number of recent high profile situations in which directors have been held responsible, it appears to be one because there seem to be simply more of these kinds of obligations.

See CBCA s. 119; OBCA s. 131. Additional statutory obligations to meet debts owed to employees have had to be imposed under labour standards legislation to remedy the perceived shortcomings of the corporate statutes. This perception of failure is related to one of the arguments made below about the impetus for the increased imposition of direct statutory responsibility on directors.

One rationale offered is that workers are vulnerable creditors of the corporation and that directors are in a position, and ought, to guard their interests. Vulnerability is not a term of art in the world of Rational Economic Men. Indeed, the suggestion that there may be something involuntary about the contract of employment is the very point which Marxists make (supra, footnote 1) and which contractarians always meet with fierce resistance. Compare this with the imposition of (somewhat constrained, but real) civil (as well as criminal) responsibility on directors to outsiders for misrepresentation in a prospectus under the Securities Act, R.S.O. 1990 c. s. 5 (s. 126, see also s. 127 et seq.) This burden is not seen as inappropriate. This may be so because the imposition of responsibility requires some showing of negligence on the part of directors. But the more negative view of directors' liability for unpaid wages may be attributable to other factors as well, such as the class relations between directors and shareholders (or would-be shareholders) as opposed to those between directors and workers; see the discussion in Part V of this article.
There is however another explanation, and this is that the quality of this increasing number of obligations differs to such an extent from the pre-existing directors' responsibilities\(^{35}\) that not only is the legal model of the corporation coming under pressure, but the usefulness of the corporation as a vehicle through which to do business also may be imperilled. It is the last possibility, that of the threat to efficiency, which may be central to the law and economics critique of the developing personal responsibility of directors.

2. The Efficiency Model

The logic of law and economic scholarship is that the enterprise should bear the costs and fines associated with debts incurred by the enterprise and harms inflicted by it.\(^{36}\) The argument is that the managers (which term seems to include directors) of the corporation are merely agents of the investors, that is, the shareholders, and that to hold these agents personally responsible could make them inefficient agents if they were given reasons to start to think more about their own interests than they already do.\(^{37}\) The danger to be avoided, then, is that these agents, in order to escape personal liabilities, will not take some of the potential wealth-creating risks their principals have appointed them to take on their behalf.

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\(^{35}\) This is how the fuss around the *Bata* case, *supra*, footnote 32, can be better understood. The concern is that directors/managers are being held liable not only for wanton, deliberate conduct, but also for routine, if careless, conduct. See R. McLeod & B. McMeekin, "*R. v. Bata Industries Ltd: Directors Beware*" (1992), 2 J.E.L.P. 313. The anxiety occasioned by *Bata* may be exaggerated, but the argument that the nature, rather than the number, of director responsibilities is changing in a significant way has merit; see *infra*, Part IV of this article.

\(^{36}\) The term "enterprise liability" seems to be preferred to that of corporate liability in this literature. It tends to bolster the argument in the text which follows that, to these theorists, the separate legal personality of the corporation is not a significant issue. It does so by suggesting that agency theorists do not take the idea of the corporation as a closed association as seriously as do the more traditional legal model theorists. To the latter, only certain persons can be members of the corporation, even though others work for it and/or contract with it. To the agency theorists, the business organization is a series of contractual relations, making each person who is contractually related in some way, potentially an integral part of a co-ordinated business, that is, of an enterprise.

\(^{37}\) As Rational Economic Men they may already concern themselves too much with their own interests for the taste of the agency theorists. This is a reference to the well-known problem of agency costs, costs manifested in "looting" and "shirking" by managers at the expense of the shareholders whom they are supposed to serve.
What is striking about this approach is that it does not object to director/manager liability because this may undermine the separate legal personality of the corporation concept. To the contract-nexus theorizing of the corporation, the separate legal personality of a corporation is a useful device, but no more. The resistance to personal responsibility for the corporation's directors and managers, therefore, is not based on the argument that it might run counter to the notion of identification of the directors with the corporation, the notion which gives the corporation its personateness.

The contractarians, then, take a functional approach to the role of directors. The directors and managers of the corporation, being the investors' agents, have a responsibility to shareholders and their investment. Logically, this approach suggests (although not incontrovertibly) that the agents' principals, the shareholders, should be held responsible for acts done on their behalf. But, at this point, the contractarians turn round and accept, wholeheartedly, another feature of the legal model of the corporation: limited liability for shareholders. Of course, they do not embrace this concept because it has a long legal tradition. Rather, their argument is that limited liability provides a most useful incentive to would-be investors, providing them with a loss-spreading mechanism which is likely to lead to greater overall economic welfare and well-functioning capital markets. Thus, share-

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38 This is just as true of the institutional variants of the contractarian theories.

39 In this sense, the approach to legal personality is not unlike that taken by fiction theory adherents, except that the state registration system is characterized as a mere enabling agency rather than a creative force. This approach reinforces the argument that corporations, being privately generated vehicles, ought not to be restrained or constrained by the state unless it is proved, in efficiency terms, that it is necessary to do so.

40 There is a counter-argument: the principals are too far removed from the agents to be held responsible for their conduct. Shares frequently change hands and shareholders are not expected to take an interest in the way in which share values are enhanced. This counter-argument has some, but not total, appeal; consider the doctrine of vicarious liability in tort and the approach taken by some U.S. courts to the criminal responsibility of corporations for the acts of very lowly placed employees.

41 See supra, footnote 5. In an unlimited liability scheme, the value of a share of any one firm would be different to different investors because of the varying personal vulnerabilities of its holders. Further, a paradox would arise because the less assets an investor had, the more risky the kinds of investments s/he made might be. Both these difficulties are avoided by limited liability, making for more reliable capital markets. The arguments are well rehearsed; see F. Easterbrook and D. Fischel, "Limited Liability and the Corporation" (1985), 52 U. Chi. L. Rev. 89; H. Manne, "Our Two Corporation Systems: Law and Economics" (1967), 53 Va. L. Rev. 259. For a useful summation and evaluation of the arguments, see T. Gabaldon, "The Lemonade Stand: Feminist and Other Reflec-
holders, the real owners of the business, are not to be held directly and fully responsible for losses because this would be a disincentive to welfare-creating investments. But, as seen, it is also argued that it would be counter-productive if these investors' agents were held personally responsible. In the name of efficiency, it appears to be difficult to hold any human being responsible. This is a curious position to take and, therefore, a reasoned and spirited defence has had to be mounted in support of the proposition that the corporation should be the primary target of accountability rather than senior corporate actors.

It is somewhat ironic, perhaps, that the very scholars who do not highlight the separate personality of the corporation want the corporation to be the responsible "individual". To be sure, this is less of a contradiction than it seems at first blush because, from these scholars' perspective, what is being made responsible are the "funds", as it were, of an enterprise which is constituted by the relevant contracting parties. Given their starting position, the line of reasoning these scholars offer in support of enterprise liability is a plausible one. The reasoning goes as follows.

If the costs of the damage-causing and/or wrongful conduct are attributed to the enterprise, the shareholders' return will be adversely affected. They will discipline their agents — the directors and managers — and/or require them to set up procedures and systems which will avoid these kinds of profit-undermining and anti-social acts. All the goals which have been set will thus be met. At the same time as social norms are being promoted, shareholders will be safeguarded. This is so because, if personal responsibility were attached to managerial conduct, managers and directors would exact a price from the enterprise by demanding extra compensation and/or contractual indemnity and insurance to off-set their increased personal risks.

