

***ALL BARK AND NO BITE: A SOCIO-LEGAL STUDY OF
CORPORATE CRIMINAL LIABILITY IN CRIMINAL LAW***

by

Alexander N. Marar

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Abstract

Given the overwhelming financial and human costs of crime committed through the incorporated entity, this thesis explores corporate criminal liability in criminal law as a mechanism of social control for corporate crime. First, this thesis traces the fundamental claims regarding corporate criminal liability in both the jurisprudential and sociological literatures in an effort to explore how law applies liability in a criminal context to the incorporated entity. Second, the contemporary corporate criminal liability landscape in Canada is examined. In particular, an examination of *Bill C-45* as codified corporate criminal liability and as criminal law in action is empirically grounded in a detailed review of both the black letter law of corporate criminal liability and the judicial case documents on prosecutions against incorporated entities for corporate crimes. Finally, this thesis analyzes the socio-legal environment of corporate criminal liability through its construction and operation within Canadian criminal law. Overall, as a result of the legal, cultural, political, and economic privileges of the incorporated entity, corporate criminal liability is a product of a socio-legal environment that inhibits the ability of criminal law to be an effective mechanism of social control for corporate crime. Only when corporate criminal liability recognizes the complexities of the social, economic, and organizational structures and practices that are shaping corporate criminal activities can it become an effective mechanism for regulating the most harmful corporate misconduct. Otherwise, as this thesis demonstrates, corporate criminal liability will continue to be *all bark and no bite*.

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Chapter 1

Introduction

Scholarship on the sociology of corporate crime consistently reaffirms the overwhelming financial and human costs of crimes committed through the incorporated entity (see Kramer 1984; Snider 1993; Hartley 2008; Friedrichs 2010). Financially, the economic costs of corporate crime far outweigh any financial costs associated with conventional street crime, such as robbery. In addition, corporate crime has heavy human physical costs. In this sense, corporate crime continues to kill and injure people. It can kill or seriously injure a worker when a corporation decides to cut costs on safety (see Tombs and Whyte 2010; Bittle 2012); it can kill or seriously injure consumers who buy faulty products (see Frank and Lynch 1992); and it can even endanger the lives of the public who are forced to negotiate environmental disasters or industrial pollution (see Pearce and Tombs 1998; Snider 2004).

This scholarship has also recently exposed the disappearance of law or regulation against corporate crime within the hyper-globalized context of the 21st century, implicating how law responds to incidents of corporate crime (see Snider 2000; 2002). This is the realm of corporate criminal liability that acts as a legal mechanism for the social control of corporate crime. The socio-legal scholarship on corporate crime has produced many questions discussing how corporate criminal liability is important for the social control of corporate crime (see Fisse and Braithwaite 1994). As such, two major schools of thought currently infuse the debate on how corporate criminal liability should control corporate crime (Gruner 2004). The first is the *agency model* in which emphasis is placed on the rational actions of individuals as corporate agents who facilitate corporate activities, both legal and illegal. The second is the *structure model* in which

emphasis is placed on the social, economic, and organizational environments in terms of shaping corporate criminal activities. These two major schools of thought are often utilized to examine key controversies within the sociology of corporate crime, such as its causes, the standards of criminal liability that should be employed for corporations and individuals for illegal corporate conduct, what sanctions should be administered, and what types of regulatory relationships between corporations and the state will be the most effective at controlling corporate crime (Lofquist 1997). This thesis aims to invigorate these debates and controversies within the sociology of corporate crime.

Therefore, since the overwhelming financial and human costs of crime continue to be committed through the incorporated entity, this thesis explores corporate criminal liability in criminal law as a mechanism of social control for corporate crime. To this end, there are three research objectives: 1) Establish the fundamental claims of corporate criminal liability and corporate crime that extend across the jurisprudential and sociological literatures; 2) Examine the contemporary construction and operation of corporate criminal liability in Canadian criminal law; and 3) Analyze the socio-legal environment that shapes corporate criminal liability in Canadian criminal law today.

Chapter 2 addresses the first research objective through an overview of how law applies liability in a criminal context to the incorporated entity. In particular, this chapter will explore the historical and theoretical perspectives of corporate criminal liability, exposing the controversies on structuring an individualistic construction of criminal liability for the incorporated entity. In addition, the sociological aspects of corporate criminal liability will be explored through the white-collar and corporate crime literatures that discuss corporate criminal liability in the context of the social control of corporate crime.

Chapter 3 addresses the second research objective through an examination of the contemporary corporate criminal liability landscape in Canada. It will first examine the black letter law of criminal liability before and after *Bill C-45* with the aim of providing a comprehensive account of how Canadian criminal law assigned and currently assigns criminal liability to incorporated entities. Using the contemporary standards of corporate criminal liability described in Chapter 2, this chapter will explore the efforts to construct and codify a uniquely “Canadian-made” approach to corporate criminal liability through *Bill C-45*. In addition, this chapter will also examine how *Bill C-45* operates as criminal law in action through judicial case documents on prosecutions against incorporated entities for corporate crimes. Through both the review of the black letter law of corporate criminal liability and the empirical insights gleaned from the rigorous and objective selection, coding, and summary of judicial cases, Chapter 3 will aim at providing a basis for analyzing the socio-legal environment of corporate criminal liability in Canadian criminal law.

Finally, Chapter 4 addresses the third research objective by situating the Canadian construction and operation of corporate criminal liability in criminal law through three arguments: 1) The legal construction of the incorporated entity as a juristic person is privileged within legal, cultural, political, and economic institutions; 2) The ability of criminal law to be an effective mechanism of social control against corporate crime is diminished when corporate criminal liability is constituted through a privileged socio-legal environment for the incorporated entity; and 3) In order to achieve meaningful legal accountability for corporate crime, criminal law must balance a model of corporate criminal liability that does not negate individual liability for corporate agents, yet ultimately recognizes the complexities of the social, economic, and organizational structures and practices that shape corporate criminal activities.

Chapter 2

Criminal Liability, Law, and Corporate Crime

This chapter examines how law applies criminal liability to incorporated entities. This requires an understanding of how law structures liability in a criminal context. This chapter first explores the legal studies literature on corporate criminal liability. Through the historical and theoretical perspectives of corporate criminal liability, this section exposes the controversies that have arisen when structuring an individualistic construction of criminal liability for the incorporated entity. In addition, this chapter explores the sociological aspects of corporate criminal liability through the white-collar and corporate crime literatures that discuss corporate criminal liability in the context of the social control of corporate crime. This second section establishes the crucial debates and discussions that situate corporate criminal liability beyond the conventional perspectives of the legal tradition. Overall, this chapter establishes the basic claims of criminal liability for incorporated entities that extend across the jurisprudential and sociological literatures. Such a basis assists in contextualizing the empirical aspects of this thesis.

Historical Context of Corporate Criminal Liability

One of the most central pillars of the British system of criminal justice and criminal law is the attribution of criminal liability or responsibility. Traditionally, the conceptualization of criminal liability is individualistic in nature as a result of the development of criminal law through the common law doctrine of *mens rea* (Dubber 2013). While criminal liability is associated with “persons,” this has been historically attributed to the individual possessing the capabilities to form criminal intent, or *mens rea*, which, along with *actus reus*, form the crucial

elements of how Western legal systems constitute crime (Friedrichs 2010). Nevertheless, incorporated entities (i.e., corporations) are considered “persons” under the law, so it is practically uncontroversial that the corporation is a person subject to criminal laws (Ferguson 1998). As such, the most pertinent question for this chapter is the following: how is the incorporated entity (“legal person”), as opposed to simply the individual (“natural person”) of an organization, attributed criminal liability for criminal offences? The socio-legal phenomenon of corporate criminal liability shares a rich history with the foundational development of legal liability in law and has expanded over time through judicial interpretations of common law doctrines (Bernard 1984). Thus, for the sake of understanding the contemporary content of criminal law as it relates to corporate criminal liability, it is necessary to first establish the historical processes by which corporate criminal liability developed in common law jurisdictions, such as England and the United States.

The development of corporate criminal liability was a tedious journey. In fact, “[n]obody bred it, nobody cultivated it, nobody planted it. It just grew” (Mueller 1957 cited in Bernard 1984). The struggles to hold corporations criminally liable stem from the well-documented fact that the corporation could not face criminal charges, be convicted, or face punishment for a crime (Khanna 1996; Ferguson 1998; Friedrichs 2010). Since law primarily functions to regulate or control relations between individual persons, it is unsurprising that common law doctrines related to crime (*mens rea* and *actus reus*) only recognized “natural persons” as being capable of committing a crime. However, the roots of corporate criminal liability can be traced to the early development of these common law doctrines related to crime. As Dubber (2013:222) suggests, the history of corporate criminal liability “turns out also to be a history of *mens rea* in English criminal law – not merely the history of various conceptions of the corporation ...” This Anglo-

American tradition has struggled to apply an English definition of crime to the incorporated entity. These struggles began, first, with the expansion of juristic “persons” under the law and, second, with the legal challenges on whether these new juristic “persons” could be held legally liable (criminal and civil) for actions in its name (Bernard 1984).

Beginning in the 12th century, a legal fiction developed that began expanding various nonhuman entities as “persons” under the law (Bernard 1984; see also Dubber 2013). One of the earliest applications of this expansion of “persons” involved the question of ownership of church property. As the power of local landowners, who traditionally built and owned the churches, waned during the feudal period, it became unclear how ownership was structured. During the decline of feudalism, the clergy asserted greater independence, but it was considered inappropriate for the clergy to own the church. As a result, several devices were fabricated to account for this ownership dilemma (Bernard 1984; see also Coleman 1974). One involved declaring the church was owned by its “four walls,” while another involved church property being owned by its patron saint. However, the tradition became that local church property was owned by a separate and individual nonhuman entity, “the church,” which was considered the congregation as constituted by each local group of churchgoers. This Anglo-American tradition thus treated “the church” as a separate yet single person capable of owning property, which was instrumental in establishing the notion of “legal persons” or “juristic persons” under the law. The development of the business corporation would borrow heavily from this tradition and would be similarly recognized as a juristic person (Bernard 1984).

Once this initial hurdle was passed, the Anglo-American tradition wrestled with the legal question of attributing liability to these nonhuman juristic persons. It is generally accepted that

civil liability for damages was available almost from the existence of these new persons during the 12th century, yet criminal liability developed more gradually (Friedrichs 2010; Dubber 2013).

“Vicarious” Liability

The original attribution of both criminal and civil liability to incorporated entities or juristic persons derived from and grew out of a minor ancient common law doctrine that claimed masters had “vicarious” liability for the illegal conduct of servants (Bernard 1984; Parisi 1984; Khanna 1996; Ferguson 1998; Pinto and Evans 2003; Friedrichs 2010). As a theory or standard of attributing criminal liability, vicarious liability does not require the person (i.e., the master) to have committed any criminal offence, but that person is nonetheless deemed liable for the criminal actions of subordinates (i.e., servants). This common law doctrine was justified on the grounds that the master as a human person acquired the benefits of their servants’ work, so s/he should also carry that burden. This is particularly pragmatic for civil liability in tort law where third parties were allowed to collect damages from injury by servants under the control of masters. However, this pattern of attributing liability to masters for the conduct of their servants made a subtle step in law from viewing masters as a human person to masters as a corporate person (Bernard 1984). Criminal liability for masters presented a unique challenge, as they were not criminally liable for their servants’ illegal conduct *unless* that master gave his command or consent.

