CAP Forum on Enron

What If Andersen Had Shredded in Toronto or Calgary? The Potential Criminal Liability of Canadian Public Accounting Firms*

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ABSTRACT

Both Canadians and Americans often assume that the legal system, like many other aspects of society, works the same in both countries. Just as these assumptions often fail to stand up to detailed scrutiny, so too may the assumption that Arthur Andersen LLP could have been charged with and convicted of obstruction of justice in Canada. In this paper, we examine the hypothetical question of what would have happened if a public accounting firm had shredded documents, fearing a provincial securities regulatory investigation in Toronto or Calgary. We examine the key differences between both the law and the institutional environment in Canada and the United States to determine whether such a prosecution could occur in Canada. We find that the letter of the law would probably have resulted in a successful prosecution. However, because of differences in the institutional environments, a criminal prosecution of a Canadian public accounting firm would probably never have occurred. The implications of this conclusion are discussed.

Keywords Andersen; Criminal law; Enron; Obstruction of justice

N.B. Le condensé française de l'article qui suit commence à la page 78.

On June 15, 2002, a Texas jury found Arthur Andersen LLP guilty of obstruction of justice by shredding documents and deleting electronic records that may have been relevant to Securities and Exchange Commission (SEC) inquiries about the financial accounting and disclosures of Andersen's second largest client, Enron. The consequence of this decision was immediate and devastating — it effectively brought Arthur Andersen to an end as Andersen executives announced they would cease auditing public companies, effective August 31, 2002. Almost 26,000 Andersen U.S. partners and employees lost their jobs,

* We thank the Social Sciences and Humanities Research Council for the generous financial assistance given to the second author. Most of this paper was written while the second author was a visiting professor at the Richard Ivey School of Business at the University of Western Ontario and a faculty member at the University of Waterloo. We are grateful to the various informants on the Canadian legal and regulatory processes who aided us in our research but who wish to be sourced without attribution. We thank the participants attending the University of Alberta's Conference on Financial Reporting for their comments and suggestions.

and many partners and retirees lost a substantial portion of their life savings. Over 2,300 Andersen public company clients were forced to engage new audit firms with all the disruptions and costs associated with an auditor change (Deis and Giroux, 1996; DeFond and Subramanyam, 1998). These clients also lost almost three times the stock market value of matched firms in the period ending with Andersen's announcement that it had shredded documents (Callen and Morel, 2002).

Commentators have suggested that Canadians have not reacted to the Enron and Andersen events with the degree of seriousness that these issues deserve (McKenna, 2002). This lack of response might be due, at least in part, to the different legal environment in Canada in civil actions against auditors and, to the best of our knowledge, the rarity of criminal prosecutions of auditors for failed audits in Canada (Arens, Loebbecke, Lemon, and Splettsoesser, 2002). The question that arises is whether the legal consequences would have been the same if a Canadian public accounting firm had shredded documents in Toronto or Calgary for a Canadian public company client undergoing an Enron-like investigation.

Our interest in this question stems from comments frequently made by Canadians at the time of the Andersen's conviction in the United States; Canadians tended to assume that this was one more example of the excesses of the U.S. legal system. Various organizations and commentators suggested that such an outcome could not and would not occur in Canada (see, for example, various press releases from the Canadian Institute of Chartered Accountants and the Institute of Chartered Accountants of Ontario). Analyses of civil actions certainly support the contention that the legal systems are different — for example, the inability of Canadian plaintiffs to use the U.S. doctrine of "fraud on the market", which was established in U.S. civil law in the 1970s (Paskell-Mede, 1999). The question thus becomes whether differences in Canadian law would extend to this context.

This paper explores the issue by first reviewing the events and law that led to the U.S. conviction of Andersen in a federal court in Texas. It then examines and compares Canadian jurisprudence with that in the United States, and discusses the likely result of a decision to prosecute and the likelihood of conviction on a successful prosecution. Although we might be reasonably confident about what the legal outcome would be if the decision were made to prosecute, the events surrounding that decision would require an unprecedented will and degree of cooperation among multiple federal and provincial officials. In other words, it would be the Canadian equivalent of a "perfect storm" (Reinstein and McMillan, 2002; Wilson, 2002).[1] Law exists in a social and political context (Gall, 1995) and institutional pressures differ between countries that are often viewed as very similar. Individuals within a given justice system can choose how to respond to a given set of facts. For this reason, it is particularly important that accountants understand the way regulators, police forces, and

1. G. Peter Wilson in his presidential acceptance speech to the American Accounting Association in 2002 is credited with describing the events surrounding Enron and Andersen as a "perfect storm", a reference to Sebastian Junger's 2000 account of the 1991 North Atlantic "storm of the century" and the film of the same name. In nautical terms, a "perfect storm" occurs when all the weather patterns align to produce a rare, truly destructive storm.

Crown prosecutors or attorneys (lawyers) — all those involved in a decision to prosecute — make choices and how their interpretations of events influence their decisions.

THE INDICTMENT AND CONVICTION OF ARTHUR ANDERSEN LLP

This section of the paper outlines the critical stages leading to the indictment and subsequent conviction of Arthur Andersen LLP. It focuses on the various legal steps to provide the comparative basis for the investigation of a hypothetical Canadian prosecution of a public accounting firm.[2] Table 1 shows the key events in the Andersen legal story by date.

Pretrial Events

Andersen executives in Chicago claimed to have learned of the massive document shredding and electronic file deletion in the Houston office on January 3 and 4, 2002. Management of the Houston office claims to have discovered this destruction as it was preparing for the arrival of congressional investigators with whom Andersen had agreed to cooperate as part of its strategy for responding to the Enron crisis. At least a ton of documents and many megabytes of computer files had been destroyed in the period from October 23 to November 9, 2001. Andersen reported this finding to the SEC, the Department of Justice, and to the congressional investigators. When Andersen executives issued a press release on January 10, 2002 that they had found evidence of massive document destruction in Houston by the Enron audit team, both the legal and accounting worlds were shocked. Andersen immediately took steps within the firm to contain the fallout. These included announcing plans to fire David Duncan, the partner in charge of the Enron audit who, on October 23, started the document shredding frenzy in Houston; demoting various Houston office management team partners; and putting substantial firm resources into recovering the deleted computer files and recreating the shredded documents.

Many observers thought that a number of Houston-based Andersen partners and employees might face criminal charges, but Andersen executives were allegedly shocked to learn in a meeting on March 3, 2002 that the U.S. Justice Department intended to indict the firm itself. Andersen CEO, Joe Berardino, was then in Japan on a mission to reassure Far East Andersen partners that there was no need to be unduly concerned. From the public's perspective, Andersen's legal woes began when U.S. Deputy Attorney General Thompson announced a grand jury indictment at a press conference on March 14, 2002. The indictment, dated March 7, 2002, against Andersen for the criminal offence of obstruction of justice was unsealed at this press conference, revealing to the public the Justice Department's intent to criminally prosecute Andersen.