They would make such demands because, unlike the shareholders who are able to diversify their exposure to risk, a firm-specific investment makes managers particularly vulnerable. The imposition of personal responsibility on directors and managers, therefore, will lead to extra costs for the enterprise. And, if managers and directors are not able to protect themselves because, for example, it is difficult to get insurance coverage for

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Footnote:
exposure to personal liability, they will simply become more cautious. Their concern for their own well-being will cause them to treat their principals’ goal, profit-maximization, as a secondary goal. The well-known agency problem, namely the possibility that agents will exploit their position to further their own ends at the expense of their principals, will have gained a new, and damaging, dimension.42

By making the corporation responsible, rather than individual corporate actors, shareholders will have an incentive to discipline and control their agents. These agents, in turn, still will have sufficient interests at stake — their professional reputation, their career prospects and even their jobs — to ensure that they will avoid adverse shareholder reaction. At the same time, they will remain more willing to take profit-oriented risks than they would if they were likely to be held directly liable, because the impact of such personal liability is greater than the potential weight of any subsequent shareholders’ reaction to their (mis)conduct. Further, as the costs of privately disciplining managers and directors into acceptable social behaviour will be tailored more precisely to meet the needs of a particular firm than any general public law rule could ever hope to do, a more efficient form of regulation of managers and directors should evolve.43

This is a very neat argument. It depends, however, on certain conditions whose existence cannot be guaranteed. First, for shareholders to react, the potential losses imposed on them by holding the corporation, rather than managers and the directors, responsible must outweigh the potential profits from the corporate conduct engineered by these agents. Since these shareholder-motivating costs are fines, the fines must be optimal.44 The diffi-

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42 Not surprisingly, the availability of directors and officers’ liability insurance has been the subject of much recent scrutiny; see R. Daniels “Must Boards Go Overboard? An Economic Analysis of the Effects of Burgeoning Statutory Liability on the Role of Directors” in Conference on Canadian Corporate Governance, C.D. Howe Institute, February 1994; R. Daniels and S. Hutton, “The Capricious Cushion: The Implications of Directors’ and Officers’ Insurance Liability Crisis on Canadian Corporate Governance” (1993), 22 C.B.L.J. 182.


culty of establishing this necessary condition for the enterprise liability model to work are well-known. One source of the problem is that there is a sentiment that a fine should be proportional to the gravity of the offence.\textsuperscript{45} This may be considerably less than needs to be imposed if the potential profit from wrong-doing is high and/or the likelihood of being held responsible low. The apparent inability to develop appropriate sanctions is well-understood as is illustrated by the recent and very earnest attempts at devising optimal fines in the US. The purpose of these efforts was to find ways to sanction corporations and, via their shareholders, their corporate officers, more efficiently.\textsuperscript{46}

One of the points sought to be made in this article is illustrated by the debates surrounding these US efforts. The arguments have ranged from the assumption that it is obviously necessary to increase the penalties on corporations as existing enforcement tools and sanctions are not effective,\textsuperscript{47} to arguments that the response of different corporate offenders may vary at different levels of sanctions and that some very careful calibration is necessary when devising a scheme of optimal fines lest the exercise becomes a self-defeating one.\textsuperscript{48} The point being made is that these modellers of law and economics theories rely heavily on the need to prove that cost-benefit analyses support the state's decision to intervene with private action. Yet these kinds of assessments are very hard to make, as is shown here when the kind of intervention these very theorists ought to favour is subjected to an exercise in empiricism.\textsuperscript{49}

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the Criminal Liability of Organizations" (1991), 71 B.U.L.R. 315 at p. 317. The assumption here is that criminal law is essentially economic in nature: conduct is criminal because it imposes costs on others and can be deterred by making the offender internalize the cost. Note that this approach suggests the possibility that law and economic analysis may be distorted because it pays scant regard to other social values than cost-benefit ones (even if sometimes lip-service is paid to the fact that they, too, deserve respect).
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\textsuperscript{46} U.S. Sentencing Commission, Sentencing Guidelines for Organizational Defendants (Preliminary Draft, November 1, 1989).

\textsuperscript{47} S. Saltzburg, "The Control of Criminal Conduct in Organizations" (1991), 71 B.U.L.R. 421.

\textsuperscript{48} For the theoretical bases of this argument, see G. Becker, "Crime and Punishment, An Economic Approach" (1968), 76 J. Pol. Econ. 169; for an application of this theory to the Sentencing Commission's efforts, see M. Block, "Optimal Penalties, Criminal Law and the Control of Corporate Behaviour" (1991), 71 B.U.L.R. 395.

\textsuperscript{49} The uncertainty surrounding both the theory and the "facts" is great enough to have
Precisely because it appears to be so difficult to sanction the enterprise by way of monetary fines (and it must be remembered that the shareholders are not available as targets for punishment), those who believe in the efficacy of enterprise liability keep on trying to devise new forms of sanctions to impose on corporations qua corporations.50

While none of this undermines the abstract argument that using enterprise liability to attain social ends is the most efficient thing to do, it does throw some serious doubt on the practical plausibility of such a scheme. So also does the very real possibility of the insolvency of an enterprise which has inflicted costs on others and/or committed violations of legal norms. How are compensatory or punitive goals to be satisfied by imposing enterprise liability in such a case? For instance, some of the largest fines levied under the Ontario Occupational Health and Safety Act have been imposed on bankrupt corporations.51 Of course, there is a counter-argument to the contention that the possibility of insolvency undermines the enterprise liability position. This is that the imposition of personal responsibility on directors and managers makes insolvency more likely. The idea here is that, because of

50 Some believe in enterprise liability because, unlike contractarians, they believe in the organic nature of a corporation, an entity separate and more than the sum of its parts. For variants of the organic approach, see B. Fisse and J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability" (1985-88), 11 Sydney L. R. 468; see also their, The Impact of Adverse Publicity on Corporate Offenders, (Albany, SUNY Press, 1983); C. Wells, Corporations and Criminal Responsibility (Oxford, Clarendon Press, 1993). For a clever attempt at finessing the issue, see J. Coffee, Jr. "No Soul To Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981), 79 Mich. L. Rev. 386. The development of more effective tools will support enterprise liability but, given the resistance to the increase of fines simpliciter, it is unlikely that a wholesale new approach to sanctioning of corporations is nigh. Note too that, while all this scholarly debate about the optimal fines is going on in the United States, the direct representatives of corporate interests have been fighting a mighty battle to avoid the imposition of more serious fines on corporations. That is, they are resisting something which the classical economic proponents of efficiency tell them might be to their overall advantage. See, eg., Mistretta v. United States, 488 U.S. 361 (1989).

51 For example, Elan Corporation, when bankrupt, was fined $400,000, at that time the largest fine imposed; see Windsor Star, February 13, 1992, p. A3. Now a larger fine, $475,000 has been levied against Noranda Mines Inc. for failure to obtain a permit for an elevator, for failure to examine a blasting area properly and for failing to meet safety standards in an underground mine. A worker had been killed. At the time of writing, this fine is under appeal.
their increased risk, managers and directors will not take the risks they otherwise might incur on behalf of the corporation and this may affect its viability in some circumstances. This is theoretically plausible, but empirically difficult to support. For instance, such questions arise as: what lawful risks would not be taken as a result of the imposition of personal responsibility and, if one could think of such risks, would there be different impacts from this kind of risk-avoidance in different kinds of firms? These sorts of questions cannot be answered in the abstract. Again, then, this creates a dilemma for the proponents of enterprise liability who prefer that model of responsibility because, empirically, it is bound to be more efficient than one which imposes personal liability on corporate actors.