In addition, jurisprudence wrestled with whether legal entities (masters as corporate persons), as opposed to individuals (masters as human persons), could possess the capabilities of criminal intent. After all, if a natural person can think and act, they can think in a criminal manner; thus, they can be criminally liable. Under the doctrine of vicarious liability, in principle, there should be no barrier for attributing the intent and acts of one natural person to another

natural person. In essence, the fundamental challenge for legal scholars and practitioners in the 17th century was whether the criminal intents and acts of a natural person (employee) could be attributed to a legal entity, the corporate person (Bernard 1984; Parisi 1984). Since corporations were not thought capable of giving command or consent, an exception developed to this doctrine of vicarious liability. Masters were held criminally liable for creating a public nuisance if any subordinate “layeth or casteth anything out of his house into the street or common highway, to the damage of any individual or the common nuisance of His Majesty’s leige people” (Ehrlich 1959:76 cited in Bernard 1984:6; see also Khanna 1996; Pinto and Evans 2003). Thus, the first form of corporate criminal liability derived from local governmental entities and applied only to common law crimes that did not require criminal intent (Ferguson 1998). Corporate bodies would be held criminally liable for creating nonfeasance or public nuisance if officials from these entities failed to maintain roads or waterways in their respective jurisdictions (Bernard 1984; Parisi 1984; Khanna 1996). In other words, as corporations became juristic persons, they also assumed criminal liability as masters when their servants failed to maintain public infrastructure, so a minor exception to the command or consent rule established under vicarious criminal liability can be viewed as the original source of criminal liability of corporations within this Anglo-American tradition.

Duty Creates Liability

The next major development in the attribution of criminal liability to corporate persons came in the 18th and 19th centuries as corporations began to possess more public functions such as maintaining or operating public infrastructure (i.e., roads or railroads). The obligation to uphold the general interests of the public gradually shifted from public corporations to private corporations (Parisi 1984). The exceptions to the “command and consent” rules under the

vicarious liability doctrine similarly applied to private corporations. In other words, private corporations now were subject to a duty to maintain the general interests of the public through the maintenance or building of public infrastructures. Thus, when the corporation failed to maintain a duty, it could be prosecuted for a public nuisance offence (Bernard 1984). An important distinction in 18th century England was between a failure to perform a function (i.e., build a bridge) and an improper positive action (i.e., building an unsafe bridge). The former, known as nonfeasance, initially represented corporate criminal liability under this duty or obligation, yet the latter, known as misfeasance, soon became another device of attributing corporate criminal liability (Parisi 1984). While the concept of criminal liability as both nonfeasance and misfeasance was adopted in the United States, Canada would more closely follow the history of these common law traditions in England.

The advent of the railroads in 19th century England led to a deluge of formerly public duties or obligations from public entities to private corporations. Thus, private corporations were specifically chartered to build and maintain railroad infrastructures and offer public service(s) (Bernard 1984; Pinto and Evans 2003). At first, English courts held these chartered corporations criminally liable for public nuisance offences when they failed to maintain infrastructure. However, as a result of Parliament adding specific legal duties to corporate charters, additional statutory elements were established within corporate criminal liability. For instance, a special legislative statute incorporating the *Birmingham and Gloucester Railway Company* in 1842 required the corporation to construct bridges over rail lines. When it did not, the corporation could be held criminally liable for a public nuisance offence. This case represented the first prosecution by the English state against a private corporation for breaching its statutory duty. The prosecution established that the corporation itself had the obligation to construct these bridges –

and not the individual officers of the corporation. Thus, the courts relied not on previous common law tradition (i.e., judicial interpretations) but on the legislative statute that governed the corporation when it was established (Bernard 1984; Pinto and Evans 2003). While this case represented a nonfeasance offence, as the corporation did not construct bridges for safe passage of pedestrians over rail lines, the breach of the statutory duty did not address whether criminal liability would be attributed to a corporation for a positive action (misfeasance) that violated the statute. As such, under this ruling the courts were upholding a distinction between nonfeasance and misfeasance, which limited corporate criminal liability. However, the *Great North of England Railway Company* case would challenge this distinction between nonfeasance and misfeasance offences (Bernard 1984; Pinto and Evans 2003).

Another precedent-setting case in 1846, *Great North of England Railway Company*, focused on the positive actions of a chartered corporation that was prosecuted for unlawfully destroying sections of the highway and causing “damage and common nuisance of all Her Majesty’s liege subject” (Pinto and Evans 2003:25). The company relied heavily in its defence on the distinctions established in the *Birmingham and Gloucester Railway Company* case, which stated liability could not be imposed for a positive action – only a negative omission or failure of duty or obligation (Bernard 1984). The judge in this case, Lord Denman, took the rare step of concluding that a corporation should be liable for both nonfeasance and misfeasance. This case ultimately began both a gradual expansion of corporate criminal liability and a continued immunity for certain crimes. It expanded corporate criminal liability in the sense that law now recognized that corporations could be prosecuted for both negative omissions and positive actions. However, Lord Denman maintained that corporations could not be guilty of treason, felony, perjury, offenses against the person, or immorality. These offences were seen as derived

from the character of “the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases” (Bernard 1984:8). In effect, the history of the development of corporate criminal liability at this time, while slowly progressing from corporate immunity to minimal liability, could not rise above the legal fiction that corporations cannot commit true crimes, which require both criminal intent and a criminal act. Given these early developments in corporate criminal liability only served to satisfy the *actus reus* element of crime, the next major development of corporate criminal liability required legal jurisprudence to reconsider attributing criminal intent to corporations (Gobert 1994).

Liability for *Mens Rea* Offences

At the beginning of the 20th century, it was well established in common law in the United States and England that corporations could be convicted of common law criminal offences (Bernard 1984; Khanna 1996; Ferguson 1998; Pinto and Evans 2003; Friedrichs 2010). As the courts in both the United States and England began to see more prosecutions of public nuisance offences, the question of whether there might be corporate criminal liability for *mens rea* offences began to gradually take hold. The case of *New York Central & Hudson River Railroad Company v. United States* was the first to grapple with this question of attributing *mens rea* offences to corporations (Bernard 1984; Khanna 1996; Friedrichs 2010). Both companies were involved in offering rebates to sugar companies for shipping their goods on particular railroads. The case was based on the language of statute law (*Elkins Act* of 1903) in the United States that regulated shipments across state lines. Most importantly, this statute, as opposed to common law, provided a provision for attributing liability to a corporation for acts of their employees (Bernard 1984:9):

In constructing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person

acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person.

The courts in the United States agreed with this standard of imposing liability because of the limitations of prosecuting individuals within these carriers. For the purposes of enforcement, it was argued that the corporation derives the benefits of the unlawful activities of its employees, so the corporation needs to be prosecuted. Especially in the United States, this precedent-setting ruling expanded the opportunity for corporations to be criminally liable for almost all wrongdoings, except rape, murder, bigamy, and other malicious crimes, as by the nature of these crimes, corporations cannot commit them (Bernard 1984; Khanna 1996).

English courts also pondered the question of liability for *mens rea* offences. The case of *Moussell Brothers v. London and Northwestern Railway* in 1917 involved the misrepresentation of goods so tolls for shipment could be avoided, as tolls were only collected based on certain goods (Pinto and Evans 2003). The English courts relied on a statute, the *Railways Clauses Consolidation Act*, passed in 1845 that made it an offence for a person to give a false account with intent to avoid the payment of tolls. This case in particular challenged the earlier English common law tradition of vicarious liability, as it relied on statutory construction. Instead of simply negating liability as a result of a lack of a public nuisance charge, the courts applied the statute governing toll collections, reasoning that the statute “intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment” (Pinto and Evans 2003:35). Given this view, it became logical to not distinguish a corporation from any other master. This particular case also involved attributing criminal liability to the corporation as a result of the actions of its employees if they committed a prohibited offence.

The significance of these cases for the contemporary developments of corporate criminal liability cannot be overstated. Once it was established in common law that criminal intent could be attributed to a corporation through the intent of its officers, the courts and legislators could utilize this precedent to contemplate which officers could act and intend for the corporation. Thus, corporate criminal liability grew seemingly spontaneously and incrementally from a relatively obscure common law doctrine that governed the liabilities of masters for their servants' actions. The expansion of vicarious liability, duty as liability, and liability for criminal intent through judicial interpretations of common law and existing statute law, as opposed to explicit statutes detailing criminal liability for corporations, all grew from this foundation and became the basis for the development of corporation criminal liability as it (explicitly) exists today.

Contemporary Development of Corporate Criminal Liability in Law

Despite the establishment of precedents attributing criminal intent to corporations through the actions of their employees, courts and legislators would continue to struggle with the development of this new common law. Nonetheless, it is widely recognized that across common law jurisdictions, including the United States, England and Canada, two contemporary standards or models of criminal liability have developed: the imputation standard and the identification standard (Parisi 1984; Gobert 1994; Friedrichs 2010). However, first, these contemporary standards require an understanding of the legal nature of the corporation, as it constitutes a significant structural constraint upon the construction of these standards.

The Legal Nature of the Corporation

Throughout the 18th and 19th centuries, while corporate criminal liability through vicarious liability and other strategies was gaining ground in the world of law, the corporation was becoming the dominant vehicle for all business ventures (Glasbeek 2002; see also Snider

1993; Micklethwait and Wooldridge 2005). As such, the corporate form became the corporation's organizing frame. Incorporation grants the corporate entity certain inalienable legal rights, while also subjecting this new legal entity to legal liabilities, such as civil or criminal liability. Most importantly, through incorporation, the corporate form attains limited liability.

As discussed earlier, common law has long grappled with the question of whether corporations are considered persons under the law. Since the early developments of corporate criminal liability strategies in 17th century England, corporations were regarded as a special person. While such recognition was primarily recognized in the context of property ownership, it would gradually expand to include criminal contexts (Pinto and Evans 2003). As a legal person, corporations are entitled to similar rights of natural persons as developed through the concept of legal personality, such as owning property or possessing the ability to sue (and thus be sued as well). Incorporation law requires that shareholders of a corporation elect a board of directors, which directly manages the company. In turn, the board of directors hires officers, such as the Chief Executive, who together constitute the decision-making authorities within the company. In theory, the board and its officers, who also represent the top of the organizational hierarchy, are responsible for the operation of the company. However, in most cases, officers of a corporation delegate many of their responsibilities to individuals further down the organizational hierarchy, such as Vice-Presidents and Directors of particular divisions. These executives directly oversee the execution of policies established by the board and its officers by directing their employees to accomplish these tasks (Parisi 1984). In essence, an incorporated company has a separate legal personality distinct from its shareholders, operating under a formal corporate structure (i.e., board of directors or senior officers), which allows it to enjoy the rights and duties of natural persons under the law (Pinto and Evans 2003).