U.S. grand juries are convened to determine whether there is sufficient evidence to indict a party. They operate in secret and act on information put before them, typically only by the investigators. Often the accused party will have no knowledge of the process. When the formal indictment was announced, Andersen spokespeople argued that it was issued in haste (and therefore, presumably, for suspect reasons) and that the government

2. Except where noted, the description of events is drawn from McRoberts (2002) and Fox (2003).

TABLE 1

Timeline of significant events leading to the June 15, 2002 conviction of Arthur Andersen LLP for obstruction of justice and events subsequent to the conviction

Date	Event
August 14, 2001	Enron's CEO, Jeffery Skilling, resigns, citing "personal reasons".
August 15, 2001	Sherron Watkins, an Enron VP, sends a letter to Enron CEO Kenneth Lay and warns that a "wave of accounting scandals" could engulf Enron.
September 15, 2002	The law firm of Vinson & Elkins issues a nine-page report stating that Andersen approves of the Condor and Raptor deals and that Enron had done nothing wrong.
September 2002	Andersen's national office and Houston office struggle with how to properly have Enron restate and account for various losses.
October 9, 2001	Andersen engages Davis Polk & Wardwell to prepare the defence for the firm in any Enron-related litigation.
October 12, 2001	Nancy Temple, an Andersen national office attorney, sends email to David Duncan to remind him to comply with Andersen's document retention policy. Twenty-one minutes after sending this email, Temple opens "a litigation tracking account" for Enron-related matters.
October 16, 2001	Enron discloses a $638 million loss in its third quarter for this fiscal year.
October 17, 2001	The SEC sends Enron a letter asking for more information about reported losses.
October 22, 2001	Enron confirms rumours of a possible SEC investigation.
October 23, 2001	David Duncan, the partner in charge of the Enron audit, starts the document shredding/ electronic file deletion in Houston by telling the audit team to get into compliance with Andersen's document retention policy.
October 24, 2001	Andrew Fastow is ousted as Enron CFO because of questionable business transactions and partnerships.
	Jeff McMahon takes over as Enron CEO.
October 31, 2001	The SEC upgrades its inquiry into a formal investigation of Enron's business transactions and accounting records.
November 8, 2001	Enron revises its financial statements to reduce earnings by an additional $586 million over the past four years.
	Andersen receives an SEC subpoena for Enron-related documents.
November 9, 2001	Andersen partner Duncan's assistant sends highest priority email: "Per Dave: no more shredding."
	Dynegy offers to buy Enron for $10 billion in stock. Dynegy also agrees to pay back more than $13 billion of Enron's debt, and Dynegy's major shareholder, Chevron Texaco, provides Enron with immediate working capital of $1.5 billion.
November 19, 2001	Dynegy withdraws its Enron purchase offer.

(The table is continued on the next page.)

TABLE 1 (Continued)

Date	Event
November 21, 2001	The SEC investigation is expanded to include the role of Andersen.
November 28, 2001	Dynegy terminates the Enron purchase agreement.
December 2, 2001	Enron files for the largest chapter 11 bankruptcy protection in U.S. history.
January 3-4, 2002	Andersen executives in Chicago allegedly learn of the massive document shredding and electronic file deletion in the Houston office.
January 10, 2002	Andersen issues a press release announcing that it has found evidence of massive document destruction in Houston by the Enron audit team.
January 15, 2002	Andersen begins process of firing Enron audit partner David Duncan. The firm cites the destruction of documents in its dismissal.
January 17, 2002	Enron publicly fires Andersen; Andersen claims it quit due to bankruptcy filing.
	It is publicly reported that Sherron Watkins, who warned Enron's CEO Kenneth Lay of accounting improprieties in August 2001, also took her concerns directly to Andersen months before Enron sought bankruptcy protection.
January 21, 2002	Under attack for his firm's role as auditor of Enron, Joseph Berardino, CEO of Andersen, states that he was unaware of any instance in which Enron broke the law, and he seeks to focus blame for Enron's collapse on its business model rather than its dubious accounting practices.
	The first publicly reported Andersen public company client leaves: Heller Financial, a client of Andersen for 50 years, whose 2001 revenue was $1 billion.
January 23, 2002	Enron CEO Kenneth Lay resigns.
	The FBI announces an investigation of Andersen document destruction.
January 24, 2002	Andersen audit partner David Duncan refuses to testify as congressional hearings open.
January 25, 2002	J. Clifford Baxter, former Enron vice-chairman, dies, apparently by suicide.
January 2002	Andersen loses another six public company clients during the month.
February 3, 2002	Andersen CEO Joseph Berardino announces that former Federal Reserve Bank Chairman Paul Volcker will head Andersen's reform commission.
February 2002	Andersen loses eight public company clients during the month.
March 1, 2002	Merck announces the end of its relationship with Andersen; Merck was a client for 30 years, with 2001 revenue of $40.3 billion.
March 3, 2002	Andersen executives are allegedly shocked to learn of the intention of the U.S. Justice Department to indict the firm itself.
March 7, 2002	A sealed grand jury indictment is laid against Andersen.

(The table is continued on the next page.)

TABLE 1 (Continued)

Date	Event
March 13, 2002	Andersen lawyers inform the Justice Department, in writing, that they will not plead guilty to any obstruction of justice charge.
March 14, 2002	Andersen's public legal woes begin with an announcement by U.S. Deputy Attorney General Thompson, at a press conference, of the sealed indictment's contents.
March 25, 2002	Andersen CEO Joseph Berardino resigns.
March 2002	Andersen loses 66 public company clients during the month.
April 9, 2002	Andersen's Enron audit partner, David Duncan, enters a guilty plea to obstruction of justice; sentencing is deferred until after the Andersen trial.
April 12, 2002	Andersen continues to seek deferred prosecution in exchange for an admission of wrongdoing in the destruction of Enron-related documents. Paul Volcker is involved in the negotiations and thinks that a deal is at hand.
April 17, 2002	Andersen breaks off settlement talks with the Justice Department as Justice insists that a guilty plea be part of any settlement.
April 18, 2002	Enron's post-collapse CEO Jeffrey McMahon resigns, calling for outside leadership of the company.
April 23, 2002	CMS Energy announces the replacement of Andersen; CMS Energy was a client of the firm for 85 years, with 2001 revenue of $9.6 billion.
April 2002	Andersen loses 179 public company clients during the month.
May 7, 2002	The Andersen trial begins.
May 8, 2002	Several current and former Enron board members appear before a Senate subcommittee.
May 14, 2002	David Duncan, the now fired and former Andersen audit partner in charge of the Enron audit, tells the Texas federal jury that he knew he had committed a crime when he instructed his colleagues to destroy documents.
May 30, 2002	CNF announces that it is replacing Andersen; its 2001 revenue was $4.9 billion.
May 2002	Andersen loses 292 public company clients during the month.
June 15, 2002	The Texas federal jury finds Arthur Andersen LLP guilty of obstruction of justice by shredding documents and disposing of electronic records that may have been relevant to SEC inquiries about the financial accounting and disclosures of Andersen's second-largest client, Enron.
June 28, 2002	Delta Air Lines announces Andersen's replacement; its 2001 revenue was $13 billion.
	Horizon PCS announces Andersen's replacement; its 2001 revenue was $9.7 billion.
June 2002	Andersen loses 181 public company clients during the month.
July 2002	Andersen loses 91 public company clients during the month.

(The table is continued on the next page.)

TABLE 1 (Continued)

Date	Event
August 21, 2002	Michael Kopper, a former Enron executive, pleads guilty to money laundering and wire fraud, becoming the first Enron official to be convicted.
August 31, 2002	Andersen ceases auditing public companies
August 2002	Andersen announces the loss of 15 public client this month. Many changes are occurring without drawing news attention, given Andersen's announcement of cessation of audit practice on August 31.
October 16, 2002	Andersen is sentenced.
	Andersen is given the maximum penalty for its Enron-related obstruction of justice conviction; it must pay a $500,000 fine and is prohibited from doing consulting or auditing work for public companies for five years. The sentence is handed down in U.S. Federal Court in Houston by Judge Melinda Harmon.

Sources (as of March 1, 2003):

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was now abusing the grand jury process by subpoenaing certain Andersen personnel to appear before further grand juries investigating the actions of individual partners and employees. Andersen was unsuccessful in its efforts to quash the subpoenas. The Justice Department persuaded the court that it was at Andersen's behest that the indictment was unsealed and announced relatively quickly, and that the further grand juries and subpoenas had legitimate legal purposes.