Similar empirical difficulties for the model arise because a corporation may be under-capitalized. The law requires no minimum level of capitalization and investors may not have had the wherewithal, or have seen the need, to fund the enterprise so as to enable it to meet certain costs or penalties. Or, even if the risks can be anticipated, they may have led the investors to hive-off the risky operations by having them carried out in a separate corporate vehicle; that is, they will have shielded themselves from responsibility by using the flexibility of the separate legal person. However it arises, under-capitalization may well make the enterprise liability model unworkable in a number of cases.

Expecting shareholders, whose enterprise has been held responsible, to discipline their directors and managers may be based on shaky grounds for a variety of other reasons as well.

In a widely held corporation one of the raisons d'être of the logic of limited liability, namely that investors' risks are diversified because what they lose in one investment may be off-set by a gain elsewhere, suggests that it may sometimes be difficult to motivate shareholders to act against delinquent agents. As noted, the size

52 See, Daniels, supra footnote 42.


54 Proponents of the model sometimes argue for changes to the rules of capitalization. It is said that these are difficult to design and even more difficult to implement; Daniels, supra, footnote 42; Ziegel, supra, footnote 4; see also the discussion of the difficulty by the Jenkins Committee (1962) Cmdn. 1794, para. 55 et seq., which would have liked to recommend a minimum capital requirement, but did not.

55 There is very little in corporate law, as opposed to the supposed push of market forces posited by law and economics scholars, which requires the imposition of internal discipline by shareholders; see J. Coffee, "Corporate Crime and Punishment: A Non-
of the enterprise’s liability affects the plausibility of the argument, as huge costs or fines may affect otherwise passive shareholders. It is, therefore, uncertain whether shareholders will exert appropriate discipline over directors and managers. In addition, shareholders might take the view that to discipline their managers for having caused corporate liability would be unduly upsetting to the corporation’s operations which already have been disturbed by the imposition of liability on the enterprise. Equally, they may fear that to identify wrongdoing and wrongdoers will only encourage people who may want to bring civil actions against the corporation, and/or shareholders may believe that to take action against senior corporate managers and directors will encourage whistle-blowers within the corporation.  

All of these potential problems with the arguments for an emphasis on enterprise liability rather than on personal responsibility draw our attention back to one of the starting points of the argument in this article, namely that something is lost when a corporation is held responsible, especially if that responsibility is criminal in nature. Lederman has argued that the “cohesive link within criminal law, between the commanding authority and the conscious individual who alone is susceptible to guidance is threatened when confronted with the imputation of criminal liability to corporations, which by their very nature lack any consciousness”. While the argument that the criminal law is

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57 This article is concerned with the wisdom and effects of the imposition of liabilities on directors rather than managers. Many of the law and economic scholars’ arguments apply both to directors and managers, but some clearly do not. For instance, since the logic of creating increased risk-adverseness rests on the firm specific investment of a manager, this does not apply with equal force to a director, certainly not to an outside director. Inasmuch as the effectiveness of enterprise liability rests on the manager’s fear for his/her job security, this has no application to the director situation, although the threat to reputation does. It may be the case that the pro-enterprise liability arguments are over-inclusive if they are thought to be applicable to directors without more.

not a meaningful tool when applied to corporations is fiercely disputed by scholars interested in organizational theory, the argument has resonance with law-makers and regulators. In view of this, and the many questions about the ability of enterprise liability to regulate the behaviour of corporate actors in a way which achieves the purposes of law-makers and regulators, it is not surprising that they have been looking for other ways to ensure more responsible conduct by corporations. Indeed, the reasons to make direct personal responsibility more of a tool than it has been heretofore are manifold and pervasive.

III. IMPETUS FOR MAKING DIRECTORS PERSONALLY RESPONSIBLE

By way of reprise, let us note that a search is on to make someone (or something) responsible for corporate conduct because the doctrines of legal personality and limited liability put the most obvious persons, the shareholders, out of reach. Apparently, this starting point is not to be questioned in any serious way. This creates particular problems where the enterprise is a closely held corporation. In those cases, the twin characteristics, separate legal personality and limited liability, combined with the possible insolvency and/or under-capitalization of the firm, are likely to leave involuntary creditors and state institutions holding an empty bag.

See, e.g., Fisse and Braithwaite and Wells supra, footnote 50. The argument of these scholars is that the corporation is an organic entity, that it is more than the sum of its individual components. Thus, the goals of stigmatization and deterrence may be achieved by punishing a corporation in an appropriate way. For a partial response see H. J. Glasbeek, “The Corporational Responsibility Movement — The Latest in Maginot Lines to Save Capitalism” (1988), 11 Dalh. L.J. 363; “Why Corporate Deviance is not Treated as Crime—The Need to Make ‘Profits’ a Dirty Word” (1984), 22 O.H.L.J. 393. What is important to note here is that the organizational behaviour approach conflicts with the contractual conceptualization of the corporation and should not be looked to for support by contractarians.

Here very influential vested interests, the long and successful history of limited liability as part and parcel of welfare creation and the logic of law and economics-type thinking come together to make the questioning of limited liability very difficult. For an argument that shareholders, as well as senior officers and directors, should be held criminally responsible for corporate deviance, see H.J. Glasbeek, “Why Corporate Deviance . . .”, ibid. I still believe this to be a legally plausible argument, but one which has little resonance with policy-makers because of the very influential forces ranged against it.

The hallmark of all of this is the old case of Salomon v. Salomon & Co. Ltd., [1897] A.C. 22 (H.L.); the literature and the case law is well-known. It is intriguing, however, that the
It is in this context that some law and economics scholars acknowledge that the abolition of limited liability may make sense. But, so far, this is merely talk in books; there is no action. This is so because, rather than take on the project of abolishing limited liability for some corporate vehicles — a difficult task which may have unexpected or undesirable repercussions for the legitimacy and/or use of the corporate form generally — legislatures and regulators are more comfortable when targeting directors and managers in order to attain their objectives. Possibly they are encouraged to take this route because targeting directors does not require them to engage in an analytical departure from well-established practices. This may be comforting because they will not be seen to be attacking directly the always hard-to-maintain legitimacy of the corporate vehicle at a time when this legitimacy is feeling some other pressures.

In particular, legislators want to avoid being seen as questioning the legitimacy of the corporate vehicle, which is so central to the market mechanism, because recently that market system has not been delivering as much welfare as it did during the 25 or 30 years following the post-war period. Governments get their status and prestige from the fact that welfare is being created by the private sector. In liberal democratic capitalist states such as our own, governments are required to create optimal conditions for welfare creation by capitalists and, at the same time, they will get kudos for being seen to be willing to mediate the worst effects of an economic system which, if left alone, might have egregious impacts on some of the citizenry. They must appear both to support corporate actors and to be regulating them. This tension-filled role is a particularly difficult one to discharge at the moment.

This is not the place for an exegesis on contemporary political economic developments. It is clear, however, that large wealth owners, claiming to be under market-generated competitive pressures, are urging governments to give them more help by deregulating the economic system, tearing down barriers to trade,
etc. Governments seem to accept the logic of these arguments but feel the need to reassure their citizens that this does not mean that they will lose any of the protections they had won over time against the more harmful externalities and outcomes of unregulated competition.

In a context where there is a good deal of belief that the corporate sector is guilty of much deviance or seems to care little for community needs, and at a time when members of the corporations themselves have been calling for more accountability by directors and managers, governments feel the need to demonstrate that the corporate sector still can be trusted to be the engine of welfare creation because, in large part, its excesses are being kept under control by governments. The targeting of directors is a useful tool for policy-makers as they subtly, instinctively manoeuvre to maintain public trust in the status quo.