However, the primary advantage of incorporating business ventures within a corporate structure that has its own legal existence and personality is that it allows limited liability. This privilege restricts the liability of owners and shareholders to the amount invested. In other words, the corporation shields shareholders from personal liability beyond this investment (Parisi 1984; Glasbeek 2002). As a hallmark of corporate law, limited liability is directly associated with minimizing risk and fostering economic growth in a market capitalist economy (Easterbrook and Fischel 1985; see also Glasbeek 2002; Micklethwait and Wooldridge 2005). Ordinary partnerships typically confer personal liability for all debts between the partners of the firm; incorporated companies do not. In this sense, the liability for a shareholder is simply to the company. If creditors, for instance, are attempting to collect their debts, they are generally limited in law to collect from the company solely and not from individual members (Pinto and Evans 2003). The law, thus, explicitly limits how much risk an individual investor holds. If they invest a certain amount of money, they are only liable for that amount. As a result, limited liability has been seen as the cornerstone of the modern public corporate form (Easterbrook and Fischel 1985). Because limited liability is engrained in corporate law, it also provides a level of stability for both creditors and shareholders that would otherwise be jeopardized through (inefficient) contracts. These legal rules, in essence, allow the corporation to extract the advantages of limited liability at a lower cost. While economic ventures that are incorporated with limited liability bring enormous economic benefits to private investors and even the state for taxation purposes (see Snider 1993), it is important to highlight that the purpose or motivation inherent within all corporations is profit maximization. This has framed much of corporate decision-making, and thus corporate activities, over time (Micklethwait and Wooldridge 2005).

Over the course of the development of the modern corporate form, which ultimately shaped corporate criminal liability *legislation* (see Bittle 2012), the nature of the corporation has remained remarkably similar. Although significant social developments occurred throughout this period, a separate legal personality, limited liability for shareholders, and an organizational structure that allows the board of directors or executives to make the “best” decisions for the corporation and its shareholders through its fiduciary responsibility to maximize profits, remained dominant (Snider 1993; Glasbeek 2002; Micklethwait and Wooldridge 2005).

“Imputation” Standard

Between the two contemporary standards that attribute criminal liability to a corporation for the actions of its employees or agents, the “imputation” standard was the earliest articulation of contemporary corporate criminal liability (Parisi 1984; Khanna 1996; Laufer 2006; Friedrichs 2010). Here criminal liability is imputed to corporations based upon the *intent* and *acts* of its employees at any level of its hierarchy (i.e., board of directors, officers, supervisors, and lower-level employees). The general exception is acts that are intended to benefit only the employee. This imputation standard, which was primarily adopted and developed in the United States, is based upon vicarious liability. Common law in the United States utilizes a form of vicarious liability known as the *respondeat superior* doctrine to attribute criminal liability to a corporation on the basis of the criminal intent and actions of its employees (Khanna 1996; Friedrichs 2010). This doctrine imputes criminal liability to a corporation when the corporate agent, acting within the scope of his or her authority, commits a crime intended to benefit the corporation. Specifically, the corporate agent must have both committed an illegal act (*actus reus*) with the guilty mind (*mens rea*). Whether the corporate agent is a Chief Executive or support staff, if the prosecution can prove criminal intent, this will be imputed to the corporation. Similarly, *mens rea*

can be imputed to the corporation based on the collective knowledge of employees as a group, as opposed to identifying a single employee who displays criminal intent (Parisi 1984; Khanna 1996). It does not matter whether the act actually did benefit the corporation as long as this was the intent of the corporate agent. In addition, the corporate agent must have committed the offence while carrying out job-related activities (Khanna 1996).

The *respondeat superior* doctrine can be traced to tort law where the possibility of recovering damages for victims was more viable when liability for employees' actions were imputed to a corporation, which generally possessed more money than individual employees (Parisi 1984). Borrowing from its tort law origins, the *respondeat superior* doctrine effectively makes it easier for prosecutors to establish criminal liability for corporations,¹ primarily for strict liability offences² (i.e., federal regulatory offences).³ Since corporations are criminally liable for the actions of their employees even if those actions violate corporate policy (see Lederman 1985), this is thought to increase the level of deterrence against corporations and prevent corporations from immunizing themselves from criminal liability (Parisi 1984; Laufer 2006; Friedrichs 2010). In England, however, while the courts do recognize the value of the *respondeat superior* doctrine in civil cases, they do not recognize vicarious liability in criminal law (Pinto and Evans 2003). The English tradition, while similarly focusing on attributing criminal intent to a corporation

¹ The prosecution does not have to identify, as demonstrated below, the “directing minds” of the corporation to impute liability. In this sense, there are much less barriers to establishing liability.

² Strict liability is not a strategy or theory of corporate criminal liability; it is a common law offence where the Crown (in Canada or England) or the prosecutor (in the United States) must establish only the *actus reus* element of the offence, as the mental intention or *mens rea* is not a required element of a strict liability offence. Strict liability is one of three categories of offences, which also include absolute liability offences and true crimes (see Saxe 1990:99-102 for more detail).

³ However, the United States utilizes a different standard or theory of corporate criminal liability for state offences, which follows more traditional criminal offences (i.e., fraud or bribery) (Ferguson 1998). This standard is more similar to the standard utilized by England and Canada for establishing criminal liability for most criminal and regulatory offences, which is known as the “identification” standard.

through the actions of its employees, applies a standard of imputation that is more rigorous. This is known as the *identification* standard.

“Identification” Standard

The “identification” standard for attributing criminal intent to a corporation through the actions of its agents is the basis for corporate criminal liability in England and Canada (Parisi 1984; Gobert 1994; Ferguson 1998; Pinto and Evans 2003; Friedrichs 2010).⁴ The identification standard of corporate criminal liability differs substantially from the imputation standard. Instead of imputing liability to the corporation for the actions of any corporate agent, the identification rationale holds that liability is direct, such that certain corporate agents are acting on behalf of the corporation. In essence, the identification standard holds that the criminal intent and criminal actions of *certain* senior officers of a corporation, as opposed to any corporate agent, are those of the corporation. In effect, these senior officers are the “directing minds” of the corporation. Thus, if these directing minds display criminal intent and criminal actions, the corporation is directly liable, as these minds *are* the corporation (Ferguson 1998). Granted, this identification rationale does, in fact, eliminate the potential vicarious liability of certain corporate agents (i.e., supervisors or lower-level employees); however, the identification rationale specifically targets the responsibility chain or dynamics within the corporate hierarchy structure, such that liability is only assigned to those senior officers (i.e., board of directors member or chief executive) that

⁴ In Canada, however, with the relatively recent introduction of *Bill C-45*, which codifies common law on corporate criminal liability, it is argued that Canada has taken steps to significantly change criminal law that is typically associated with the identification standard of corporate criminal liability. Where some argue *Bill C-45* is an expansion of the identification standard (see Dusome 2007), others suggest it replaces the identification standard with a broader regime of criminal liability for corporations (see MacPherson 2003). Chapter 3 provides more detail on *Bill C-45* and the general history of law in Canada on criminal liability.

have the responsibility to direct the policy of the corporation. In a sense, especially for prosecutions, the identification rationale “appears more fair” (Parisi 1984:49).

During the time that courts in the United States and England established precedents in common law for attributing criminal intent to a corporation, English courts began to demand a more direct connection between the corporation and the person responsible for the criminal act before attributing criminal liability to the corporation for *mens rea* offences (Gobert 1994). The courts were not satisfied with vicarious liability for attributing criminal intent for these types of offences. As discussed earlier, as of the 18th century all English cases of criminal responsibility for corporations were based on vicarious liability for strict liability and quasi-criminal offences (i.e., regulatory or public nuisance offences). Corporations would only become liable for offences outside the regulatory or quasi-criminal domains when the courts decided that those who controlled or directed the policy of a corporation could be regarded as embodying the corporation (Pinto and Evans 2003). The landmark case in England that would not only give rise to this general basis of corporate liability in English criminal law but also heavily influence Canadian common law was the 1971 case *Tesco Supermarkets Limited v. Natrass* (Gobert 1994; Pinto and Evans 2003).

The *Tesco* case involved a branch manager at a supermarket who allowed a products’ price that did not conform to its advertised price to be displayed on the shelf. The company argued that it took all reasonable steps (i.e., due diligence) to avoid such pricing errors. However, during the court case, the legal issue became whether that store manager was considered a *different* person than the directors or officers of the company. The court held that the store manager was, in fact, a different person outside of the corporation. In other words, the legal liability of the corporation was restricted to acts of persons who “embody the controlling mind

and will” of the corporation (Gobert 1994:400). Since these persons (i.e., directors or officers) *are* the corporation, the store manager was not considered *the* corporation. Thus, those who embodied this corporation took steps to avoid pricing errors of this type, so the corporation was not directly liable for the store manager’s wrongdoing.

The *Tesco* decision would attract significant critical discussion, as it was argued to be both over- and under-inclusive in terms of corporate criminal liability (Gobert 1994; see also Pinto and Evans 2003). It is over-inclusive in the sense that even if certain individuals are violating corporate policy, the company will still bear legally liability for the criminal intent and actions of directors, officers, and senior management. However, it is under-inclusive in the sense that the number of individuals who would cause vicarious liability to be attributed to a corporation is reduced to those few individuals who directly manage or control the company. Even though the vast majority of corporate agents are not directors, officers, or senior management, this form of criminal liability excludes the corporation from the criminal intent and actions of other corporate agents. This is especially noteworthy with modern corporations that have complex managerial structures where it is difficult to determine who is directly responsible for corporate operations on a day-to-day basis. In other words, the crude distinction between workers and the directing minds oversimplifies the hierarchical structure within modern corporations, as few of these directing minds will actually perform the “dirty work” (Gobert 1994; Pinto and Evans 2003; see also Khanna 1996). Although the imputation and identification doctrines represent the dominant standards of corporate criminal liability in the United States, England, and Canada, several alternative models have recently developed. As Gobert (1994) notes, there are four standards of corporate legal liability that can apply to corporate wrongdoings. The first two represent the traditional standards of corporate criminal liability;

namely, the imputation standard (vicarious liability) and the identification standard. The latter two represent alternative models or standards for imposing corporate criminal liability, which their advocates argue can overcome the perceived deficiencies in the imputation and identification models. These are known as the aggregation model and the corporate fault model.

“Aggregation” Standard

The aggregation model attempts to overcome the diffusion of responsibility inherent within corporate wrongdoings and can be applied to both imputation and identification standards (Gobert 1994; Lederman 2000). Given the realities of the modern corporate form, and specifically its hierarchical structure (see Snider 1993; Glasbeek 2002), the aggregation model of corporate criminal liability does not simply focus on the actions or inactions of one particular party (i.e., an executive or a supervisor); it also aggregates the failings of all relevant parties to give an overall, more accurate picture of the corporation’s fault. Specifically, it allows the “acts, omissions and mental states of more than one person within a company to be combined in order to satisfy the elements of a crime” (Gobert 1994:404).