This request for a quick trial was part of Andersen's strategic response upon learning of the full extent of the document destruction. Andersen determined that it was important to move quickly and to dispose of any criminal accusations so as not to continue to lose its *Fortune 500* clients — the lifeblood of its international audit business. Andersen executives and lawyers apparently believed that demonstrations of the firm's good faith would ensure that the government would proceed against individuals alone. These good-faith

demonstrations included publicly acknowledging the actions of certain partners and employees as wrong and dismissing or demoting them, and making highly public reforms under the aegis of such a high-profile person as former Federal Reserve Chairman Paul Volcker (McCoy, 2002).

This reform strategy might have been sound if the circumstances had been less extraordinary and if there had been no "history" between regulators and Andersen. In fact, the prosecutors considered current events to be a continuation of a pattern of improper behaviour. The U.S. Justice Department saw a long line of past transgressions — for example, Andersen's actions with Waste Management Inc., which had been subject to a much publicized consent agreement with the SEC in 2001 enjoining Andersen from engaging in any further improper conduct, as well as allegations of similar problems at Sunbeam and other audit clients (Witt and Behr, 2002). Added to this history was a great deal of public concern about Enron's collapse and the massive number of documents and files that were destroyed even when Andersen executives were visiting the Houston office. There was and continues to be a lot of confusion about how much Andersen executive partners knew about what turned out to be a key part of the case against Andersen — the Temple email memo of October 12, 2001. This memo urged David Duncan to bring the Enron files into compliance with Andersen's document and retention policy and, allegedly, induced Duncan to lead the shredding effort. What the Andersen executive partners knew, what they ought to have known, and what was the true intent behind the Temple memo could not be ascertained. All these factors, however, undermined Andersen's claims to redemption with prosecutors (McRoberts, 2002).

Mike Chertoff, chief of the Justice Department's criminal division, believed that, in this context, indicting individuals was insufficient because there had been no noticeable change in Andersen throughout the history of SEC enforcement actions and investigations during the 1990s. Indeed, in some cases, Andersen partners who had been involved in SEC regulatory cases were subsequently promoted by the firm or assigned to other high-profile engagements (Fox, 2002; McRoberts, 2002). The extraordinary step of moving to indict the firm as a whole was, therefore, necessary in Chertoff's eyes.

The Justice Department wanted an admission of criminal responsibility from Andersen. The March 14 indictment announcement was a direct response to the failure of plea-bargaining negotiations and the formal letter sent by Andersen's lawyers on March 13 that the firm would not plead guilty to any obstruction of justice charge. Andersen executives believed that they could not admit to liability because, if they pleaded guilty to a criminal offence, they would lose their right to audit public companies under the U.S. securities acts of 1933 and 1934 (Arens et al., 2002).

The Justice Department's case was strengthened by the decision in late March 2002 of David Duncan (the partner in charge of the Enron audit and whose firing was announced by Andersen in January) to testify against his former firm. Duncan entered into a "cooperation agreement" with the government such that the prosecution would be more lenient in his forthcoming trial for obstruction in return for his "cooperation" at the Andersen trial. On April 9, 2002, Duncan pleaded guilty to obstruction of justice with sentencing deferred until after the Andersen trial. Contradicting months of denial, Duncan stated, "On October 23, I instructed local people at Arthur Andersen to begin destroying documents, with the knowledge and intent that those documents would be unavailable to the SEC and others" (Jenkins, 2003).

The Trial

The obstruction of justice charge against Andersen was based on the federal U.S. Code that states (in part):

> 1512. Tampering with a witness, victim or an informant …
>
> (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to …
>
> (2) cause or induce any person to …
>
> (B) Alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding, …
>
> shall be fined under this title or imprisoned for not more than ten years, or both.

The trial was held in U.S. Federal Court, the judicial branch of the U.S. federal government. The charges were twofold: that the document destruction took place in the expectation of an investigation by the SEC (from October 10 to on or around October 16, 2001) into the activities by Enron and its auditor, and second, that the document destruction took place after Andersen became aware of the investigation into Enron and until Duncan and others were informed that the firm had received a federal subpoena (from on or around October 16 to November 9, 2001). Note that the charges include the period when Duncan claimed that no organized shredding had taken place (that is, before October 23).

The Justice Department's proceeding against the firm and not against individuals alone was both unusual and risky because it required proof that an order was given by specific people with authority to act on behalf of the firm (that is, partners) and that this was not the action of a wayward individual or series of individuals. The processes and outcome of the trial, while interesting for their historical significance, were not particularly different in significant respects from what might occur in Canada (see McRoberts, 2002 for a description of the events leading up to the June 15 verdict). As with any criminal case, the outcome was determined by what the judge or jury believed beyond a reasonable doubt. Therefore, in legal terms, the outcome was determined by the facts and the interpretation of the facts; it is entirely possible that another U.S. jury would have reached different conclusions. The conclusions this jury reached, while not necessarily expected, were within the bounds of the law and, as such, not controversial.[3]

3. The only surprising move was that during jury deliberations, when it became clear that individual jurors had decided that different persons in Andersen had directed the destruction of documents, the judge advised that so long as jurors were all in agreement that some persons had made this directive on behalf of the firm, it did not matter that the actual identity of those persons differed. This instruction relieved the deadlock and the jury reached its decision. Although, as Andersen attorney Rusty Hardin stated, the judge's instruction might have provided grounds for an appeal, the issue became irrelevant because the conviction and its fallout made it impossible for Andersen to fund an appeal (McRoberts, 2002). Nonetheless, an appeal (still pending) was filed on October 10, 2003 (Flood, 2003).

A HYPOTHETICAL CANADIAN COMPARISON

Our investigation into what would happen in Canada is based on our understanding from the U.S. public record of what happened in the U.S. case against Arthur Andersen LLP. In carrying out our investigation, we first document our assumptions about these facts, describe the nature of Canadian criminal law and relevant institutions, and then reach conclusions about both whether the law in fact would allow for such a prosecution and whether the relevant participants would have made judgements similar to those made by U.S. participants. We are guided in our investigation by the Criminal Code of Canada, Canadian case law that interprets the Criminal Code, and informal interviews with various individuals including persons familiar with Ontario Securities Commission (OSC) investigations, Alberta Securities Commission (ASC) representatives, Canadian lawyers, and Crown prosecutors. Our conclusions are necessarily speculative but based on an informed understanding of the law and the forces at work in the Canadian regulatory and criminal justice systems.[4]

Background

For the purpose of our investigation, we assume facts equivalent to those that we know existed in the Andersen case — that is, certain partners of a Canadian public accounting firm become aware of the imminent and precipitous collapse of an audit client; the audit client is, at all relevant times, listed on the Toronto Stock Exchange; there are the beginnings of an investigation by the provincial securities regulator (in Toronto, the OSC or, if in Calgary, the ASC) into possible offences by the audit client; the partners responsible for the audit believe there may be an investigation into possible regulatory offences by them as well as the client; the partners, either independently or believing they have been instructed by others within the firm to do so, embark on a massive destruction of documents and electronic records (well beyond routine destruction); the partners are located in Toronto (or Calgary), as is much of the documentation destruction; and the provincial securities regulator becomes aware of the destruction of records during the course of its investigation.

Certain key facts about the environment are also known. The Ontario regulators operate pursuant to the Ontario Securities Act, an act of the provincial Legislature, as it is known in Ontario (or Legislative Assembly in many provinces and National Assembly in Quebec). Any criminal charges that flow from the destruction of documentation will be brought under the Criminal Code, an act of the federal Parliament. The criminal investigation might be handled by the Royal Canadian Mounted Police (RCMP), a federal government police force (in Ontario or Alberta), the provincial police (in Ontario), or the municipal or regional police. The decision whether to bring charges will be made by a Crown prosecutor — a member of the provincial attorney general's staff who is usually a full-time

4. In the following analysis, when we refer to the Ontario setting alone, we have not carried out analogous interviews or investigations in Alberta. However, nothing has come to our attention in our presentations of this paper to suggest that these observations would not be correct in Alberta.

employee of the province but may be a contracted attorney in private practice. A Criminal Code case will be heard by either a provincially or a federally appointed judge (depending on the nature of the offence and the defence's election as to the mode of trial) in a court built, serviced, and administered by the province.