IV. THE INCREASE IN NUMBER AND IN KINDS OF DIRECTOR RESPONSIBILITIES

Jacob Ziegel has noted that the enumeration of emerging director responsibilities has become something of a growth industry. The newsletters and trade journals to which he refers describe both the nature of these responsibilities and what directors need to do to meet their obligations and to diminish their personal liability. It is, therefore, not very useful to set out another list of the potential legal issues with which directors have to deal. It is sufficient for the purposes of this discussion to give a


64 This is in part the origin of the argument that the managers should use their discretion to take the interests of other groups than shareholders into account, the so-called social responsibility movement — based on the anti-managerialist views which were very popular in the 1960s — but which were met with vehement responses from contractarians.

65 Those range from demands for control over directors' behaviour in takeovers and mergers to the need to control executive compensation and self-dealing as well as to the need to prevent a repetition of some spectacular frauds and insider-trading activities — e.g., Milken, Boesky — and unexpected large failures of respectable corporations (savings and loans banks in the United States, Canadian Commercial Bank and Confederation Life are some high profile examples).

sense of the vast variety of circumstances in which directors have enforceable duties and obligations to persons other than the corporation and its members.

Directors are personally responsible for setting moneys aside for revenue collecting authorities. There is a vast range of such provisions, from income tax Acts, to retail tax Acts and goods and services revenue-raising statutes. In the same way, directors are responsible for making sure that premiums are payable to such schemes as the Canada Pension Plan, the Unemployment Insurance Commission, as well as for a variety of obligations under environmental statutory schemes, occupational health and safety regimes, and responsibilities under employment standards Acts and the Competition Act. Further, directors can be made personally responsible for wages owed to employees upon the insolvency of a corporation. Here it is to be noted that the corporate statutes have been supplemented by employment standards legislation.67

The increased variety of things for which directors can be held responsible is a remarkable addition to the rather few and simple requirements imposed on boards of directors by the business corporations statutes. Under such statutes they are required to act in good faith and to exercise their best judgment (at an unspecified but relatively low level of care, skill and diligence) in the interest of the corporation, writ large. As if this were not enough, an obligation to safeguard some voluntary creditors' interests is emerging as a legal obligation as a result of judicial decisions in some jurisdictions and legislative policy in others.

When courts hold directors responsible to creditors it is not always clear whether they are doing so because the directors, knowing that their corporation was in peril, did not act with proper regard to the corporation’s interests when they disregarded the interests of the corporation’s creditors, or whether it is because such directors failed in their obligations to creditors, tout court. These issues have been extensively canvassed in both the cases and in the literature.68 For our purposes, what is important is that directors are being attributed very serious legal responsibilities by

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67 See, e.g., Employment Standards Act, R.S.O. 1990, c. E.14, Part XIV.1, which guarantees that employees get something fairly quickly, independent of the directors' responsibility.

some courts and legislatures. And, in Canada, the judicial readiness to make the statutory remedy of oppression available to voluntary creditors means that directors, who may be asked to bear the brunt of remedial orders, also are confronted by legal responsibilities which impose a burden on them to look to creditors' interests when exercising their powers on behalf of the corporation.  

This is quite a menu of responsibilities. While, as argued in Part II(1) of this article, the increasing range of director liabilities does not, in and of itself, present a conceptual problem, a question does arise as to when this increase in the quantum of obligations to the outside world will make the legal model of corporate governance a caricature of the way in which the corporation functions in the real world. That is, there could be a point at which the concerns of those who have adopted the legal model approach to corporate theory and the concerns of contractarians may very well overlap. The latter theorists, of course, are alarmed by the dramatic increase in direct director responsibilities. They have a deep belief that this will lead to a risk-averseness which may hamper the efficiency potential of the corporate vehicle, perhaps to the point of catatonia.

Their anxiety probably has been heightened by some as yet unmentioned aspects of the statutory responsibilities which have been imposed on directors. First, most of the obligations seem to arise under what are generally known as welfare offence schemes. This means that, inasmuch as penalties are sought to be imposed on directors, the government's burden of proof may be reduced to that associated with strict liability offences rather than with the pure mens rea requirement associated with criminal offences. The directors have the burden of establishing that they exercised due diligence to try to prevent the offending conduct. This gives the creation of statutory director liability a sharper bite, adding to the directors' (and their legal theoretical allies') worries about these developments. Still, it is acknowledged that the availability of

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69 See Ziegel, supra, footnote 66, for a fine discussion of the expansion of the oppression remedy and the rather peculiar way in which directors have become responsible to creditors and in which creditors have got standing.

70 The categorization of offences into absolute, strict liability and criminal offenses received judicial approval in R. v. Sault Ste. Marie (City) (1978), 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, analytically difficult though it may be to justify. The constitutionality of changing the burden of proof from mens rea to due diligence was also approved of by the
the due diligence defence to directors on whom responsibilities have been imposed is better than the application of absolute liability rules.\footnote{As we shall see, the Draft Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, "Where Were the Directors?", May 1994, argues for the inclusion of a due diligence defence if the trend towards making directors ever more responsible for harm arising out of conduct to further the corporations' best interests continues.}

Second, some of the more recent statutory impositions of responsibility on directors are different in kind from their predecessors.\footnote{For a very useful discussion, see Andrew J. Roman, "Personal Liability of Directors and Officers of Corporations for Violation of Environmental Norms" (1993), 12 Nat. Bank. L. Rev. 20.} The older statutes\footnote{The proponents of enterprise liability believe that such statutes are dangerous enough.} imposed responsibilities on directors for wrongful or harm-causing conduct by the corporation. Typically, s. 242 of the Income Tax Act provides that, where a corporation is guilty of an offence under that legislation, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence is a party to and guilty of the offence and is liable to be convicted and sanctioned.\footnote{This is in addition to the fact that there will be responsibility for remitting the moneys owed to Revenue Canada, Income Tax Act, s. 227; see also Income Tax Act, S.C. 1970-71-72, c. 63. There are many similar provisions on the books.} This kind of provision means that the director is being held responsible because the corporation has committed a wrong in which the director has played a part. To bring this into line with the argument made earlier, these kinds of provisions hold the director responsible because s/he is viewed as having made a corporate act her own. This is not how the director's responsibility is seen under some of the more recent statutes, such as the Ontario Environmental Protection Act.\footnote{R.S.O. 1990, c. E.19.}

Section 194 provides that:

> Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care
to prevent the corporation from causing or permitting such unlawful discharge.

It goes on to say that a director is liable to conviction whether or not the corporation has been prosecuted or convicted. There is no requirement that the corporation itself have engaged in violating conduct. The director's responsibility arises independently of the existence of a corporate duty. The director's duty is direct. It requires her/him to take care lest the harm which the corporation might cause materializes; the harm need not actually occur. While it is most unlikely that, even under these differently structured provisions, the director will be made responsible when the corporation has not inflicted harm, these provisions do present an important change in emphasis.7

Under the director responsibility for the corporation's breach of duty provisions, directors will only be liable if there was a corporate violation and if in some way they have acquiesced or permitted or actually positively encouraged the conduct. Given the jurisprudence which does not require a director to be particularly skilled or knowledgeable, and the deference given by courts to the directors' delegation of daily operations to competent managers, a hands-off director can easily meet many of the responsibilities imposed by these kinds of provisions. It is true that there may be a chain reaction if the delegatees/officers are held personally responsible for their positive participation in a corporate violation. This will cause them to want to be relieved of responsibility when they carry out the wishes of the directors. They will work towards the establishment of procedures and systems which will involve directors in decision-making and, therefore, make them potentially liable for the implementation of these decisions by their delegatees. The extent to which this will happen will depend on the frequency of successful enforcement against the enterprise and its officers.