Aggregation is quite useful in establishing a complete sense of the *actus reus* requirement, but its value comes in determining the *mens rea* requirement (Gobert 1994; Lederman 2000). If, for example, a corporation is being prosecuted for failing to take reasonable steps to prevent criminal harm, a crucial legal question, when trying to satisfy the *mens rea* requirement, becomes the knowledge key actors held that the corporation was acting in a reckless or negligent manner. The aggregation model of knowledge offers two insights for establishing corporate criminal liability. First, it can be applied to fulfil the *mens rea* requirement of any one individual within the corporation. As such, the knowledge of one is considered the knowledge of all if the “collective knowledge” of the company includes everyone (Lederman 2000:661). This

provides a more complete basis for attributing crucial elements of the *mens rea* requirement from a corporate agent to be imputed to the corporation. Second, aggregation is helpful in situations where no one individual possesses all knowledge of the criminal event. If you consider all relevant parties, a complete picture emerges from the sum of all knowledge instead of focusing on attributing one individual's mental state to the corporation. Only by aggregating pieces of all corporate agents' knowledge and attributing that to the corporation can an accurate picture be created.

However, the aggregation model has been heavily criticized for failing to provide specific criteria for determining whose knowledge should be aggregated (Gobert 1994). The identification standard suggests that only those certain senior corporate officers who are the directing minds of the corporation should be targeted when attributing criminal liability to a corporation. The imputation standard suggests that all corporate agents can attribute criminal liability to a corporation. In the aggregation model, it is unclear whether it is restricting the aggregation of knowledge to the directing minds as opposed to all corporate agents. Corporations point out that at any given time they may find it difficult to control the actions or inactions of their agents. Nonetheless, an aggregation standard of criminal liability could encourage corporations to communicate with their agents and potentially rectify any opportunities for criminality (Gobert 1994; Lederman 2000).

“Corporate Fault” Standard

One paradigm connects the imputation, identification, and aggregation models of corporate criminal liability: individual responsibility (Gobert 1994; 2011). The corporate fault model represents the first attempt to depart from this individualistic paradigm. The crucial component of the corporate fault model is precisely whether individual fault is different than

corporate fault. Considering anything other than individual fault seems peculiar given the large emphasis on the individuals within the corporation, particularly for attributing criminal liability. After all, the corporation is nothing more than the collection of individuals that control or manage it; a corporation cannot act without people. However, the corporate fault model suggests a new paradigm that places the fault for criminality with – and within – the corporation. As Gobert (1994:396) states,

A company should also be liable for its failure to prevent crimes by persons for whom it bears responsibility. This “corporate fault” model of corporate criminality would locate the blameworthiness which underlies criminal liability within the company itself. It would not depend on proof of wrongdoing by an identifiable individual or aggregation of individuals.

As such, the corporate fault model focuses not on establishing *mens rea* for the individual to be imputed to the corporation; it focuses on locating and identifying corporate *mens rea*. Several alternative models of corporate criminal liability that fall under this new paradigm have been suggested (e.g., Fisse 1982; Fisse and Braithwaite 1988; 1994; Wells 2001; Weissmann 2007), but Bucy (1990) provides the one that best corrects the reactive corporate fault or reactive corporate *mens rea* problem.⁵ Bucy’s corporate ethos theory of corporate criminal liability emphasizes the *mens rea* of the corporation through the concept of corporate “ethos.” This ethos, she suggests, encourages corporate agents to commit crimes or to refrain from committing them. The model posits a corporate identity that is independent of the individuals who manage or control the corporation. Thus, criminal liability is only attributed to a corporation under this model if its “corporate ethos” encourages criminality. A corporation would not be convicted for

⁵ Fisse and Braithwaite (1988; 1994) advocate for a reactive corporate fault model that liability can be retroactively attributed based on the reaction of the corporation to the initial offence, which is argued to violate the elements of a crime simultaneously (see Bucy 1990).

the actions of reckless or negligent lower-level employees or senior managers alone but only when corporate goals and policies create an ethos that is conducive to criminal intent (Bucy 1990). This model addresses the gaps in locating and identifying *mens rea* through individuals that are exposed under the identification and even aggregation standards of criminal liability. In this sense, the model provides a means of establishing corporate *mens rea* by examining the roles within the corporation, as opposed to individual mental states. A corporate ethos does not have to facilitate criminal intent explicitly if it can be empirically established, through corporate roles and actions or inactions, that a criminogenic “ethos” was created (Gobert 1994; 2011). In essence, if fault is to be attributed to the corporation, it will most likely be located in the way it is organized and operates through its goals, policies, and culture (e.g., see Sarre 2011; Punch 2011).

In theory, under this model, where a corporation can be faulted for not preventing a criminal offence, it should be criminally liable in its own right. However, as with the aggregation model, the corporate fault model is mostly an academic exercise conceived by scholars interested in addressing the perceived deficiencies of the vicarious and identification liability models. Australia is the only common law jurisdiction that adopts a corporate criminal liability model in certain areas that is not based on an individualistic paradigm (i.e., imputation, identification, or aggregation) (Sarre 2011). In Canada, critics of the corporate fault model highlight the current legal landscape that relies upon an individualistic paradigm of corporate criminal liability (Duesome 2007). Although the merits and flaws of a corporate culture model similar to Australia were discussed during Canadian Parliamentary debates (see Bittle 2012) and in Canadian government reports (see Chapter 3 for a detailed discussion), the model was ultimately rejected during the most recent legislative reform of corporate criminal liability in 2003.

Controversies of Corporate Criminal Liability in Law

Conceptual Justifications

Conceptually, the notion of corporate criminal liability is controversial within a criminal justice system and a system of criminal law that is historically constituted for individuals (Dubber 2013). The history of corporate criminal liability, as stated, is the history of *mens rea* within English common law. In other words, the historical development of corporate criminal liability has been the struggle to apply an English common law standard of crime, particularly its mental state requirement, to an incorporated entity. This began with the decision to grant corporations, as inanimate entities, the status of “persons” under the law, which has spurred a legal fiction requiring that all persons, whether natural or legal, must possess the necessary guilty mind to be convicted for a crime. These historical struggles to apply *mens rea* to the corporate person burgeoned since corporations could not be charged, convicted, or punished for “true” crimes, such as criminal negligence or fraud (Friedrichs 2010; see also Bernard 1984; Ferguson 1998).

The conceptual controversies on the justifications for corporate criminal liability initially target its philosophical roots. Philosophically, criminal liability is grounded in the notion that a moral agent is legally accountable (i.e., to justice) (Pascal 2011). The crucial question is the extent to which legal persons, as opposed to natural persons, conform to the essential features of a moral agent: a sense of the self, a free will, and a moral conscience. As Pascal (2011) and others (Hasnas 2009; Stewart 2013) suggest, legal persons lack the necessary moral consciousness or responsibility that is typically associated with natural persons. Moral consciousness is determined by our practical reasoning or rationality, which is constituted morally as a strong will or self-control. Legal persons (i.e., a corporation) do, in fact, have a sense of their own identity and the ability to act freely to pursue its interests. However, it is precisely the pursuit of its own interests,

such as profit, that inhibits a moral consciousness. In other words, to display a moral consciousness, a moral agent will have to sometimes act against its own interests, such as a desire to profit (Pascal 2011). If a moral agent can exhibit these characteristics, then it possesses a strong moral consciousness; however, the very definition of a corporation, including its corporate form through limited liability and a fiduciary responsibility to shareholders (i.e., to pursue profit), lacks this notion of a moral consciousness. If a corporation, for instance, does not pursue profit, its very existence is threatened, as it leaves itself open to civil suits by shareholders. Without altering an understanding of “the criminal,” it can be argued that without a moral consciousness, a corporation – an inanimate entity – should not be held criminally liable, as only individual human actors display this level of moral consciousness or responsibility and therefore can possess the necessary intent to commit crime (Lederman 1985). In essence, this conforms to the philosophical parameters of a legal system that is inherently individualistic; thus, pragmatic concerns⁶ take advantage of the philosophical gaps within corporate criminal liability and dismiss it as a non-justifiable legal tradition (Stewart 2013).

Nonetheless, to dismiss a form of organizational liability, especially through individual paradigms of liability (i.e., imputation, identification, or aggregation), in the face of corporations whose size and income rival nation states in terms of GDP is problematic (Friedrichs 2010). If corporations are, indeed, “persons” under the law, there ought to be a mechanism for ensuring order and discipline within them, a task usually undertaken by a criminal justice system (Fisse 1982; see also Lederman 1985; Quaid 1998). Deterrence, and thus stigma, is often utilized as a rationale to justify attributing criminal liability to corporations in the face of rising corporate

⁶ For instance, the significant legal costs associated with prosecuting corporate offenders under criminal law as opposed to prosecutions under civil law, which is a common position among the law and economics scholars (see Khanna 1996).

power (Fisse 1982; Friedman 2000). In other words, the potential for a corporation to be labeled a criminal, given that this is such a highly stigmatized label, offers greater deterrence from potential wrongdoings. In effect, this can assist facilitate compliance, as corporations may feel threatened by such a label if convicted (see Walsh and Pyrich 1995). Similarly, the concept of corporate criminal liability is justified on the grounds that corporations exhibit some form of guilt or blameworthiness (Stewart 2013).⁷ In fact, Bucy's (1990) corporate fault model of corporate criminal liability, as stated above, locates and establishes a corporation's culpability through its corporate ethos. Therefore, this model is justified on the grounds that the corporation as an inanimate entity deserves punishment in its own right, outside of the actions of its agents.

The Value of *Criminal* over *Civil* Liability

The debate on the value of criminal liability over civil liability in a corporate context borrows heavily from these controversies associated with the conceptual justifications of corporate criminal liability, especially in terms of its *raison d'être* (Friedman 2000).

The leading advocates against criminal liability in a corporate context argue that it serves almost no purpose (Fischel and Sykes 1996; Khanna 1996). These scholars borrow from the conceptual controversies surrounding deterrence as justification for corporate criminal liability. The assumption is essentially that corporate criminal liability *only* serves the purpose of deterring misconduct (Coffee 1981; Byam 1982). As such, Khanna and Fischel and Sykes primarily attack corporate criminal liability through deterrence on the economic basis of efficiency. These law and economics scholars promote the traditional assumption of Chicago-school economists that the validity of law rests on whether or not it facilitates efficiency. Given these scholars' assumption

⁷ Friedman (2000) also argues that deterrence is not the only normative basis of criminal law. In a corporate context, criminal law can be based upon retribution. Thus, criminal law is a valid medium for moral condemnation. Modern corporations exhibit attributes (i.e., indefinable persona [see Bucy 1990]) that support this argument that corporations, as with individuals, can and should be morally condemned.

that the basis or purpose of corporate criminal liability is to deter, they argue, overall, civil liability deters misconduct in a corporate context more efficiently than criminal liability. Efficiency, in these terms, is defined as producing social desirability, or the ability of liability regimes to deter misconduct. In a typical economic approach to law, Khanna (1996) suggests that socially desirable regimes of corporate criminal liability must be assessed by comparing the net benefits of imposing civil or other liability strategies versus criminal penalties.