One immediately identifiable difference between the two settings is that, in the Andersen prosecution, the securities regulator, the criminal law, the prosecuting lawyers from the Department of Justice, and the courts were all based in the U.S. federal jurisdiction. Therefore, one obvious and possible impact of the scenario in Canada is the classic issue of jurisdiction — that is, the securities regulator in our scenario is under provincial jurisdiction whereas the criminal law is under federal jurisdiction (Gray, 2000). When officers of an administrative tribunal such as the OSC identify what they believe to be clear instances of violations of the Criminal Code, they would contact one of the various police forces (RCMP, provincial police, or metropolitan, regional, or municipal police, depending on local resources and the geographic area in which the harm occurred), and these officers of the law would determine whether charges should be laid. Depending on the complexity or difficulty of the case — and this case would clearly be considered "difficult" — and the particular province, the police will either lay charges and then forward the case to the provincial Crown prosecutors or they will discuss the case with the prosecutors before deciding to lay charges. In either case, before the matter proceeds further, the prosecutors would have to be satisfied that there was both a reasonable prospect of conviction based on the available evidence and a public interest in prosecuting the matter.[5] In this particular context, a referral by the securities commission to the police would be unusual. Whether in practice the police and/or the provincial Crown prosecutors would have the resources and/or interest in prosecuting such a case is a separate issue — see, for example, comments by former RCMP officer John Beer (Gray, 2000). Investigations of this type are lengthy, complex, and immensely time-consuming. Finally, in most serious cases of this nature, a preliminary hearing would be held and a judge would decide whether a full trial was warranted.

Thus, there are two issues to consider in our investigation of whether our hypothetical Canadian public accounting firm could be found guilty of obstruction of justice. First, can actions analogous to those taken by Andersen be considered a criminal offence under the Criminal Code? Second, given the set of Canadian institutions and the social context, is it likely that such a prosecution would be undertaken? In the remainder of this section we consider the first question; we consider the second question in the next section.

5. Both these tests are considered to be objective but also clearly require the exercise of judgement. For "reasonable prospect of conviction", a determination that a reasonable jury, properly instructed, *could* convict would be too low a threshold, but a "probability of conviction" would, in itself, be too high. The "public interest" consideration comes only after the "reasonable prospect of conviction" factor is satisfied. See Ontario Ministry of the Attorney General, Criminal Law Division (2002).

The Canadian Law on Obstruction of Justice

In Canada, as in the United States, the criminal provision most relevant to these circumstances is known as "obstruction of justice".[6] The wording of the Canadian Criminal Code, however, is less specific than that of its U.S. counterpart. The offence is found in section 139 of the Criminal Code:

> (1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,
>
> (a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or
>
> (b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,
>
> is guilty of
>
> (c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> (d) an offence punishable on summary conviction.
>
> (2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
>
> (3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,
>
> (a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;
>
> (b) influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or
>
> (c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

In the context of our hypothetical scenario, there are at least two "in principle" reasons why the public accounting firm might argue that there was no offence committed under

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6. There is one provision that relates to the destruction of documents, but it is in the context of the "Falsification of Books and Documents" and is not relevant to the described scenario. Specifically,

> 397.(1) Every one who, with intent to defraud,
>
> (a) destroys, mutilates, alters, falsifies, or makes a false entry in, or
>
> (b) omits a material particular from, or alters a material particular in,
>
> a book, paper, writing, valuable security or document is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

section 139(2). First, the provision arguably applies only to a "judicial proceeding" or events surrounding actual court cases such as bail and witness testimony, and not to the enforcement processes of an administrative tribunal such as the OSC. Second, the phrase "the course of justice" seems to imply that a judicial process must have commenced at the time of the offence. In contrast, in our scenario, the partners do not know that an investigation into their actions has begun, although they suspect that one will probably start shortly. Certainly, no administrative charge has been formally laid at the time of the shredding.

Interpreting the Canadian Law on Obstruction of Justice Charge

Assuming a financial crisis of the audit client equivalent to the Enron crisis, any evidence of document destruction by the auditor would immediately attract the attention of OSC staff and its lawyers. Furthermore, as noted above, where offences are potentially criminal, the OSC has established protocols for bringing in both the police and Crown prosecutors. These officers of the law then determine whether there are reasonable grounds to believe a crime has been committed and whether, on the basis of the evidence collected over the course of the investigation, there is a reasonable prospect of conviction (the equivalent of the grand jury inquiry in the United States). They would also make the critical determination whether the charges should be brought against individual partners or also against the firm as a whole.

The officers of the law would consider at least five issues when deciding whether to prosecute:

1. Because the charges are criminal, the offence must be proven *beyond a reasonable doubt*. In practice, proof beyond a reasonable doubt is an onerous burden for the Crown, especially in cases of white-collar crime (Gray, 2000), and typically requires lengthy and resource-intensive investigations. To reduce the burden and cost of meeting this standard, governments are increasingly allowing administrative tribunals to take action against white-collar offenders under civil provisions, which have a lower burden of proof (proof on a balance of probabilities). (For example, recent amendments under Bill 198 enhance the regulatory and enforcement powers of the OSC.)

2. Although the events in our hypothetical situation fall, in principle, within the scope of Criminal Code section 139(2), there is little direct judicial precedent (Che and Yi, 1993). Protection of documentation is, however, critical in many contexts. For example, one of the basic legal and ethical obligations of lawyers requires them, when asked in appropriate circumstances (and when solicitor–client privilege does not apply), to find and deliver documentation, even when disclosure might harm their client's interests. The seriousness with which judges view the destruction of documentation was evident in the Supreme Court of Canada decision in *Carosella v. The Queen*, where Mr. Justice Sopinka stated, "a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice".[7] Thus, the

7. [1997] 1 SCR 80, at 83.

events in our scenario would likely be considered to fall within the meaning of an attempt "to obstruct, pervert or defeat the course of justice" in section 139(2).

3. It could be argued that section 139(2) may apply only to events surrounding the proceedings of a court of law and not to hearings of administrative tribunals such as the OSC. In other words, what is the meaning of a "judicial proceeding"?[8] A number of accused persons have raised the argument that section 139(2) does not extend to administrative proceedings. The Supreme Court of Canada in *R. v. Wijesinha*[9] spoke to this issue in the context of an investigation by the Law Society of Upper Canada (pursuant to the statute governing regulation of lawyers in Ontario). Using U.K. and Australian authorities as a guide, Mr. Justice Cory found that, as long as the tribunal is a body that "judges", is created by statute, and is obliged to act in a "judicial manner", the provisions of section 139(2) would extend to its operations. Clearly, the OSC meets all three of these tests. Therefore, it is probable that it is as much an offence to destroy documents that are required for a hearing of the OSC as it would be to destroy those required in a court proceeding.[10]

4. The expression "the course of justice" could be interpreted as meaning that a judicial proceeding and not merely an investigation must have already commenced at the time the documents are destroyed. What if there is only the perception that there will be an investigation that might lead to charges? In *R. v. William Zeck*, the Ontario Court of Appeal stated that "the course of justice" must be given a broad interpretation, and cited with approval an earlier case that stated that "the course of justice" includes existing or proposed judicial proceedings, but is not limited to such proceedings.[11] The expression also includes "attempts by a person to obstruct, pervert or defeat a prosecution which the person contemplates may take place, notwithstanding that no decision to prosecute has been made".[12] Applying this language to our scenario, if an investigation had commenced and the partners were aware of it, the provision would clearly apply. Furthermore, it does