There is no such uncertainty about the effect of the statutory provisions which impose responsibilities on directors independent of corporate wrongdoing. The need to set up adequate monitoring is plain; the pressure on directors to become more like hands-on functionaries is great. How much of a challenge to the traditional

76 There are a whole range of these kinds of provisions: see Environmental Protection Act, R.S.O. 1990 c. E. 19; Pesticides Act, R.S.O. 1990, c. P.11; Ontario Water Resources Act, R.S.O. 1990, c. O.40; Occupational Health & Safety Act, R.S.O. 1990, c. O.1.
nature of corporate governance this represents remains to be seen. In any event, both types of provisions are bound to have some effect on corporate governance structures.

IV. POSSIBLE EFFECTS ON CORPORATE GOVERNANCE

While there are many new duties, directors still are not being asked to weigh profit maximization against other social interests and values. Rather, they are being asked to maximize profits in a market place which has been democratically circumscribed by the state. Corporations, like any other kind of business, always have been limited in this way. Clearly, what is happening is that regulators, perhaps motivated by the fear of their loss of reputation and legitimacy because there appears to be too much unchecked deviant behaviour by corporate actors, are looking for cheaper and more effective ways to make corporations play within the rules. As seen, the apparent lack of control over corporate behaviour has been a major launching pad of the corporate social responsibility movement.

The debate around the design of appropriate penalties has been inspired, in large part, by the perception that large corporate actors flagrantly breach the law because it pays them to do so. To respond to this problem, suggestions have included proposals for increased fines, different kinds of sanctions and the imposition of new duties on directors or the establishment of specialized directors. This is not the same agenda for reform, however, as the one which would turn corporate actors into arbitrators of what a just and equitable society needs and deserves. This was the thought behind the advocacy of some of the anti-managerialists’ arguments and which it underpins the reasoning of some of the more contemporary corporate social responsibility proponents. The core of their argument is that, because corporations control so much of the wealth, some managers of large corporations have true, sometimes determinative, economic and social policy-making power over the citizenry; they should take that citizenry interest into account, beyond what the law requires them to do, when making decisions.77

77 The literature is voluminous and well-known. To cite one of the best-known examples, see C. Stone, Where the Law Ends: The Social Control of Corporate Behaviour (New York, Harper & Law, 1975).
To force directors to comply with the law by making them personally responsible represents a much more modest agenda, one which cannot be objected to on the basis that privately appointed persons are being asked to make legislative choices. The only riposte which can be made to this more modest agenda is the one which is made by law and economics theorists, namely that, whatever regulators believe, this kind of enforcement mechanism is likely to lead to less efficiency than continued reliance on (improved) enterprise liability. Earlier I argued that, in the abstract, the foundations of this kind of response are, at best, equivocal. We are now in a position to look at some more concrete political and economic problems with this line of argument.

First, the assumption must be that governments believe that reliance on enterprise liability is not working as well as it should be. This may be because the corporate sector and its allies have been very influential in inhibiting regulators and legislators from imposing appropriate sanctions and setting appropriate standards. From this perspective, an argument based on the fact that, after all, enterprise liability could be perfected, is likely to be viewed with suspicion by regulators and policy-makers. Since one of the concrete influences on regulators and policy-makers is to enhance the legitimacy of government, this scepticism is a serious consideration militating against reliance by policy-makers on enterprise liability rather than personal liability.

Second, one of the social/political values which is thought to imbue the law — that individuals should be responsible for their actions — can be better attained by imposing personal responsibility on directors. They are particularly attractive targets to legislators because, under the statutory model of the corporation, directors are the governors of the corporation. That is, the goal of promoting the overall efficiency and acceptability of the legal system is seen as being furthered by making directors directly

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78 Classical economists and the law and economics theorists have availed themselves of two powerful responses to the social responsibility movement: the first is that there is no way to tell what other interests, in addition to profit-maximization, should be taken into account, whereas the second is that, if unelected managers are to make social and legislative decisions, they soon will be replaced by state appointed officials. The classic texts are M. Friedman, *Capitalism and Freedom* (Chicago, Univ. of Chic. Press, 1962) and F. Hayek, *Law, Legislation and Liberty* (London, Routledge and Kegan Paul, 1982) also see Glasbeek, *supra*, footnote 59 and the literature discussed there.
responsible. The impact of this consideration is difficult to put in the scales of cost-benefit analyses of efficient welfare-creation of the *economic* kind. Nevertheless, it should be accorded some weight, indeed perhaps a great deal of weight, because of the significance of the legitimacy of the legal system to the political regime which, in turn, supports the economic model.

Third, one of the arguments which supports the case for the superiority of enterprise liability over personal liability hinges on the fact that it is easier, in evidentiary terms, to attribute responsibility to enterprises than it is to individuals. The reasoning is that it is difficult in a complex organizational structure to find the decision-makers. Consequently, the increased enforcement costs make the imposition of personal responsibility less efficient than enterprise liability. While this argument has some credibility, maybe it should have less than is usually accorded it. It is valid enough when the director’s statutory responsibility requires proving both corporate wrongdoing and the director’s participation in it, but it does not apply to the responsibility imposed on directors when they are given a discrete, personal statutory duty to carry out. In those cases, at least, the efficiency argument for non-liability loses much of its force.

Fourth, it is probably accurate to assert that the source of much of the embarrassment is the manipulation of the corporate vehicle by shareholders of smaller, closely held corporations. Making directors, who often also are the major shareholders and operational managers of such corporations, personally responsible will help attain objectives which are much harder to realize if reliance needs to be placed on poorly premised piercing of the corporate veil techniques and/or on investing scarce political capital into (likely ill-fated) efforts to demand minimum capitalization for smaller firms. As argued earlier, it is hard for the contractarians, who are more interested in the way in which the corporation actually functions than in the niceties of the sterile legal model of the corporation, to oppose this way of dealing with problems which arise from, and which are not easily soluble within, the statutory model of the corporation.

79 See, for instance R. Kraakman, “Corporate Liability Strategies and the Costs of Legal Contracts” (1984), 93 Yale L.J. 857. Kraakman argues that, among other reasons, this is why enterprise liability has become the norm rather than the intuitively more appealing personal liability.
There are, then, solid political and economic bases on which the proponents of the imposition of personal responsibility on directors can argue that they have amply discharged any burden the law and economics scholars want to put on them in the name of efficiency.\(^{80}\) Indeed, the law and economics' case against director responsibility has to be fortified by moving from abstract and non-empirical economic-type arguments of efficiency and risk-averseness to more concrete contentions that the imposition of such burdens is bound to be inefficient because: (i) in a minority of, but nonetheless very important, cases, it will become very difficult for corporations to attract the right kind of directors;\(^{81}\) and (ii) this would be a bad thing or, in the contractarians' language, it would lead to inefficiency. Here I note that it is largely the status of the directors, as well as the nature of their corporations (their size and their widely held nature), that gave rise to the hue and cry which surrounded the Bata and PWA subsidiaries and Westar cases. Again, however, this spin on the efficiency argument, like other arguments meant to bolster the law and economics' case, raises some intriguing questions.

First, the imposition of both criminal and civil liabilities on directors is not new. And, despite the increase in their liabilities, it has not resulted in a shortage of candidates for directorial appointment. To make the point in a small way, some well-informed people, with a great deal of worldly experience, whose reputation (as well as personal fortunes) ought to mean something to them, seem to be falling over themselves to sit on supposedly perilous boards of directors.\(^{82}\) As is common in this debate, the

\(^{80}\) Here it is worth remembering that that burden should be lighter in respect of directors than it is in respect of managers and officers; (...)\(^{81}\) The TSE Draft Report, supra, footnote 71, provides some anecdotal support. The Molson Companies Ltd. spokespeople are quoted, at p. 33, as saying: "Over the long term, this (imposition of directors' liability) will inevitably lead to the diminution of qualified business advice and counsel, thereby reducing Boards to legal fora which observe the letter rather than the spirit of the law". The representatives of C.R. Spector, Byers Casgrain, are quoted, at p. 34, as follows: "While recognizing the policy concerns ... it is clear that some balance must be struck in order to enable companies to attract competent independent directors ...".