Khanna (1996), for instance, relies heavily on the fact that a corporation cannot be imprisoned. As such, the only deterrent value of corporate criminal liability is exercised through sanctions, such as fines or probation. Nevertheless, these sanctions are also available, he would argue, in a more cost effective fashion in civil liability regimes. Khanna, as well as Fischel and Sykes, note the procedural differences in obtaining convictions between criminal and civil liability regimes. The criminal standard of proof to obtain a conviction (i.e., guilt beyond a reasonable doubt) is inefficient in a corporate context, as it is expensive in terms of time and resources compared to the lower standard of proof within civil liability regimes (i.e., balance of probabilities). Khanna and Fischel and Sykes (1996) also question the stigmatizing aspects of deterrence offered by those advocating corporate criminal liability. Khanna situates stigma as reputational loss, or the reluctance of others to deal with the corporation in the future. His concern is that such stigma does not deter misconduct because customers are not directly affected. Moreover, the real cost of a criminal conviction is not borne only by the corporation; it may produce a “reputational rub-off” that affects innocent parties, such as shareholders or workers (Khanna 1996:1510). Khanna, as well as Fischel and Sykes (1996), argue that inefficiency is created if, as a result of a criminal conviction, the total penalty exceeds “optimal” damages, particularly if this affects innocent parties through, for example, job losses. Fischel and Sykes

(1996) go so far as suggesting that stigmatization in a corporate context may actually result in over-deterrence. In other words, stigma is more socially expensive in a corporate context than optimal cash fines, and it may lead to higher levels of government or regulatory investment to monitor and prevent potential misconduct, an outcome they see as highly inefficient.

The leading advocates for criminal liability in a corporate context critique these claims primarily on the basis that these scholars incorrectly assume deterrence is the *only* aim or goal of a corporate criminal liability regime (Friedman 2000; Wells 2011; Stewart 2013). Economic analyses of corporate liability may indicate civil liability regimes are more efficient at deterring misconduct, but as Friedman (2000) argues, this ignores the fact that retribution is also a justification for criminal liability. Corporations, as such, exhibit attributes that can be philosophically associated with expressive retribution. Specifically, they first possess an identity that the community can perceive. Based on this identity, corporations are independent of their agents on the basis that they display an identifiable persona and a capacity to express moral judgments. This position stands in stark contrast to an economic perspective that would critique corporate criminal liability on the basis that it is not independent of its corporate agents (Fischel and Sykes 1996; Khanna 1996). As such, this presents new challenges about whether civil liability is more “efficient” at accomplishing this retributive task than criminal liability (Friedman 2000). However, the counter-position is that the value of criminal liability in a corporate context comes in concert with civil liability since there needs to be a mechanism that expresses moral condemnation for misconduct. Corporations can easily see financial liability alone as a “normal” cost of doing business (Wells 2011; Stewart 2013). The strength of criminal liability does not only rest on its symbolic value, or as ammunition the state can use against corporations; it rests on the recognition that legal persons require regulation under the moral authority of criminal law.

The Value of *Corporate* over *Individual* Criminal Liability

It is important to recognize that even Khanna (1996) suggests that criminal liability in a corporate context may benefit corporations, despite its inefficiencies and supposed lack of purpose, for it assists corporations, especially in the United States, to avoid civil sanctions and managerial liability overall.⁸ As such, there is also debate about the value of *corporate* criminal liability over *individual* criminal liability of corporate agents.

Critics of corporate criminal liability often point to the efficacy of individual criminal liability for corporate agents (Fischel and Sykes 1996; Khanna 1996; Friedrichs 2010). These predominately American-based scholars approach the validity of individual criminal liability based on its pragmatism. As mentioned earlier, in the United States corporate criminal liability was born through tort law that assigned this liability through the imputation of corporate agents' guilty minds. The *respondeat superior* doctrine that the United States utilizes for corporate criminal liability is sufficiently broad, it is argued, because it enables vicarious liability (Stewart 2013). In this sense, it is argued that it is important to remain faithful to established legal tradition, which holds that *real* guilt must be specific and properly traced to the individual who is capable of forming criminal intent for the corporation. Foster (2011) illustrates this reasoning when examining the individual liability of corporate agents in England for health and safety violations. He argues that it is undoubtedly individuals who carry out crimes for corporations. While it is also argued that managerial decision-making about safety procedures contribute, in part, to injuries in the workplace, such harm nevertheless violates long-standing community

⁸ See also Frank (1984), who attempts to answer the question of why so many white-collar or corporate crimes are subject to civil penalties over criminal penalties. Frank argues empirically through health and safety laws how the corporate sector exercises political influence over legislative considerations of criminal liability for both corporations and corporate agents, especially jail sentences. Bittle (2012) also speculates as to the level of political interference with regard to corporate agents, namely executives, over the legislative process in Canada's recent changes to corporate criminal liability law.

norms that require justice not just to the legal person but also to a real or natural person to bear the responsibility for these harms. It is ultimately suggested that focusing on the responsibility of corporate agents (i.e., individual liability of corporate agents for such harms) may be effective at altering corporate behaviour overall.

Moreover, in understanding the relationship between individual and organizational fault, Gobert (2011) suggests that we must examine the circularity of imputing liability, such that law can not only impute criminal liability to the corporation for an individual's offence but also impute criminal liability to the individual for the corporation's offence. This is demonstrated in situations where the corporation is the medium for executing an individual's offence, where an individual would not be able to carry out a criminal offence without the corporate vehicle. This is particularly relevant for privately held corporations where corporate criminal liability is seemingly redundant, as by their nature privately held corporations require substantial direction from their owners and managers (Bucy 1990). Thus, it is argued that individual criminal liability is only necessary as a vehicle to deliver justice due to the lack of practicality of corporate criminal liability in certain situations (Stewart 2013).

However, others argue the value of corporate criminal liability is best displayed in tandem with individual criminal liability. Fisse (1984:69) argues that there must be a duality of individual and corporate criminal liability, such that individual liability does not "do the whole job." He lists nine reasons for this coexistence: organizational secrecy, number of suspects, corporate profit motive, expendability of personnel, personnel beyond jurisdiction, offences defined by reference to corporate status, corporate negligence, corporate intentionality, and surrogate liability. This relies heavily on the organizational component in facilitating corporate crime (Punch 2011). For instance, the modern corporate form puts pressure on a corporation to

violate laws. In this context, individual liability is weak as a deterrent since corporations display their own organizational identity, culture, or ethos that may pressure corporate agents to break the law to keep their positions (Bucy 1990; Laufer 2006). For example, the Enron scandal, one of the most significant corporate crimes in American history, exposed just such a toxic corporate environment, one that was conducive to criminality (McLean and Elkind 2004). Jeff Shankman, a former top trader at Enron, summarized its competitive work environment: “The joke at Enron was that everybody was replaceable” (McLean 2005). Adopting corporate criminal liability does not negate the criminal liability for, say, individual traders at Enron; it simply recognizes that the complexities of the modern corporate form are partially liable for criminal offences.

As mentioned earlier, existing laws on corporate criminal liability in common law jurisdictions, except for certain federal statutes in Australia, are not capable of holding a corporation’s culture or ethos criminally liable. As such, when used in tandem with individual criminal liability, corporate criminal liability represents, as it stands today, a “convenient surrogate.” It is obviously not perfect in holding corporations criminally liable for all offences, yet it achieves some accountability in instances where it is difficult to identify the individual responsible for the decision-making of a criminal offence (Coffee 1981:229). Corporate criminal liability ultimately is needed to address the complex structures of the modern corporate form that acts as a shield for offenders and inhibits criminal accountability (Punch 2011).

Thus far, this chapter has traced the foundational historical context of corporate criminal liability, its contemporary development in four theoretical models or standards of corporate criminal liability, and exposed the controversies or debates surrounding corporate criminal liability. However, it is necessary to situate these jurisprudential insights of corporate criminal liability beyond a conventional legal lens. As such, it is impossible to analyze corporate criminal

liability from a socio-legal perspective without understanding the substantive sociological aspects of corporate criminal liability.

The Sociology of Corporate Crime

Definitions, Concepts, and Typologies

The notion of corporate crime developed in socio-legal and criminological scholarship from the seminal concept of white-collar crime. Sutherland (1945) challenged the traditionalism of criminology that failed to discriminate different types of crimes from street crime, as most research during this time – and to this day – emphasized the high propensity of crime among lower socio-economic classes. Sutherland (1949:9) coined the term white-collar crime to describe crime that was committed by upper socio-economic classes, or persons of “respectability and high social status in the course of his [sic] occupation.” This idea would help spur the study of crime outside of its status quo conceptualizations. Sutherland’s definition of white-collar crime would also attract a healthy level of debate and criticism. Generally, criticism of Sutherland’s definition centre on several avenues of ambiguity: conceptual, empirical, methodological, legal, and policy (Payne 2012). However, the earliest source of criticism came from Tappan (1947) who struggled with the notion that any means of profit accumulation would or could be viewed as representing the same moral reprehension as street level crime. Tappan’s argument was that white-collar crime as a concept loses any validity given that “crime” can only be defined by states through criminal law, and an individual must knowingly intend to break the law to be categorized as a criminal.

As such, conceptual problems or debates on white-collar crime have largely focused on the constitution of white-collar and corporate offending, which must rely on this fundamental question of how crime itself is constituted (see Geis and Meier 1977). These definitional debates have fostered a lack of consensus regarding a universally accepted conceptualization of white-

collar crime (Kramer 1984; Green 2004). It became clear that white-collar crime, as Sutherland defined it, was too broad, leading to a spectrum of categorizations that encompassed multiple types of crimes, such as corporate crime, occupational crime, organizational crime, and even political crime (Hartley 2008). In an attempt to foster consensus, scholars have formulated strategies to resolve definitional conflicts. Geis (1982), for instance, suggests that definitions of crime generally may borrow from existing law, harms committed, and/or offender or victim traits.

Given this thesis relies heavily on the notion of corporate crime, as opposed to white-collar crime broadly, it is important to emphasize its sociological aspects. Especially in contrast to white-collar crime generally, corporate crime does not emphasize the harmful acts of individuals or groups of individuals within organizations who commit such crime for personal gain. Corporate crime represents the harmful acts – illegal or legal – committed by the corporation itself. This represents the most noted distinction within white-collar crime, which is the division between occupational crime and corporate crime (Clinard, Quinney, and Wildeman 1994). This distinction relies on an organizational context, as corporate crimes are committed within or by the organization typically against their workers, the environment, or the general public. However, more encompassing definitions of corporate crime exist. Snider (1993:14), for instance, refers to corporate crime as the “illegal acts committed by legitimate formal organizations aimed at furthering the interests of the organization and the individuals involved.” In this sense, corporate crime can also be identified along financial and social dimensions, as corporations can commit certain types of financial offences, such as insider trading or fraud, and social offences, such as environmental pollution or health and safety crimes. Both tend to victimize different groups: the more and less powerful classes, respectively (Snider 1993).