8. Note that while this expression is omitted from Criminal Code section 139(2) in contrast to sections 139(1) and (3), it was held by Cory J. in *R. v. Wijesinha*, [1995] 3 SCR 422 that section 139(2) is, if anything, intended to be broader than the other two sections, and that the term "judicial proceeding" as defined in section 118 of the Code should apply. This would then include the activities of an administrative tribunal such as the OSC taking evidence under oath.
9. Ibid.
10. In the case of *Re M.C. Shumiatcher* (1961), 31 DLR (2d) 2, the Supreme Court of Canada decided that proceedings under oath conducted by the registrar under the Securities Act (Sask.) were "judicial proceedings" as required by a different provision of the Criminal Code.
11. (1980), WCBJ 49542.
12. Citing Martin J.A. in *R. v. Spezzano* (1977), 34 CCC (2d) 87. This reasoning was applied in *R. v. Kennedy* (2002), WCBJ 4816, where the accused threatened a person he saw leaving a court house and whom he assumed was testifying against members of the local community. In fact, the person had not testified that day because the proceedings were adjourned and, in any event, the accused would not have known what case the person would have testified in had she testified. He only assumed she was a likely witness in some case (because of a standard form of police escort used in the circumstances). This level of knowledge alone was deemed sufficient to satisfy the requirements for an "obstruction of justice" conviction.

not seem to be a stretch to state that "the course of justice" also applies to the *perception* or *belief* that the OSC may already begun or will be conducting an investigation, even if in fact it had not.

5. There are further technical requirements for proving a criminal offence:

a. There must be both a guilty mind (the intent to commit the crime — *mens rea*) and a guilty act (*actus reus*). Typically, it is the mental component that is most difficult to prove because, by definition, it often must be "inferred" from behaviour. In section 139(2) the words "wilfully attempts" focus the issue. In the case of *R. v. Murray*, Mr. Justice Gravely of the Ontario Superior Court examined and applied what is known as the "tendency" test — that is, "Attempting to obstruct justice is construed as the doing of an act which has a tendency to pervert or obstruct the course of justice (the *actus reus*)."[13] "Wilfully" constitutes the *mens rea* — that is the act is done for the purpose of "obstructing the course of justice". The *actus reus* is, then, whether the act *in fact* had the tendency to pervert justice. In our case, the Crown must prove beyond a reasonable doubt that the order to destroy documents was given with the intention of thwarting a possible or actual investigation by the OSC. It must also prove that the destruction of these documents would have had such an impact. The OSC might never know exactly what was destroyed, but because the destruction was so extensive and wholesale, it is very likely that the prosecutors could readily argue that the *actus reus* existed. The OSC would have to demonstrate the extent of documentation required in investigations of the type proposed.

b. Should the indictment be laid against individual partners or against the entire firm? There is nothing in Canadian law to suggest that the Crown could not lay criminal charges against the public accounting firm, and its "LLP" (limited liability partnership) status would not assist, although prosecution would clearly be unusual as it was in the United States. Furthermore, there would be an equivalent evidentiary burden in establishing that an order was given by one or more partners.

c. Because the offence under Criminal Code section 139(2) is an indictable offence, the accused can choose whether the case will be heard by a provincial court judge or by a superior court judge or judge and jury. This is a strategic decision and such issues as the perceived strength of the case and the public perceptions of the alleged criminal activity will drive the decision. Often the accused will elect to have the case determined by a jury where they believe the case is complex and its complexity might lead to some confusion in a layperson's mind and, as a result, a "reasonable doubt". Personal styles and preferences of individual counsel may also drive the decision.

13. [2000] OTC 275, applying *R. v. Spezzano*, supra note 12. This test was applied by the BC Court of Appeal in the case of *R. v. Guess* (2000), BCD Crim. J. 54.

Considering each of these legal requirements for laying and proving an obstruction of justice charge in Canada, there is nothing in either the definition of the law or its judicial interpretation to suggest, given a judge and/or jury similar to those that convicted Andersen, the same conviction might not be reached in a Canadian courtroom.[14] Hence, the letter of Canadian law, in and of itself, would not allow our hypothetical Canadian public accounting firm to escape prosecution and conviction under circumstances similar to those of Andersen. The question whether charges would be laid against our hypothetical Canadian public accounting firm given existing Canadian institutions and their social context must now be considered.

WOULD CHARGES HAVE BEEN LAID IN CANADA?

We have observed that one of the risks of living in a country adjacent to the enormous media market of the United States is that it is easy to blur the distinctions between the two judicial and regulatory systems (Duplessis, Enman, Gunz, and O'Byrne, 2001). We know that there are major differences between the two systems, and, at least in civil law, many of the factors that lead to what Canadians may perceive to be excessively high U.S. tort awards simply do not apply here (Paskell-Mede, 1999). As well, the U.S. criminal justice system is substantially different from that in Canada, with capital punishment in some states, use of the U.S. federal sentencing guidelines, and a far higher rate of incarceration in the United States than in Canada (*Economist*, 2002).

We further observed that the law operates in social and political contexts (Gall, 1995). More specifically, while there may exist many opportunities to lay criminal charges against persons or entities, only a fraction of offending events will proceed to a formal legal process, and only a fraction of these will be formally tried because most will be settled by way of "plea bargaining" or, in civil law terms, "settlement" (Daughety, 2000). Selective prosecution occurs in all countries because there are always sound, practical constraints to excessive rates of prosecutions. Trials are costly and deciding whether to pursue a matter requires all who are connected with the criminal justice system to engage in cost–benefit analyses, incorporating a broad range of concerns (Loewenstein, Issacharoff, Camerer, and Babcock, 1993). Hence, we now consider whether Canadian officers of the law would be inclined to prosecute our Canadian public accounting firm given existing Canadian institutions and their social context.

14. As mentioned in note 3, supra, there was a controversial instruction to the *Andersen* jury that allowed different jurors to identify different people as acting on behalf of the firm in ordering the document destruction. Canadian jurors are instructed that they can reach a verdict of guilty without necessarily relying on all the same factual findings. In fact, the Crown can advance separate theories as a basis for conviction, and some jurors can convict on the basis of one theory while other jurors on the same jury can reject that theory but accept the alternative theory. See *R. v. Thatcher* (1987), 32 CCC (3d) 481 (SCC). By analogy, there appears to be nothing to suggest that an equivalent directive could not be given in Canada.

Institutional Environment

Our foregoing analysis of the law identified several stages where prosecution choices must be made. For example, in our scenario:

- OSC investigators would be presented with a complex and unusual set of circumstances. They can choose to handle the matter solely within the OSC's administrative jurisdiction or to refer it on to the judicial system involving police and prosecutors. The choice they make will reflect not only their assessments of the law and particular circumstances of the case but also the political and public pressure on them and their own capabilities and resources.
- The police, given their limited resources for investigating white-collar crime, would face a similar resource allocation decision (e.g., Johnson, 1999). The decision to recommend charges to the Crown would be made in a context where no similar recommendation, to the best of our knowledge, has ever been made.
- Crown attorneys must determine whether there is sufficient evidence to prove the case "beyond a reasonable doubt". This is a judgement call. Furthermore, how long might this case take to prosecute and how serious is the offence?
- Finally, Crown attorneys will have to exercise their judgement about whether key decision makers in our hypothetical public accounting firm believed that an OSC investigation might have commenced or would likely commence, and thus could be said to have obstructed "the course of justice" within the meaning of section 139 of the Criminal Code.