\(^{82}\) Former Progressive Conservative Finance Minister, Michael Wilson, joined the bank of directors at Amoco Corp; he was to be paid at least Us$44,000 in cash and stock for meetings which are held once a month (Toronto Star, November 2, 1993); former Prime Minister Mulroney became a director of American Barrick Resources Corp., at $12,000 per year plus $600 per meeting, plus some very generous stock options (Toronto Star, November 9, 1993); Mila Mulroney was appointed to the board of Astral Communication Inc. (Toronto Star, December 30, 1993); former Progressive Conservative cabinet
theoretical argument offered by contractarians is appealing but its empirical basis is not well-established.\textsuperscript{83}

Second, one of the consequences, indeed goals, of imposing personal responsibility on directors is to ensure that they will set up monitoring systems in respect of the legal obligations which they have to meet. While it is easier for directors to establish the defences available to them under the statutes which require a corporation to be found liable first than it is under the more recent crop of independent directors’ duty-type provisions, directors under both sets of statutes may discharge their responsibilities by setting up a preventive system in respect of all the identified legal objectives which must be met. To do this the directors must cause a precautionary system to be established, appoint appropriate managers and officers to operationalize it, and they must insist on getting regular reports that advise them about both compliance and non-compliance from the relevant managers and officers.

It is clear that extra costs will be incurred by the enterprise as a result of these monitoring/defence systems; however, it is also clear that, assuming that social welfare, as defined by the elected government, requires compliance, there will be social benefits, including the enhanced legitimacy of private wealth-creation.

No less important, it seems that well-advised directors will be able to shield themselves from many of the legal responsibilities about which so much fuss is being made. It is true that this will not

\begin{thebibliography}{99}
\item{83} The TSE Draft Report, \textit{supra}, footnote 71, at p. 35, refers to a report of a Federal Government Interdepartmental Working Group from which it quotes:

\begin{quote}
Statutory liability faced by directors has expanded during the last twenty years particularly with respect to source deductions, taxes, unpaid wages, severance and termination pay, and environmental and corporate law . . . increased exposure of directors’ liability . . . This has raised concerns in the business community . . . Despite these concerns, the Working Group did not find sufficient evidence to conclude that directors’ liability has become so severe that it could not be handled by the market . . . The Working Group did not find sufficient evidence to conclude that directors are resigning in significant numbers to avoid the liabilities that they face.
\end{quote}

minister Don Mazankowski was appointed to the board of Gulf Canada Resources Limited (Globe & Mail, January 5, 1994). See, generally, “The ‘super elite’ can often find new work” (Toronto Star, August 23, 1993). Politicians are not the only ones pleased to accept such appointments. Many CEO’s hold many directorships presumably out of a sense of noblesse oblige (which might make them ready to give up their posts if the risks increase) and from a sense that it helps them look after their own corporate interests (which might induce them to accept some extra risks). For a dramatic, if somewhat unusual example, note that when Mr. Trevor Eyton was appointed to the Senate, he acknowledged that he might have to give up one or more of the 26 directorships he held (Toronto Star, September 30, 1990, p. F1).
always be possible: some of the responsibilities are for debts owed by the corporation (to employees, to some creditors) if it becomes insolvent, or as a result of conduct in a near-insolvency situation (the PWA and Westar cases). This may have a chilling effect on would-be directors, but if the concern can be narrowed down to those cases, the fear that there will be a lack of directors may be reduced. To put the many and varying legal liabilities of directors together in one pot and raise the alarm as if there were no difference between them does not serve analysis or public policymakers well.

Third, while it is claimed that the burdens directors face because of the greater enforceability of the responsibilities they owe to the outside world may frighten them off, this is not the approach taken when different kinds of stakeholders need protection. Thus, some of the same pressures and arguments, which, I have suggested, are leading to a greater willingness on the part of regulators and legislators to impose personal responsibility on directors, have pushed some people to argue for a change to corporate governance which will require more work and more care by those very same directors the efficiency theorists seek to protect in the other circumstance.

In recent times, there has been an increased concern that directors have not monitored management well enough and that, as a result, shareholders' interests have not been adequately protected. The perceived harms are large scale failures, as well as allegedly unnecessary defensive tactics during takeovers, undeservedly high compensation of executives, in addition to concerns about conflicts of interest and incompetence. That is, shareholders are seen as being burdened with unacceptable agency costs and losses due to the lack of efficient controls over their agents. A corporate governance system which permits the

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84 Whether these perceptions reflect actuality does not matter as much as the fact that they are widely shared. For instance, TSE Draft Report, supra, footnote 71, paras. 1.4 to 1.5 states:

While there are numerous Canadian public companies which are well-governed and provide a high standard of corporate governance, we believe there have been several instances of corporate breakdown attributable in part to an ineffective governance . . . Had these corporations been more effectively governed we believe the risk of these failures and the magnitude of losses occurred would have been significantly reduced . . . Shareholders and other investors have experienced cause for concern regarding the general efficacy of the governance of our corporations . . . We have observed that these events have contributed to a scepticism in many quarters about corporate governance in Canada.
investors, the owners, to be so disadvantaged had to come under scrutiny.

It should be relatively easy to solve this problem by applying the remedies suggested by proponents of enterprise liability. Presumably, if shareholders become aware that the people they have appointed to look after their interests have become lap dogs for shirking and looting managers and officers, and/or that directors are willing to favour their own interests over those of their principals, and/or that directors are incompetent, they could set up the appropriate monitoring and sanctioning systems. More precise contractual obligations, buttressed by existing statutory remedies, and a publicized refusal to hire people whose reputation has been degraded because of their past transgressions and failures, etc., should prevent directors from falling down on the job.

Unsurprisingly, this is how many of these scholars would like to respond to this kind of corporate governance problem. They would prefer not to impose legislative corporate governance rules which restrict directors' activities. Given that (in the USA at least) the widely held shareholding which characterizes large corporations makes it unattractive and difficult for shareholders to assert their interest, many analysts are putting their faith in large institutional investors. They hope that they can be induced to change their traditional pattern, that is, from being passive, management-oriented shareholders to becoming active, management-monitoring shareholders. Whatever the potential of this approach, there are many who doubt that we ought to wait and see.

It is against this background that the TSE-commissioned study made its recommendations. The report urged the same kind of corporate governance structure (directors appointed with the specific obligation to ensure that profit-maximization and legal requirement systems be set up, that the appointment of appropriate managers/officers/auditors, etc., who are to report back to those directors on a regular basis, become an enforceable duty,

85 The potential may be greater in the US than in Canada. For an argument that institutional investors can provide an antidote for the problem, see J. Coffee, Jr., "Liquidity versus Control: The Institutional Investor as Corporate Monitor" (1991), 91 Yale L.J. 1277. For an argument that institutional investors may not be that much help, see H. Gartner, "Institutional Investors and the New Financial Order" (1992), 44 Rutgers L.R. 585.

86 Supra, footnote 71.
etc.) which the statutorily imposed special duties on directors are going to cause to evolve as directors set up due diligence systems to protect themselves.\textsuperscript{87} For the purposes of this article, a number of points emerge.

Although the directors' liability in case of failure may not lead to sanctions as dramatic as those imposed under the existing statutes, it is clear that the TSE Report's suggested scheme of corporate governance would impose some enforceable responsibilities and liabilities on directors. What this means is that, from the perspective of looking after the shareholders' interests, the TSE Report supports the argument for the imposition of new legal and operational responsibilities on directors. Apparently, to the TSE Task Force the perceived need for more competence and accountability outweighs any concern there might be that the market for competent directors will dry up.