In addition, the concept of social harm in socio-legal and criminological scholarship has recently interested corporate crime scholars as an alternative to the more traditional conceptualization of crime. Historically, traditional scholarship on crime has been defined by its “conservative, depoliticized, androcentric, [and] state-orientated nature ...” (Boyd, Chunn, and Menzies 2002:10). In this sense, “real” or true crime is defined by criminal laws, which overwhelmingly display an individualistic bias towards crimes of the “street” (i.e., property crime, interpersonal violence, etc.). However, environmental degradation, lax health and safety rules, and financial exploitation are defined by quasi-criminal laws (i.e., provincial regulatory mechanisms) or are not considered criminal at all (see also Hillyard et al. 2004). Critical criminologists have heavily critiqued their omission from traditional criminology. They point out, for instance, that the traditional concept of crime lacks an ontological reality, consists mostly of petty events, excludes serious harms, and reinforces existing power relations (see Hillyard and Tombs 2007). The social harm approach challenges these critical critiques of criminology, while offering potential as a field of study in which it is advanced as “more theoretically coherent and imaginative, and more progressive politically” (Hillyard and Tombs 2007:16; see also Pemberton 2007). As Hillyard and Tombs (2007:16) outline,

Taken together, these concerns, encompassing the deleterious activities of local and national states and of corporations upon peoples’ lives, whether in respect of lack of wholesome food, inadequate housing or heating, low income, exposure to various forms of danger, violations of basic human rights, and victimisation to *various forms of crime*, produces a sense of a need for a disciplinary home which could embrace a range of harms that affect many people throughout their life cycle (Original emphasis).

Overall, the social harm approach does not prioritize a state-oriented bias or restrict its examinations of harms solely to those contained in criminal law. It favours examining a broad array of social harms along physical, financial/economic, and emotional/psychological lines.

Corporate crime scholars lastly continue to struggle to find a definitive typology. As Friedrichs (2010) highlights, there are different approaches that encompass corporate crime. One emphasizes the primary victims of corporate crime, such as the general public, consumers, employees, or corporate competitors. Another emphasizes the nature of the harmful activity, such as corporate violence, corporate corruption, corporate stealing, or corporate deception. Another emphasizes the size of the corporate entity, such as crimes of transnational corporations, domestic corporations, small or local corporations, or incorporated individuals. Lastly, corporate crime can be classified through its products or services, such as crimes of the automotive industry, pharmaceutical industry, banking, or even health care providers. None of these approaches serve as appropriate ideal types, but they capture the scale and scope of corporate criminality.

Schools and Controversies

As this thesis explores the notion of corporate criminal liability as a mechanism of social control for corporate crime, socio-legal and criminological scholarship has produced many questions surrounding how corporate criminal liability as an “accountability problem” should be addressed (Fisse and Braithwaite 1994). Two major schools of thought have developed around this accountability problem (Gruner 2004). The first is the *agency model* in which emphasis is placed on the rational actions of individuals as corporate agents in terms of facilitating corporate activities, both legal and illegal. The second is the *structure model* in which emphasis is placed on the social, economic, and organizational environments in terms of shaping corporate criminal activities. These two major schools of thought can be utilized to examine key controversies

within the sociology of corporate crime: 1) causes of corporate crime; 2) standards of criminal liability for corporations and individuals for illegal corporate conduct; 3) adequate sanctions for corporate crime; and 4) the types of regulatory relationships between corporations and the state that will be the most effective at controlling corporate crime (Lofquist 1997).

Scholarship on corporate crime, first, exists along a continuum of causality. Specifically, corporate crime scholars continue to debate the causes of corporate crime between micro, organizational, and macro levels. At the micro or psychological level, *certain* individuals are responsible for committing corporate offences. In this sense, emphasis is placed on differences between people, such as personality traits, that may facilitate or inhibit these offences. Where there is some evidence to suggest that white-collar workers charged with corporate offences display no significant differences in personality than those who have not been charged, research has focused on explaining how those who are not charged are prevented from engaging in corporate offending (Snider 1993). For instance, motivation is identified as a factor. In a capitalist society, there are pressures or strains to succeed, which may motivate individuals to engage in corporate criminality. Especially in North American society, success means accepting that material goods are essential for a happy life, which means motivation to possess material goods is a strong predictor of this drive to acquire and to “win” (Snider 1993). Opportunity is another factor affecting criminality. The psychological availability to commit crime is not only subjective, but it is also not available to everyone, especially those who reject competitive values. Lastly, access is another factor after opportunity is psychologically available, as the presence or absence of physical opportunity is significant for whether corporate criminality will actually occur (Snider 1993). At the organizational level, the social structure of the organization is identified as a factor in corporate criminality. Specifically, corporate goals, corporate structure, and the larger

organizational environment in which business operates all occupy a central role into whether the organization encourages or inhibits individuals from engaging in corporate criminality (see also Bucy 1990). Finally, at the macro level, certain social and cultural value systems encourage and support corporate criminality. Capitalism, for instance, emphasizes profit maximization and minimization of costs, which is criminogenic (Snider 1993; see also Glasbeek 2002). Overall, these diversities between the causes of corporate crime are consistent with the agency and structure schools of thought.

Optimal standards of criminal liability for corporations and individuals for illegal corporate action are also controversial issues within the sociology of corporate crime. The distinction between the individualistic paradigms of corporate criminal liability (i.e., imputation, identification, and aggregation standards) and the organizational paradigm (i.e., corporate fault standard), as discussed earlier in this chapter, are consistent with the agency and structure schools of thought, including the debate on the appropriateness of corporate versus individual criminal liability.

Corporate crime scholarship also debates “adequate” sanctions for corporate crime. In this sense, there is controversy on the utility of formal remedies (i.e., legal penalties) versus informal remedies (i.e., those outside of law). For instance, Braithwaite (1982) spearheaded the effort to recognize alternative strategies of controlling corporate crime, proposing government-enforced self-regulation of corporate crime while also maintaining criminal law and sanctions as a symbolic last resort. This echoes innovative, albeit impractical, approaches from Coffee (1981) and Fisse (1981) who proposed equity fines, where shares of a corporation would be seized by the state, and community service orders as sanctions to corporate crime, respectively. Grabosky (2001) also suggested a third-party vigilance scheme called conscription that requires oversight of

a corporation's compliance (e.g., safety standards) processes through third-party actors. As discussed earlier in this chapter, in terms of formal remedies, there is significant debate on the value of civil and criminal sanctions for corporate offenders. Lastly, some scholars go as far as to challenge corporate law. For instance, Glasbeek (2013) challenges the limited liability doctrine in corporate law that protects shareholders from any liability, including criminal liability, arising from the corporation. As Glasbeek argues, there are viable legal avenues to achieve a form of corporate criminal liability for shareholders (see also Wells 2011). Further, a shareholder criminal liability model is both practical and feasible because it targets the active shareholder – the investor who aims to profit – and not the passive shareholder (i.e., pension funds). This argument is equally relevant for both private and public companies. Private corporations usually have two or three controlling owners who oversee all of their decision-making, hence law can more easily hold them – as a group or individually – criminally liable for their corporation's actions. On the other hand, public corporations typically possess thousands of shareholders, so it should, in theory, be difficult to trace responsibility, let alone criminal liability. However, this is where the distinction between passive and active shareholders is crucial, as the majority of corporations in Canada have controlling shareholders that possess 50% of the equity and thus have complete control over the appointment of senior positions (Glasbeek 2013). Overall, consideration of the adequacy of sanctions for corporate crime also conform to the agency and structure schools of thought.

Finally, there is also significant debate on the role regulatory agencies play in controlling corporate crime. In this sense, there is controversy as to how the relationship between the state's regulatory agencies and corporations should be structured. This is the debate between the efficacies of criminalization/deterrence versus compliance/cooperation (see Snider 1990).

Sanctions, for instance, differ substantially if the guiding principle of regulating corporate crime is to promote deterrence or cooperation. This follows the two schools of thought in the sense that if the agency model is prioritized, cooperative schemes may offer assistance to the corporation to reform policies that may be conducive to corporate criminality. Similarly, if the corporate model is prioritized, criminalization schemes primarily emphasize deterrence through prosecutorial action.

Where are we now?

Despite the many controversies within the sociology of corporate crime, scholars generally agree that crimes committed by corporations continue to cause significant amounts of harm against economies, consumers, employees, workplaces, and the environment (Pearce and Snider 1995a; see also Friedrichs 2010). These consequences are typically examined by listing its economic, physical, and social or moral costs (Cullen, Maakestad, and Cavender 1987; Kramer 1984; Hartley 2008; Friedrichs 2010). Most scholars agree that the economic costs are difficult to quantify, yet it is not unreasonable to assume that such costs are in the billions of dollars, given the massive revenue generating capabilities of modern corporations. There are also many types of financial corporate crime such as fraud, antitrust, bribery, and tax avoidance, all of which place strain on governments, consumers, and even honest corporations. Financial-related exploitation continues to outweigh the rather menial costs of petty street crime through, for instance, stock market fraud (Snider 2007). This recently led to one of the worst global recessions in history, catching regulators off guard and forcing governments to institute reforms from the aftermath of its effects (see Bittle and Snider 2011; Snider 2011). As such, the economic costs of corporate crime far outweigh any financial costs associated with conventional street crime, such as robbery (Hartley 2008). In addition, corporate crime has heavy human physical costs. In this sense,

corporate crime continues to kill and injure people. It can kill or seriously injure a worker when a corporation decides to cut costs on safety (see Tombs and Whyte 2010; Bittle 2012); it can kill or seriously injure consumers who buy faulty products (see Frank and Lynch 1992); and it can even endanger the lives of the public who are forced to negotiate environmental disasters or industrial pollution (see Pearce and Tombs 1998; Snider 2004). Lastly, corporate crimes continue to have significant social and moral costs. As Sutherland (1949:13) highlighted 80 years ago,

The financial cost from white collar crime, great as it is, is less important than the damage to social relations. White collar crimes violate trust and, therefore, create distrust; this lowers social morale and produces social disorganizations.

The social costs of conventional street crime are visible. Individuals physically see the damage to their sense of safety and security when they witness murders or robberies. However, the social costs of corporate crime are much more subtle. It continues to covertly erode the public's sense of trust and confidence in the economic system. This was most visible during recent economic protests against corporate greed in the United States (Kroll 2011). Given the overwhelming evidence that corporate offenders are rarely convicted and punished (Simpson 2002), this fuels resentful sentiments about the social divide between the upper and lower classes, whereby one gets richer and the other gets prison for criminality (Reiman and Leighton 2012).

Health and safety violations, in part, facilitate these human costs. As examined through safety crimes, or the "violations of law by employers that either do, or have the potential to, cause sudden death or injury as a result of work-related activities," it is claimed that safety crimes represent a significant social problem, resulting in 1700 deaths annually in the United Kingdom (Tombs and Whyte 2007:1), 4.4 million work-related injuries in the United States (Reiman and Leighton 2012), and approximately 1000 annual worker deaths in Canada (Bittle 2012). However, since workplace injuries and deaths are often defined as "accidents," they are omitted

from hegemonic definitions of crime. As Tombs and Whyte (2007) outline, it is the consistent popularity of the notion of the accident-prone worker that fuels victim blaming and diffused responsibility (and thus liability) for these incidents. As such, safety crimes are invisible to the social and political spheres that prioritize 'real' crime over 'accidents'. In addition, environmental degradation and exploitation also cause injury and death, and its social costs often victimize marginalized classes and races (see Boyd, Chunn and Menzies 2002; Snider 2004).