The Regulatory Investigation

The history of regulation by the various provincial securities commissions in Canada is one of good intentions rather than effective actions. It was only in 1997 that the OSC was granted the funding and the ability to pay closer to market salaries for commission staff, and to have the additional resources available to enter into more complex investigations (OSC, 1998). While there have been financial statement frauds in Canada (for example, Bre-X, Livent, and Philip Services), auditors have faced only relatively low-profile civil actions (Rosen, 2001). Perhaps more important, there is little if any evidence on the public record of any Canadian public accounting firm consistently pursuing the sort of aggressive accounting that Andersen pursued in the 1990s and onward in the United States.[15] While some Canadian commentators (e.g., Rosen, 2002) have charged that there are many audit failures in Canada, this charge is based on anecdotal evidence and no systematic evidence has been presented to support these claims. Hence, given a history of weak to nonexistent enforcement actions against auditors by securities regulators under their own aegis, it is uncertain whether the OSC would refer our hypothetical case to the police and Crown attorneys.

15. A search of all enforcement decisions and settlements by the OSC from January 1, 1997 to December 31, 2002 did not reveal any allegations against public accounting firms. Available online (http://www.osc.gov.on.ca/en/enforcement.html) as of March 1, 2003.

The Criminal Investigation

Even if the OSC referred the case to external authorities, those other entities might lack the resources to conduct a timely investigation into the actions of the public accounting firm (e.g., Johnson, 1999). Furthermore, the police and the Crown attorney would have to determine who to charge should the criminal investigation reach that point. The most controversial aspect of the U.S. case was the decision to proceed against the public accounting firm itself rather than to follow the unusual but nonetheless established U.S. precedent of criminally charging individual audit partners (Arens et al., 2002). It was this prosecutorial decision that ultimately led to Andersen's demise. However, it should be repeated that this was, even under U.S. law, a discretionary issue and was considered a very aggressive legal move (McRoberts, 2002).

Prosecutorial Decision

What led to the U.S. decision to indict the firm was not just an interpretation of the law but the history of the Department of Justice's interactions with Andersen (McRoberts, 2002). There was an extensive public record of alleged wrongdoing by Andersen that was documented in various SEC enforcement actions and investigations against Andersen throughout the 1990s and into the 2000s (Witt and Behr, 2002; Rollins and Bremser, 1997). It was reported that this history of interaction significantly affected the U.S. Department of Justice's decision; Michael Chertoff, the U.S. assistant attorney general in charge of the criminal division, regarded Andersen as a "recidivist" (a repeat offender) deserving of the stiffest punishment (McRoberts, 2002). Furthermore, the introduction of this history of offences as evidence at the trial was strongly but unsuccessfully opposed by defence attorney Rusty Hardin and is thought to have played a major role in the jury's verdict.[16] As noted above, there is no equivalent public record in Canada of alleged wrongdoing by Canadian public accounting firms. Hence, the context in which the Ontario Crown attorneys would make the decision to prosecute our Canadian public accounting firm would be very different from that in which Andersen was prosecuted. Jury deliberations would also be made within a different context if a charge proceeded and this too would affect the likelihood of conviction.

Social Context

The entire Enron setting was seen by many in the United States as the culmination of all that was corrupt in U.S. business (Dallas, 2002). Andersen's role in events was particularly troubling because, if the auditor (described in U.S. Supreme Court proceedings as "a public watchdog" [Arens et al., 2002]) cannot be trusted to protect the public, who can? Those upholding the law must operate independently, but they also must be cognizant of social values. If a community is being harmed by a high incidence of crime, police and prosecutors are expected to be rigorous in prosecuting the suspected perpetrators of those crimes. There are checks and balances to ensure that justice prevails, and police and prosecutors may act only within the bounds of the law. However, within the range of choices they are

16. Hardin described this as "rank heresy" (Schepp, 2002).

given, the officers of the law may select paths that reflect what they believe to be society's goals. In the Andersen case, if asked, prosecutors would undoubtedly argue that their actions were in keeping with the legitimate public desire to bring a serious corporate transgressor to justice.

Furthermore, it should not be ignored that the nature of the offence was shocking to lawyers in both countries, if not to members of other professions or the public at large (Reinstein and McMillan, 2002). The intentional destruction of evidence under the belief that it might be required for an actual or suspected investigation would be taken as seriously in Canada as in the United States.

In our hypothetical Canadian scenario, would the serious nature of the offence have led to a decision to take actions against the accounting firm and not solely individual partners? In the end, we believe that today there would be insufficient societal consensus in Canada to pressure the prosecutors to take this major step. There has simply not been a Canadian equivalent to the Enron failure. That company was one of the 10 largest firms by market value in the United States (Callen and Morel, 2002) and its demise affected the lives of many citizens through the loss of employment, stock market value, and pension plan assets. The most comparable Canadian case would probably be Bre-X Minerals Ltd., which, while the subject of many articles (e.g., Nicholls, 1999; MacIntosh, 1999) and books (e.g., Francis, 1997; Goold and Willis, 1997), had little or no impact on Canadian public opinion (Gray, 2002).

CONCLUSION

Our investigation sought to determine the potential for criminal liability in Canada should a Canadian public accounting firm shred or delete sensitive files or electronic documents in Toronto or Calgary as a result of a provincial securities regulator's potential investigation. The letter of the law is similar enough between the Canadian jurisdiction and U.S. federal jurisdiction that such a prosecution could be launched under Canadian criminal law. Given a similar judge and jury, a conviction might also result. Hence, Canadian public accounting firms should take no solace in the thought that they could not be prosecuted in Canada in circumstances similar to those in which Andersen found itself.

However, given the limited resources of securities regulators and criminal investigators in Canada, the nonexistence of prior enforcement actions against Canadian public accounting firms, and the lower profile of improper and/or aggressive accounting practices in Canada, prosecutorial motivation to lay charges against our hypothetical public accounting firm as a whole would be substantially lower in Canada than in the United States. One of the main motivations reported for the U.S. Department of Justice to indict Andersen as a firm was the record of SEC enforcement actions and investigations spanning the 1990s. That record led senior Justice Department officials to view Andersen as a repeat offender. Hence, given these institutional differences, it is possible, if not probable, that Canadian prosecutors would have exercised their legitimate discretion and decided not to prosecute our hypothetical public accounting firm as a whole. This is likely to be the case with or without equivalent social pressure. In other words, it is unlikely that the

Canadian equivalent of a "perfect storm", where all the forces align at just the right place and time, would have occurred (Reinstein and McMillan, 2002; Wilson, 2002).

There are at least two possible implications from this set of findings. One may be the need for increased regulatory scrutiny of Canadian public accounting firms' actions by various provincial securities regulators when they investigate high-profile corporate fraud (Rosen, 2001). Only through such vigilance can a pattern of repeat offences by any one firm be detected. Another possible implication is that Canadian public accounting firms, which employ principles-based generally accepted accounting principles rather than the very detailed rules in the U.S. environment, have been able more effectively to police the financial accounting of their clients than public accountants in the United States (Lorinc, 2002). However, these conflicting implications can only be resolved through further research.

Finally, in the world after Andersen and Enron, prosecutors may be more reluctant to bring such charges against what some have called the "Final Four" public accounting firms. Certainly, the question might well arise whether such a decision to prosecute could lead to the Big 3 public accounting firms, with all the problems associated with limited competition and lack of auditor choice as well as conflicts of interest for the public accounting firms and their clients. There is no evidence that prosecutors in the Andersen case believed that their decision to prosecute would lead to the demise of the firm except as a remote possibility. With the benefit of history, future prosecutors might assess societal interests differently in any decision to prosecute an entire "Final Four" firm — but that should be little comfort to other auditors of public companies, who would be foolhardy to act based on this assumption. The lingering lesson from the Arthur Andersen prosecution must be just how unexpected these events were even for the best informed of observers.