In addition to the other arguments made in this section, this suggests that the contention that there will be a dearth of people willing to serve on boards of directors if we do not make enterprise liability the linch-pin of the system is not all that convincing. Moreover, given the fact that as sober a status quo-favouring body as the TSE Task Force supports the imposition of new legal responsibilities on directors provided this helps promote the internal vigilance and diligence of directors, the question is raised whether the opposition to a change from enterprise liability is as much about welfare/efficiency as it is about preserving the interests of existing corporations and their owners. The very raising of this question gives birth to others of a (necessarily) speculative nature.

V. THE ISSUE OF CLASS

Law and economics scholars argue for efficiency within the market as it is constructed at any one time. Thus, when faced with contentions that there should be different allocations and results to those which are produced by efficient profit-maximizing activities, their response must be that, if different outcomes are desired than those a properly working market is delivering, elected governments should regulate to achieve this; that is, governments should change the allocation and permitted uses of resources.

\textsuperscript{87} In addition, the TSE Draft Report stresses the need to find a greater number of competent, independent ("unrelated") directors.
After legislators have done this, they should let the system of self-
advancement operate freely again.

The argument is that the paradigm is a value free one: efficiency
is to be promoted within any one specific context on which there
has been some democratically arranged consensus. But, despite
the claim that the theory is value free, it may well be the case that
its proponents *ideologically* prefer a system of allocation where
the existing division of wealth (which, in Canada, is very unequal)
is as little disturbed as possible. Of course, this is an undocu-
mentable assertion, but one which, intuitively, strikes a
responsive chord. Even if it is just plausibly true, it is worth
revisiting some of the law and economics proponents’ arguments
from this vantage point.

In particular, the corporate social responsibility movement
argues that directors and managers of corporations should not
only obey the law — that is, maximize profits within the existing
market structure — but should refrain from maximizing those
profits to defer to other, non-legislated-for social interests and
values. However, this reasoning is met with the more persuasive
counter-argument that this is bound to lead to the inefficient
allocation of resources (because profit-maximization is a specific,
unambiguous goal, whereas the balancing of an unspecified
number of different kinds of interests is not) and that to require
such legislative-type calibration by privately appointed directors
and managers would lead to undemocratic results. These
arguments have no force when what directors/managers are asked
to do is to restrict profit-maximizing efforts to what is permitted by
democratically passed legislation.

Law and economics theorists who oppose this kind of direct
restriction, then, seem to have put themselves on shaky ground.
This suggests the possibility that these very sophisticated scholars
just may not like the fact that the legislative constraints on
resource uses are being made much more effective than they were.
After all, there is always a tension for both the classical economist
and for the law and economics’ analyst: the more regulation of
resources and their uses there is, the less interesting and useful it
becomes to play the game of efficient profit-maximization.

Of course, it is somewhat presumptuous to attribute a state of
mind to scholars and activists of which, even if it does affect their

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88 *Supra*, footnote 78.
thinking, they may well be totally unaware. Still, there is some supporting evidence to be found in the TSE Draft proposals.\textsuperscript{89} The authors recommended the creation of a structure of corporate governance which will demand much more diligence on the part of directors than traditionally has been demanded of them by business corporations statutes. As such, they were not in a good position to argue that the imposition of personal responsibility on directors for corporate compliance with legislated norms should be rejected out of hand. They urged, therefore, that, if governments continue to insist on imposing such responsibilities, they should afford directors a defence of due diligence and, most importantly, they should think very carefully about the nature and the number of the responsibilities they impose. They recommended that governments engage in some kind of cost-benefit analysis to make sure that the social and political goals pursued would not come at the expense of economic welfare-production through the vehicle of the corporation. That is, while there is no pronouncement in the report as to what might be an acceptable level of intervention with the existing market, it is clearly stated that existing and future interventions ought to be viewed with some scepticism. This contrasts nicely with their willingness to impose new responsibilities on directors to protect shareholders.

I conjecture that one of the unarticulated premises of the debate may be that there ought to be a different approach to intra-class disputes and inter-class ones. When the investing classes require help to solve the problems arising out of their relationships to each other, an approach imposing more direct director responsibility seems to be readily acceptable. The obverse appears to be true where the difficulties arise from relationships between the investing classes and the non-investing ones (such as the clashes between shareholders and consumers, or between shareholders and people who just want to enjoy the environment). Here the position of creditors of the corporation presents a peculiar problem.

Both the emerging jurisprudence and legislation giving voluntary creditors more protection, including the right to pursue actions against directors, are not all that easy to explain within the context of the legal model of the corporation or from the contractarian perspective, given that there are no contractual relations

\textsuperscript{89} See supra, footnote 71.
between the agent-directors and the creditors. However, from the perspective that what really is being solved are disputes of an intra-class nature regardless of the legal niceties, these developments make functional sense.  

Similarly, from a class perspective, the debate which has surrounded the efforts to make directors liable for unpaid wages can be better understood. From a contractarian point of view, workers could be characterized as belonging to the nexus of contracts which makes up the enterprise and, therefore, it could be argued that they should be given some rights within the enterprise. The contractarian and corporate sector opposition to director responsibility for unpaid wages, therefore, should not be as strenuous as it has been.  

From a class analysis perspective, however, the interests of workers and of their employers, the investors, remain antagonistic. Thus, the hostile reaction of some members of the employing classes is not much of a surprise to class theorists.

Class conflict analysts understand that while, for the good of capitalism, it is necessary for governments to mediate the class

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90 Of course, the argument is not that judges and legislators are class theorists, but rather that the deep structure of capitalism is making itself felt. While this is not the place to address all the aspects of this argument, note that at the same time as voluntary creditors are getting more rights vis-à-vis the corporation and its directors, they are also being saddled with more obligations. Because large providers of debt capital are in a position of possible control, regulators and courts have been moving to make them responsible for environmental clean-ups made necessary by the borrowing corporation's conduct; see D. Saxe, "Throwing The Net Wider: Can Parent Companies and Lenders Be Held Liable for Contaminated Land?" (1991), 3 Windsor Rev. Leg & Soc. Issues 25; R.M.C. Holmes, "Receiver's Liability for Environmental Problems in Cleaning-up Contaminated Sites: Managing Risk and Responsibility", Toronto, Insight, 1990; S. Cantlie, "When Words Collide: Environmental Regulation in Conflict with Bankruptcy Legislation" (1993), 2 C.B.L.J. 190; "The Comprehensive Environmental Response, Compensation and Liability Act", 42 U.S.C. ss. 9601 to 9657 ("CERCLA"); R.W. McGee, "Superfund: It's Time to Repeal after a Decade of Failure" (1993), 76 U.C.L.A., J. Envi. L., 165.


92 And perhaps to hide. For an argument about the complex issues raised by the bestowal of
conflict inherent in employer/employee relationships — a need which has led, after many political struggles, to sophisticated collective bargaining schemes, minimum standards legislation and equality of opportunity movements — individual capitalists do not find it easy to drop their instinctive antagonism. Employers tend to resist, therefore, all attempts to make them any more responsible than specific contractual terms of employment make them. They are happy to leave taxpayers to pick up the social costs arising out of the displacement of workers when an enterprise suffers a market downturn.