Finally, there is widespread agreement among scholars that the control of corporate crime continues to be demonstrably inadequate, especially in the proportionality of sanctions imposed relative to the harm committed. As Snider (2002:216) elaborates,

... the issue of corporate crime concerns the disappearance of law, the creation of the virtuous subject, the triumph of the discourse of the non-culpable offender. The urge to criminalize, it appears, stops at the door of the executive suite; here, and only here, jail sentences and criminal fines somehow become inefficient, ineffective, and inappropriate responses to anti-social conduct, violence, and fraud.

The disappearance of law or regulation against corporate crime is a common reality in the hyper-globalized context of the 21st century. It has happened primarily through neoliberalized knowledge claims touting decriminalization, deregulation, and downsizing for both financial and social types of corporate crime (Snider 2000). This highlights the struggles between those who benefit from the disappearance of corporate crime (i.e., the modern corporation and its executives) and those who do not (i.e., workers, consumers, and the public). As such, the nation state, as the main regulating body of corporate crime in the Western democratic world, has faced both internal and external pressures in its course of regulation (Pearce and Snider 1995b). The rise of the power of transnational corporations has fuelled the need to increase profits, encouraging the nation state to legitimize almost every avenue of profit generation (see Snider

2000). Similarly, internal pressures on the nation state to create more jobs and lower high unemployment rates, as well as facilitate growth (as the old maxim states that each progressive generation must have a higher standard of living than the proceeding one) and cut taxes, all fuel this disappearance of corporate crime. This highlights the challenges of regulating corporate crimes that are facilitated by powerful economic actors and even by the nation state, which is even complicit when it fails to institute effective legal regimes and becomes increasingly dependent on the corporate sector (Tombs 2011; see also Michalowski and Kramer 2006). As Snider and Bittle (2011) suggest, effective regulation must find ways to address these new limits of state crime control policies by interrogating the economic, political, and ideological power of corporations.

Summary

This chapter has traced the jurisprudential and sociological literatures around corporate criminal liability. In providing a history of legal thought with regard to corporate crime, it becomes abundantly clear that the two traditions do not fit together perfectly. The legal history of criminal liability for incorporated entities highlights the struggle to align individualistic constructions of the criminal with corporate crimes committed by inanimate entities. In a sense, the law has been stretched beyond its own internal logic to fit an expanding area of criminal regulation. In sum, a review of legal scholarship shows the struggle between two competing paradigms, one arguing that laws governing corporate criminal liability are not broad or strong enough, as corporations often find ways to avoid responsibility for their misconduct (Pearce and Tombs 1998; Stewart 2013; see also Glasbeek 2002); the other claiming that holding corporations criminally responsible is useless and inefficient, as it also represents an obstacle to economic growth and enterprise (Fischel and Sykes 1996; Khanna 1996). Moving forward, the key issue for

this thesis is to show how law provides a mechanism of social control for corporate crimes through corporate criminal liability. Canada has recently instituted legal reforms on corporate criminal liability. As such, the next chapter focuses empirical attention on Canadian law and its negotiations with corporate criminal liability (see Geis and Dimento 1995:85).

Chapter 3

The Canadian Experience of Corporate Criminal Liability

This chapter examines the corporate criminal liability landscape in Canada. It first examines the black letter law of criminal liability before and after *Bill C-45* with the aim of providing a comprehensive account of how Canadian criminal law assigned and currently assigns criminal liability to the incorporated entity. Using the contemporary standards of corporate criminal liability described in Chapter 2, this first section exposes the efforts to construct and codify a uniquely “Canadian-made” approach to corporate criminal liability through *Bill C-45*. In addition, this chapter also examines how *Bill C-45* operates as criminal law in action through judicial case documents on prosecutions against incorporated entities for corporate crimes. Through both the review of the black letter law of corporate criminal liability and the empirical insights gleaned from the rigorous and objective selection, coding, and summary of judicial cases, Chapter 3 aims at providing a basis for analyzing the socio-legal environment of corporate criminal liability in Canadian criminal law.

A “Canadian-Made” Standard for Criminal Liability in Common Law

Where English and American standards of criminal liability for incorporated entities burgeoned early in 20th century, as noted earlier, Canada did not formally adopt any independent standards outside of English common law until the 1980s. This early history of legal thought on corporate criminal liability also relied exclusively on English case law to inform Canada’s own jurisprudence (Ferguson 1998). However, the contemporary development of “Canadian-made” standards of criminal liability for incorporated entities first began when the Supreme Court of Canada set forth the interpretation of criminal liability for both natural and juristic persons in

common law in 1978.⁹ *Sault Ste. Marie* crafted firm definitions on the different categorizations of criminal and regulatory offences (see Table 1). At the time, criminal offences differed based on *mens rea*. A true crime required the requisite guilty mind and the physical act to justify the potentially severe consequences of criminal conviction. Regulatory, or public welfare offences, expanded the prospects of convictions only on the basis of *actus reus*. As long as the Crown proved the offence was committed by the accused, a guilty conviction could be obtained. Particularly in *Sault Ste. Marie*, one of the key legal issues was the inability for an accused to defend against such charges even without intent, as regulatory offences at this time would not allow defences such as due diligence. As such, the Supreme Court introduced a third offence, known as strict liability, while also clarifying the existing rules on true crimes and absolute liability offences (i.e., regulatory offences). Strict liability offences, in combination with absolute liability offences, both require the commission of an offence; however, they differ on the ability of an accused – both natural and juristic persons – to mount a defence of due diligence. In strict liability offences, the guilty act is all that is required and those accused can raise a defence of due diligence if reasonable care was taken to prevent the offence. The Supreme Court relied on the English case *Tesco Supermarkets v. Nattras* (see Chapter 2) to justify the introduction of this strict liability offence and defence. In doing so, this represents the first instance in Canadian case law where corporate criminal liability is codified. However, corporate criminal liability would seemingly follow English standards (i.e., identification doctrine) until the Supreme Court clarified this standard in future Canadian case law. Lastly, absolute liability offences assume *mens rea* and do not afford any defence on a lack of intent. In clarifying these rules, the Supreme Court emphasized the difference between *Criminal Code* crimes (i.e., true crimes) and the wide range of

⁹ *City of Sault Ste. Marie v. Her Majesty The Queen* [1978] 2 S.C.R. 1299.

regulatory offences (i.e., strict liability and absolute liability offences) (see also Saxe 1990:99-102). For *Criminal Code* crimes, *Sault Ste. Marie* clarified that criminal liability is primary: “...the principle that punishment should in general not be inflicted on those without fault applies.”¹⁰ Since true crimes do not discriminate between incorporated or unincorporated offenders, *Sault Ste. Marie* provides the impetus for more critical legal discussion on how to apply criminal liability to incorporated entities for true crimes. This would be clarified in the leading Canadian case on corporate criminal liability or corporate *mens rea*, *R. v. Canadian Dredge and Dock Co.* in 1985.¹¹

Table 1: Categories of Offences in Canadian Law

	“True” Crimes	Absolute Liability	Strict Liability
Standard for Imposing Liability	Requires <i>both</i> the guilty mind (<i>mens rea</i>) and act (<i>actus reus</i>) beyond a reasonable doubt.	Requires <i>only</i> the guilty act (<i>actus reus</i>); does not allow a defence of due diligence.	Requires <i>only</i> the guilty act (<i>actus reus</i>); allows for a defence of due diligence.
Example	The Crown requires the proof of both the intent to commit murder and the physical act of murder beyond a reasonable doubt.	The Crown only requires the proof of driving on a suspended licence regardless of whether the driver intended to drive without a licence.	The Crown only requires the proof of a company polluting, yet the accused can raise a defence of due diligence if it took reasonable care to prevent the offence.
Source: <i>City of Sault Ste. Marie v. Her Majesty The Queen</i> [1978].			

Canadian Dredge represents the first case in Canada to directly address the legal question of corporate *mens rea*. In a sense, this case tackles the basics of criminal law and how liability is assigned to both natural and juristic persons. As Justice Estey writes for the unanimous court,

¹⁰ See footnote 9 at p. 1326.

¹¹ *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 SCR 662.

criminal law traditionally assigns liability only to natural persons who commit crimes as the primary actor, or through authorization to other natural persons from those possessing the requisite *mens rea*. Canadian criminal law rejects any standards of vicarious liability, such as the American standard of *respondeat superior*, for natural persons. However, Estey justifies the inclusion of juristic persons in criminal law for true crimes:

... the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person.¹²

As shown in Chapter 2, where an accused is an incorporated entity, common law created a pragmatic means of attributing primary criminal liability or *mens rea* to such an entity. A modified, yet limited, form of vicarious liability known as the identification doctrine has been adopted in Canada as a contemporary standard of corporate criminal liability. In *Canadian Dredge*, the Supreme Court recognizes and adopts this standard from English common law with minor alterations of interpretation: “The application of the identification rule in *Tesco* ... may not accord with the realities of life in our country.”¹³

As a result, the Supreme Court developed the first “Canadian-made” standard for imposing *mens rea* to incorporated entities. Similar to the English identification standard, the Supreme Court recognized and affirmed the validity of the identification rule for *mens rea* offences:

... if the court finds the officer or managerial level employee to be a vital organ of the company and virtually its directing mind in the sphere of duty assigned him so that his actions and intent

¹² See footnote 11 at p. 692.

¹³ See footnote 11 at p. 693.

are the action and intent of the company itself, the company can be held criminally liable.¹⁴

This test underlying the identification standard relies on the identity of the directing mind and the identity of the company coinciding, such that the “actor-employee who physically committed the offence is the *ego* of the corporation.”¹⁵ In addition, the identification standard merges the board of directors, managing directors, superintendents, the manager or any other person who has been delegated governing executive authority of the corporation. As such, a corporation may possess more than one directing mind.¹⁶ This represents a marked distinction from English jurisprudence. As it reflects the realities of corporate activities in a large geographic country, this identification standard compensates for the “narrower” standard in *Tesco*. In essence, the Canadian courts are more willing to locate the directing mind at a lower tier in the corporation (Ferguson 1998).

The Supreme Court also recognized the outer limits of this standard, which are exceeded when the directing mind does not act in the interests of the corporation. If a directing mind intentionally defrauds the corporation and if those actions form a substantial part of the regular activities of that office, the identification standard cannot be applied. The identification standard only operates when the Crown can demonstrate beyond a reasonable doubt that the action taken by the directing mind was (1) within the field of operation assigned to them; (2) was not totally in fraud of the corporation; and (3) was by design or result partly for the benefit of the corporation.¹⁷

Before the introduction of *Bill C-45*, *Canadian Dredge* represented the standard for prosecuting incorporated entities for *mens rea* offences. Corporate crimes could be prosecuted at

¹⁴ See footnote 11 at p. 693.

¹⁵ See footnote 11 at p. 662-663.

¹⁶ See footnote 11 at p. 662-663.