ET SI ANDERSEN AVAIT EU RECOURS À LA DÉCHIQUETEUSE À TORONTO OU CALGARY ? LA RESPONSABILITÉ CRIMINELLE POTENTIELLE DES CABINETS CANADIENS D'EXPERTISE COMPTABLE

Condensé

Le 15 juin 2002, un jury du Texas reconnaissait Arthur Andersen s.r.l. coupable d'entrave à la justice pour avoir déchiqueté des documents et supprimé des dossiers électroniques pertinents à l'enquête de la Securities and Exchange Commission (SEC) sur la comptabilité et l'information financière de la société Enron, deuxième client en importance du cabinet. Les conséquences de cette décision ont été immédiates et dévastatrices : elle a radicalement mis fin aux activités d'Arthur Andersen, les cadres du cabinet ayant annoncé qu'ils cesseraient d'offrir des services de vérification aux sociétés ouvertes à compter du 31 août 2002. Par suite de ce jugement, près de 26 000 associés et employés d'Arthur Andersen ont perdu leur emploi aux États-Unis, et de nombreux associés et employés à la retraite ont dû renoncer à une part appréciable des économies qu'ils avaient accumulées pendant toute une vie. Plus de 2 300 sociétés ouvertes clientes d'Arthur Andersen ont été contraintes de se tourner vers de nouveaux cabinets d'expertise comptable et de subir toutes les perturbations et d'assumer tous les coûts associés à un changement de vérificateurs (Deis et Giroux, 1996 ; DeFond et Subramanyam, 1998). La

valeur boursière de ces sociétés ouvertes clientes a même enregistré une baisse près de trois fois plus importante que celle de la valeur boursière de sociétés correspondantes au cours de la période qui a pris fin avec l'annonce selon laquelle Arthur Andersen s'était livré à la destruction de documents (Callen et Morel, 2002).

Selon les observateurs, les Canadiens ne réagissent pas au fiasco d'Enron et à la déconfiture d'Arthur Andersen avec le sérieux que justifie la gravité du problème (McKenna, 2002). Le contexte juridique canadien est fort différent au chapitre des actions civiles intentées contre les vérificateurs et, au mieux des connaissances des auteurs, les poursuites criminelles pour vérification déficiente dont les vérificateurs feraient l'objet sont quasi inexistantes au pays (Arens *et al.*, 2002). La question évidente qui se pose aux Canadiens est donc la suivante : les conséquences juridiques auraient-elles été les mêmes si Arthur Andersen avait passé à la déchiqueteuse, à Toronto ou Calgary, les dossiers d'une société ouverte cliente canadienne ?

Quelle est la valeur de pareille étude d'une situation hypothétique analogue au Canada ? La motivation des auteurs dérive des commentaires fréquemment exprimés par les Canadiens à l'époque de la condamnation d'Arthur Andersen aux États-Unis. Dans bien des cas, les observateurs y ont vu un exemple de plus des abus du système juridique américain, convaincus qu'un tel dénouement eût été impossible et serait très improbable au Canada (voir, notamment, les divers communiqués de presse de l'Institut Canadien des Comptables Agréés et de l'Institut des Comptables Agréés de l'Ontario). L'analyse de diverses poursuites civiles viendrait assurément étayer l'affirmation selon laquelle le système juridique canadien est sans doute différent [au Canada, par exemple, les plaignants ne peuvent invoquer la doctrine de la « fraude sur le marché » (*fraud on the market*), établie en droit civil aux États-Unis dans les années 1970 (Paskell-Mede, 1999)].

Les auteurs se penchent sur la question en examinant d'abord les événements et l'état du droit qui ont mené à la condamnation d'Arthur Andersen aux États-Unis par un tribunal fédéral du Texas. Ils étudient ensuite la situation juridique canadienne et la comparent à celle des États-Unis, et ils analysent les résultats probables de la décision de poursuivre et de la probabilité de condamnation, en cas de poursuites. Dans le cours de cette investigation, il apparaîtra clairement que, même s'il est possible de projeter le résultat juridique plausible d'éventuelles poursuites, les conditions menant à la décision de poursuivre auraient exigé une détermination et un degré de coopération sans précédent parmi les multiples intervenants fédéraux et provinciaux.

LA MISE EN ACCUSATION ET LA CONDAMNATION D'ARTHUR ANDERSEN S.R.L.

Les auteurs décrivent les principales étapes qui ont conduit à la mise en accusation et à la condamnation d'Arthur Andersen. Ils recensent plus particulièrement les différentes mesures juridiques nécessaires à la constitution d'une base de comparaison pour la réalisation de l'étude relative à la poursuite hypothétique d'un cabinet d'expertise comptable canadien.

Les événements précédant le procès

Les cadres supérieurs d'Arthur Andersen à Chicago auraient appris, affirment-ils, le déchiquetage massif de documents et la suppression de dossiers électroniques au bureau

de Houston les 3 et 4 janvier 2002. Il semble que la direction de l'organisation matérielle du bureau de Houston ait découvert cette destruction au moment où elle se préparait à l'arrivée imminente des enquêteurs de la commission nommée par le Congrès, après qu'Arthur Andersen ait accepté de collaborer dans le cadre de sa stratégie pour surmonter la crise Enron. Au total, pas moins d'une tonne de documents et plusieurs mégaoctets de fichiers informatiques ont été détruits entre le 23 octobre et le 9 novembre 2001, ce dont Arthur Andersen a fait part au SEC, au ministère de la Justice et aux enquêteurs de la commission. Lorsque les cadres supérieurs d'Arthur Andersen ont émis un communiqué de presse, le 10 janvier 2002, révélant que les faits donnaient lieu de croire que l'équipe de vérification d'Enron avait procédé à une destruction massive de documents à Houston, le milieu juridique et le milieu comptable en ont été stupéfaits. Arthur Andersen a pris sur-le-champ des mesures au sein du cabinet pour limiter les retombées. Parmi ces mesures, le cabinet a annoncé son intention de licencier David Duncan, associé chargé de la vérification d'Enron et responsable de la mise en route du déchiquetage frénétique de documents à Houston, le 23 octobre, de rétrograder divers associés membres de l'équipe de direction du bureau de Houston, et de consacrer d'importantes ressources à la récupération des dossiers informatiques supprimés et à la reconstitution des documents déchiquetés.

Maints observateurs ont pensé qu'un certain nombre d'associés et d'employés des bureaux de Houston d'Arthur Andersen allaient peut-être écoper d'inculpations criminelles, mais il semble que les cadres supérieurs d'Arthur Andersen aient été consternés d'apprendre, lors d'une réunion le 3 mars 2002, que le ministère américain de la Justice avait l'intention d'inculper le cabinet lui-même. De fait, le chef de la direction d'Arthur Andersen, Joe Berardino, se trouvait alors en mission au Japon, afin de rassurer les associés d'Arthur Andersen en Extrême-Orient et de les persuader qu'il n'y avait pas lieu de s'inquiéter outre mesure. Aux yeux du public, les démêlés d'Arthur Andersen avec la justice ont commencé le 14 mars 2002, avec la conférence de presse donnée par le sous-procureur général des États-Unis, Larry Thompson. Le public a ainsi été informé de l'accusation déposée contre Arthur Andersen devant le grand jury, le 7 mars 2002, pour l'infraction criminelle d'entrave à la justice et de l'intention du ministère de la Justice de poursuivre Arthur Andersen au criminel.

Arthur Andersen a jugé qu'il importait d'agir rapidement et de se disculper de toute accusation criminelle, de façon à stopper l'hémorragie de ses clients inscrits au palmarès Fortune 500 — l'élément vital de ses activités internationales de vérification. Les cadres supérieurs et les avocats d'Arthur Andersen, lorsqu'ils ont mis au point cette stratégie, ont commis l'erreur de croire que le fait de reconnaître publiquement les gestes injustifiés et condamnables de certains associés et employés ou de rétrograder les fautifs, ou celui de procéder à des réformes qui feraient la manchette, sous l'égide d'une personne aussi en vue que Paul Volcker, ex-président de la Réserve fédérale (McCoy, 2002), allait constituer, de la part du cabinet, une preuve de bonne foi telle que le gouvernement allait se contenter de poursuive les individus en cause.