Ironically, these potential social costs provide regulators, who already feel a need to act in fulfilment of their role as mediators of adversary relations, with another motivation to intervene. The fact that legislatures reach out for what seems to be the only counter-remedy available to them when class conflict becomes overt — by making the directors of impecunious corporations responsible for wages owed to employees who are likely to be thrown onto the unemployment insurance or welfare schemes funded by the government — is bound to lead to instinctive and fierce resistance. Yet, it is to be noted that what the state is not trying to do is to stop employers from making market decisions about levels of employment. It is trying to influence those decisions by increasing the cost of dismissal to these decision-makers because of the potentially destructive social and political effects they have.

This political spin on the debate leads to a very different set of understandings than are provided by the self-proclaimed value free, apolitical arguments which underpin the legal model of corporate governance or by the law and economics approach to the issue of directors' responsibilities. In this light, some other tentative arguments are offered.

One of the effects of both the TSE Task Force's-type recommendations and of the increasing number of direct collective rights on workers, see J. Fudge and H.J. Glasbeek, "The Legacy of PC1003" (forthcoming; available on request); see also my "Law: Real and Ideological Constraints on the Working Class", in Gibson & Baldwin, eds., Law in a Cynical Society? (Toronto, Carswell, 1985), p. 282.

93 For an argument that because it is difficult to have workers represented on boards of directors to enable them to safeguard their interests, the state should pick up the pieces, see Howse and Trebilcock, supra, footnote 91.

94 Supra, footnote 71.
statutory obligations imposed on directors is to make for a professionalization of boards of directors. While directors, especially of large, widely held corporations, undoubtedly have always prided themselves on their experience, expertise and business "smarts", the level of skill, care and diligence required of them by the legal model of the corporation until recently has been appallingly low. While many reasons may be offered for this, only one possibility needs to be considered in this context.

It may be that, in large part, the resentment of statutorily imposed obligations on directors, including external directors, arises from the fact that this set of requirements causes them to be treated as if they were mere employees. The shareholders' agents who are managers and officers of the corporation more clearly approximate people who satisfy the definition of employees than do directors. Until now, the latter have been seen as special kinds of shareholder-agents. While, legally and traditionally, they have been primarily responsible to the investing classes, in practice they also have been members of those investing classes. Consequently, their legally required tasks and duties were more like those of part-time functionaries, almost dilettantish, at least in law.95

Now it looks as if the role of directors might be changing. They will be working harder for the investors who have chosen them, and they will be less equal to them.96 Inasmuch as giving professional-type service to the investing class always has been acceptable to many senior managers of corporations (that is, high level employees who serve on other corporations' boards of directors), the proposed upgrading of these kinds of duties may be relatively acceptable to many directors. This is not likely to be the case in respect of the proposals to enlarge the scope of their responsibilities to look after the interests of the "other" classes.

It may be the case that, when it is argued that there will be a dearth of competent directors if these personal responsibilities of directors to the outside world are not curtailed, what really is being talked about is that owners of wealth and their allies may not

95 This is what used to cause them be described as "parsley on the fish", an expression attributed to Irving Olds, chairman of U.S. Steel, 1940-1952.

96 Note here that, to contractarians, directors were never truly equal because they were agents for the shareholders/principals. For the legal model of governance theory, on the other hand (which provides the basis for the relatively low standard of care of these agents), they are characterized as having a great deal of autonomy, as befits non-employees who are both representatives and members of the investing classes.
take kindly to being asked to serve better "the adversary" (that is, members of the other class). While this kind of theorizing yields the same conclusion (that is, a likely increase in the reluctance of qualified people to serve as directors) as the efficiency-based argument, it is of a totally different kind and, therefore, presents different questions for theorists and policy-makers when looking for a solution to the supposedly looming problem of an unwillingness by the captains of industry to serve the wealth-owning classes.

VI. SUMMARY

The debate around directors' responsibilities is framed by a set of assumptions from which flow certain consequences.

(i) Canada is a liberal democracy. It believes in the political equality of all individuals, individuals who should be free to exercise their will as they see fit, subject only to democratically agreed-upon restrictions.

(ii) Canada is also a liberal democratic capitalist nation which believes in the sovereignty of individuals who should be left as free as possible to deploy their own resources and abilities to maximize their economic opportunities.

(iii) Canada is a mature liberal capitalist democracy. Over time, governments, which have accepted that overall welfare should primarily be created by individual actors who are left alone to advance their own position, have facilitated such private wealth creation. The corporation, the chief facilitating device, has become the key to Canada's economy.

(iv) Governments see it as their role to perfect the market, as well as to facilitate market activities. This means the removal of unnatural market barriers, of information blockages, of unfair forms of competition, etc. It also requires the setting up of regulatory regimes which internalize costs where this cannot be done easily by private actors in the market.

(v) In this kind of economy, individual actors are to depend on themselves. They need to be selfish and, because resources are unequally divided, some of the outcomes of the market become socially unacceptable, even if the government works hard to overcome some market frictions and imperfections. This means that, in the political sphere, where economically disadvantaged people may have more clout, democratic, electoral rights are used
to have governments change unacceptable outcomes. At the same
time as this may diminish some of the opportunities for wealth-
owners to profit, it may make the economic system more palatable
and give the political system more credibility.

(vi) The ensuing rules and regulations impose restraints on
individual actors who, in a political economy of this kind, are
expected to be responsible for self-optimalizing conduct which
violates these legal standards of conduct.

(vii) The corporation has become the principal tool in private
economic welfare creation because it is an attractive way to
aggregate capital and to organize production. Two features,
separate legal personality and limited liability, have been very
useful to these ends. As a practical matter, these very features,
however, put the investors outside the reach of the rules and
regulations which are meant to fetter individuals. On the face of it,
this runs counter to the basic tenet that individuals should be
responsible for the conduct which they initiate. Further, as these
rules and regulations are seen to be necessary to a well-working
liberal democratic market system, there is a need to find an alter-
native way to enforce them; new targets have to be found.

(viii) Statutory corporate law suggests that the corporation
and/or governors of the corporation could be appropriate targets.
Statutorily mandated directors are the legal governors of the
corporation. While the theory of legal personality creates some
problems for making directors responsible, it is possible to do so
without undermining the understandings of the corporation which
underlie the business corporations statutes.

(ix) There is an argument that this will adversely affect the very
efficiency which the corporate vehicle provides. Law and
economics scholars argue for enterprise, rather than personal,
liability, lest directors/managers of the corporation become too
afraid to take necessary risks on behalf of the shareholders/-
owners. This could kill the goose that lays the golden eggs.

(x) This argument depends on the fact that, as Rational
Economic Men, shareholders will react to enterprise liability by
exercising better control of the directors/managers and that this
control will be imposed at a lower cost, that is, it will be more
efficient, than other means used to achieve legislatively prescribed
political/legal goals. Such an argument is an amalgam of
theoretical and empirical presuppositions. It is far from conclusive
and raises the question as to why it is made with such vigour.
(xi) Much of the difficulty may stem from the non-questioning of the assumption that Canada is a liberal capitalist democracy, as opposed to a class-divided society in which relatively few dominant wealth owners seek to exploit non-wealth owners and resources to further their private accumulation endeavours. Adherence to the assumption that this is a liberal capitalist democratic polity means that the political and economic spheres, while seen to be related, are treated as essentially discrete spheres, one in which the political is superior to the economic. In mature democratic liberalism, the political institutions can, and should, determine the boundaries of the economic ones. In contrast, from a class analysis point of view, there is a limit to which the political institutions can be allowed to determine the economic ones. To this kind of analytical understanding, the crucial point is that the economic sphere, in the end, determines the nature and scope of the political sphere and its institutions. This approach, which seems not to be part of the theoretical/policy debates, does have explanatory force for some of the key issues in the controversy. In particular, it helps to explain why some of the extensions of directors' responsibility seem to be acceptable to proponents of the status quo, while other extensions strike horror in the hearts of those who defend the private accumulation process.