Cette stratégie de réforme aurait peut-être été judicieuse si les circonstances avaient été moins exceptionnelles et si le cabinet n'avait eu aucun « passif » aux yeux des autorités de réglementation. En fait, les enquêteurs ont de toute évidence jugé que les

derniers événements s'inscrivaient dans une suite de comportements délictueux. Le ministère américain de la Justice reprochait à Arthur Andersen une longue liste d'infractions passées [dans le cas de Waste Management Inc., par exemple, au sujet duquel Arthur Andersen avait convenu d'une entente très publicisée avec la SEC, en 2001, selon laquelle le cabinet devait dorénavant éviter toute conduite répréhensible (Witt et Behr, 2002)], auxquelles s'ajoutaient l'immense inquiétude du public relativement à l'effondrement d'Enron et l'ampleur considérable de la destruction de documents et de dossiers qui s'était déroulée sous les yeux mêmes des cadres supérieurs du siège social d'Arthur Andersen qui étaient de passage. Compte tenu de ce contexte, les procureurs ont estimé que les affirmations de rédemption du cabinet étaient sujettes à caution (McRoberts, 2002). Selon Mike Chertoff, chef de la division criminelle du ministère de la Justice, la seule mise en accusation d'individus était donc insuffisante, étant donné qu'aucun changement notable n'avait été observé dans les comportements de nature « quasi criminelle » d'Arthur Andersen tout au long des péripéties des mesures d'application de la SEC, au cours des années 1990.

Il était clair que le ministère de la Justice souhaitait qu'Arthur Andersen reconnaisse sa responsabilité criminelle, volonté renforcée par la décision de David Duncan (associé responsable de la vérification d'Enron dont Arthur Andersen avait annoncé le licenciement en janvier) d'accepter, en mars 2002, de témoigner contre son ancien cabinet. Duncan a signé avec le gouvernement une « entente de collaboration » en vertu de laquelle la poursuite allait être moins sévère à son endroit dans son procès ultérieur pour entrave à la justice, en échange de sa collaboration au procès d'Arthur Andersen. Le 9 avril, Duncan a plaidé coupable à l'accusation d'entrave à la justice et sa sentence a été reportée jusqu'au terme du procès d'Arthur Andersen. Faisant volte-face après des mois de dénégation, Duncan a déclaré : « Le 23 octobre, j'ai donné ordre au personnel d'Arthur Andersen de commencer à détruire des documents, sachant que lesdits documents allaient ainsi être soustraits à l'examen de la SEC et autres intéressés, et dans l'intention de les y soustraire » (Jenkins, 2003).

Le procès

L'accusation d'entrave à la justice portée contre Arthur Andersen repose sur l'article 1512 du Code fédéral des États-Unis. Le procès s'est déroulé devant la Cour fédérale des États-Unis, division judiciaire du gouvernement fédéral des États-Unis. Les chefs d'accusation se présentaient en deux volets : Arthur Andersen était accusé d'avoir détruit des documents dans un premier temps, alors que le cabinet anticipait une enquête de la SEC (du 10 octobre jusqu'aux environs du 16 octobre 2001) sur les activités d'Enron et de ses vérificateurs, et dans un second temps, après qu'Arthur Andersen eut été informé du déclenchement de l'enquête et jusqu'à ce que Duncan et d'autres eussent été informés que le cabinet avait reçu une citation à comparaître devant les instances fédérales (soit aux environs du 16 octobre jusqu'au 9 novembre 2001).

Comme dans le cas de toute affaire criminelle, l'issue du procès allait dépendre de ce que le juge ou le jury croiraient au-delà de tout doute raisonnable. En termes juridiques, donc, le dénouement allait être déterminé par les faits et l'interprétation de ces faits, de sorte qu'un autre jury américain aurait pu tout aussi bien parvenir à des conclusions

différentes. Les conclusions de ce jury, malgré leur relative imprévisibilité, s'inscrivaient dans les limites de la loi et, par conséquent, n'ont pas été controversées.

ANALYSE CANADIENNE

La loi canadienne en matière d'entrave à la justice

Au Canada, comme aux États-Unis, les dispositions criminelles qui s'appliquent à ce genre de cas sont également celles qui ont trait au délit d'« entrave à la justice ». Le libellé du code criminel canadien est cependant moins précis que celui du code américain. La nature de cette infraction est décrite à l'article 139 du *Code criminel*.

Résumé et conclusions

L'objectif de cette étude consistait à déterminer la responsabilité criminelle potentielle d'un cabinet d'expertise comptable canadien qui se livrerait au déchiquetage ou à la suppression de dossiers électroniques ou de documents de même importance, à Toronto ou Calgary, dans la perspective d'une possible enquête des autorités provinciales de réglementation des valeurs mobilières. Les auteurs concluent que la lettre de la loi canadienne ressemble suffisamment à celle de la loi fédérale américaine pour que de telles poursuites puissent être légitimement intentées au Canada. En supposant que le juge et le jury canadiens soient à l'image du juge et du jury américains, une condamnation pourrait aussi en résulter. Par conséquent, les cabinets d'expertise comptable canadiens doivent se garder de prendre ce risque à la légère en se persuadant qu'ils ne s'exposeraient pas à de telles poursuites au Canada, en pareilles circonstances.

Toutefois, les auteurs constatent également que certains facteurs auraient sans doute atténué la motivation des procureurs à porter des accusations contre l'entité du cabinet d'expertise comptable hypothétique, au Canada, notamment les différences entre les deux pays au chapitre de l'expérience des autorités de réglementation des valeurs mobilières et des ressources dont disposent les enquêteurs criminels, la rareté des poursuites contre les cabinets d'expertise comptable et l'ampleur plus modérée des pratiques comptables inconvenantes et (ou) audacieuses au Canada. En fait, l'un des principaux motifs qui ont incité le ministère américain de la Justice à inculper en bloc le cabinet Arthur Andersen est le dossier des mesures d'application prises par la SEC au cours de la décennie 1990. Ces antécédents ont amené les principaux représentants du ministère de la Justice à considérer Arthur Andersen comme récidiviste. Compte tenu des différences institutionnelles évoquées, il est donc possible, voire probable, que les procureurs canadiens auraient décidé, dans l'exercice de leur pouvoir discrétionnaire légitime, de ne PAS poursuivre en bloc le cabinet d'expertise comptable hypothétique, et cela en dépit de toute pression sociale analogue à celle qui s'est exercée aux États-Unis. En d'autres termes, l'équivalent canadien de cette « TEMPÊTE PARFAITE », où toutes les forces se conjuguent exactement au bon endroit au bon moment, eût été peu probable (Reinstein et McMillan, 2002 ; Wilson, 2002).

Cet ensemble de constatations a au moins deux conséquences possibles. Il se peut, en effet, qu'une vigilance accrue s'impose de la part des diverses autorités provinciales de réglementation des valeurs mobilières, relativement au comportement des cabinets d'expertise comptable canadiens lorsqu'ils font enquête sur les cas de fraude dans des

entreprises en vue (Rosen, 2001). Ce n'est qu'au prix de cette circonspection que l'on pourra repérer les comportements de récidive des cabinets d'expertise comptable, le cas échéant. Autre conséquence possible : les cabinets d'expertise comptable canadiens qui appliquent les PCGR (principes comptables généralement reconnus) fondés sur des principes, plutôt que les règles très précises qui prévalent aux États-Unis, ont pu contrôler la comptabilité de leurs clients de manière plus efficace que les experts-comptables des États-Unis (Lorinc, 2002). Seule la poursuite des recherches permettra de concilier ces conséquences antagonistes.

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