¹⁷ See footnote 11 at p. 664.

the level of corporate officials or corporations in their own right (Goetz 2003). Where limited liability protected shareholders from personal liability, executives, directors, and other officers were not afforded similar protections from criminal liability for illegal conduct. In addition, the *Criminal Code*, for instance, defines “every one,” “person,” and “owner” in Section 2 as including incorporated entities, such as “bodies corporate” and “companies.”¹⁸ Between *Canadian Dredge* and the introduction of *Bill C-45*, Canadian jurisprudence on criminal liability for *mens rea* offences remained mostly static, only expanding once in a civil case, *The Rhone v. The Peter A.B. Widener*.¹⁹ Specifically, the Supreme Court in *The Rhone* stated:

The key factor that distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis ...²⁰

This “Canadian-made” identification standard in criminal law was heavily criticized. Most of these critiques emphasized the general flaws of the identification theory in criminal law (see Chapter 2), where the significant barrier was the difficulty in prosecuting the most egregious incidents of corporate crime, particularly criminal negligence causing death. Despite the clarification of criminal liability for incorporated entities in *Canadian Dredge*, convictions were few and far between. The Law Reform Commission in 1987 published a report proposing an aggregation model of corporate criminal liability that does not require any one individual to have committed an offence for the corporation to be guilty.²¹ Similar calls for reform, such as the 1993 Government White Paper on attributing criminal liability to corporations, also emphasized the

¹⁸ *Criminal Code of Canada* R.S.C 1985 c. C-46.

¹⁹ *The Rhone v. The Peter A.B. Widener* [1993] 1 S.C.R. 497.

²⁰ See footnote 19 at p. 500.

²¹ Law Reform Commission of Canada, *Recodifying Criminal Law*, Report No. 31 cited in Goetz (2003).

need for modifications to the “directing minds” clause.²² However, these efforts would largely be ignored until particular incidents of egregious negligence by corporations reached a tipping point where legislative reform was unavoidable.

The Westray Tragedy: An Impetus for Change

On May 9th 1992, an underground methane explosion at the Westray coalmine in Plymouth, Nova Scotia killed twenty-six workers. The Royal Commission of Inquiry established shortly after the explosion and published on May 4th 1995 found that the Westray Coal Project, owned by Curragh Resources Inc., committed a list of reckless health and safety violations that directly led to the disaster. Prior to the explosion, the operations were also found to have violated fifty-two provincial safety regulations (Glasbeek 2002). Westray would be described as a “foreseeable and preventable” event, as government inspectors repeatedly failed to bring charges against the owners for health and safety violations, such as for the very coal dust that facilitated the explosion (Bittle 2012:5). Attempts to prosecute the owners of such a “truly rogue corporation” (Glasbeek 2012) under criminal law began shortly after the explosion. While Curragh Resources Inc. was charged criminally, the company itself was never convicted – nor were the owners or any managers. The prosecution experienced major difficulties assigning criminal liability to the company based on the inadequacies of the “directing mind” concept devised in the *Canadian Dredge* decision. Since Curragh Resources was structured in a way that maximized legal complexities, as a complicated stream of investors and other holding corporations owned the corporation that operated the Westray Coal Project, it was difficult for government lawyers to identify the parties who bore direct responsibility for the disaster. As Glasbeek (2002) argues, the corporate veil protected Curragh Resources Inc. from both civil and

²² Minister of Justice, *Proposals to Amend the Criminal Code (General Principles)*, 28 June 1993 cited in Goetz (2003).

criminal responsibility. As a clear – but perfectly legal – abuse of the corporate form, the Westray tragedy demonstrates how easily business could exploit the staples of corporate law (i.e., limited liability and a separate legal personality) to ultimately avoid legal responsibility for its crimes.

The Westray tragedy, however, forced governments to undertake a critical examination of how law negotiates the criminal liability of incorporated offenders. Some five years after Westray, Nova Scotia released its public inquiry report in 1997, entitled *The Westray Story: A Predictable Path to Disaster*, which proposed close to eighty recommendations. Recommendation 73 directed the federal government to study the legal issues surrounding the failed prosecution of Curragh Resources Inc., paying particular attention to the criminal liability of corporate executives and directors in relation to workplace safety violations.²³ This call for reform would first be answered not by the federal Liberal government – or the Conservative member whose riding contained the mine – but by private Members of Parliament from the NDP party. In 1999 and 2001 Bills C-468, C-259, and C-284 all expanded the basis for attributing criminal liability to incorporated entities in both *actus reus* and *mens rea*, effectively making it easier to assign criminal liability to the corporation in relation to those directing minds. These Bills would have also introduced a new *Criminal Code* offence for failing to provide a safe working environment. Bills C-468 and C-259 both died when Parliament was dissolved in 1999 and 2000, while Bill C-284 was absorbed into a House of Commons Standing Committee on Justice and Human Rights in 2002 (Goetz 2003; Bittle 2012). This Parliamentary Committee examined issues of corporate criminal liability and was directed to recommend any avenues for reform. The claims and evidence from this committee, which were relied upon by legal drafting experts at the Department of Justice, “ultimately produced the law that became Bill C-45” (Bittle

²³ Nova Scotia, *The Westray Story: A Predictable Path to Disaster – Report of the Westray Mine Public Inquiry*, 1997 cited in Goetz (2003).

and Snider 2006:471; see also Bittle 2012). Overall, these early attempts at concrete legislative reforms would lead to a more concerted effort at studying the issue of corporate criminal liability.

The Department of Justice released a Discussion Paper in March of 2002 outlining the “growing interest in law reform in Canada” on issues of corporate criminal liability.²⁴ It acknowledged the gap in statute law on the exact nature and scope of this liability. As such, the report emphasized the need for:

... a made-in-Canada law ... that addresses the functioning of corporations in the Canadian context and that advances the goals of our criminal justice system, that is, deterrence, denunciation, rehabilitation, reparation and acknowledgment of harm done to victims and to the community by criminal acts.

In turn, after the House of Commons Standing Committee on Justice and Human Rights was concluded, the government released a Response accepting its conclusion that “Canadian criminal law as it applies to corporations is in need of modernization.” The government principally argued that the directing minds model under the identification theory of corporate criminal liability (pre-*Bill C-45*) simply did not reflect the reality of corporate decision-making in Canada, particularly the decentralization of operational authority in larger, more complex organizational structures. The government was quite clear in this Response that Canadian criminal law needs to expand the “class of persons” who can engage this *existing* liability model; hold incorporated entities criminally liable for subjective fault offences that are committed on behalf of or for the benefit of the company; and hold incorporated entities criminally liable for negligence offences where the acts or omission of certain representatives display a “marked departure from the standard normally expected in the circumstances.” In addition, clear sentencing provisions would assist the

²⁴ Corporate Criminal Liability – Discussion Paper, March 2002 (Department of Justice 2013a).

courts impose sentences on corporations.²⁵ After nearly 10 years since the Westray tragedy, the government fulfilled its promise on “modernizing” Canadian criminal law through *Bill C-45* (also known as the Westray Bill) – or so it was thought.

Bill C-45 as Codified Corporate Criminal Liability

On March 31st 2004, *Bill C-45* officially amended the *Criminal Code of Canada* by codifying a criminal liability model for organizations, including incorporated entities.²⁶ *Bill C-45* moves beyond common law constructions of corporate criminal liability, as demonstrated in *Sault Ste. Marie, Canadian Dredge*, and *The Rhone*, to establish new rules for attributing criminal liability for the acts of their “representatives” and “senior officers.” It also establishes a new legal duty, albeit not a new criminal offence, that requires all persons directing work to take reasonable steps to ensure the safety of the public and workers. *Bill C-45* finally introduces new sentencing factors for courts to consider when punishing organizations, as well as establishing the conditions for organizational probation.

a) Expanding Liability to Organizations and Senior Officers

First, *Bill C-45* greatly expands the definitions of persons in the *Criminal Code*.²⁷ As discussed in Chapter 2, criminal liability is only applicable to those legally defined as persons, which includes natural persons (i.e., individuals) and juristic or nonhuman persons (i.e., corporations). In Canada, this is the realm of statute law, which governs who or what is considered a legal “person.” As such, the legal status of persons under *Bill C-45* has changed dramatically. It now includes an “organization,” as well as “Her Majesty,” in the existing

²⁵ Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights, 2002 (Department of Justice 2013b).

²⁶ *Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, S.C. 2003, c. 21.

²⁷ See footnote 18 at s. 2.

definitions of “everyone,” “person,” and “owner.”²⁸ In addition, s. 2 of the *Criminal Code* now provides an expanded definition of organizations.²⁹ The decision to expand criminal liability to organizations, as opposed to only corporations or incorporated entities, greatly increases the scope of applicability to unincorporated entities, such as labour unions. In theory, given the rather broad inclusion of an “association of persons,” organized criminal gangs could be prosecuted under such provisions (Archibald, Jull, and Roach 2004), as well as small groups of individuals organized for a common purpose (e.g., an Arcade Fire fan club), very large unincorporated groups (e.g., the Roman Catholic Church and political parties), and even a nuclear family (Dusome 2007). According to the Department of Justice, the government justifies this broad inclusion as a means to cover all “bodies” that may be involved in crime regardless of their organizational structure.³⁰

While the expansion of the definition of “organization” establishes the legal status of those applicable to criminal liability, *Bill C-45* also sets out which parties will be covered under the new model of criminal liability. Sections 22.1 and 22.2 include an expanded definition of “representative” and a new definition of “senior officer.” A representative in an organization “means a director, partner, employee, member, agent or contractor of the organization.”³¹ This inclusion of an agent or contractor might reflect the realities of modern organizations, especially incorporated entities, where contracting out services are common. It signals that contracting out

²⁸ Bill C-45, footnote 26 at s-s. 1(1).

²⁹ “organization” means

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

(i) is created for a common purpose,

(ii) has an operational structure, and

(iii) holds itself out to the public as an association of persons;

³⁰ *A Plain Language Guide to Bill C-45* (Department of Justice 2013c).

³¹ Bill C-45, footnote 26 at s-s. 1(2).

does not necessarily imply less culpability on behalf of the organization if those agents or contractors commit criminal offences (Archibald, Jull, and Roach 2004). In turn, *Bill C-45* also specifies the “senior officer” as a

... representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer ...³²

This new definition represents a marked distinction from the common law construction of corporate criminal liability through the “directing minds” clause. Instead of emphasizing solely the “important role in the establishment of an organization’s policies,” which appears similar to the “directing minds” clause as stated in *Canadian Dredge*, the definition also allows the conditions to be met under different circumstances, such as a representative who “is responsible for managing an important aspect of the organization’s activities ...” This would seemingly extend liability to those who manage, such as middle managers, and eliminate the distinction between the operational implementation of policy and those who craft corporate policy (MacPherson 2003; Archibald, Jull, and Roach 2004). It would also appear that “senior officer” does not extend to the level of vicarious liability, or the American *respondeat superior*, where any corporate agent can impute liability to the corporation, yet it automatically assumes that those in key positions (Director, CEO, and CFO) are senior officers due to the policy functions of those positions.³³ Nonetheless, the inclusion of an extended definition of representative and this new definition of senior officer occupies a central role in the classification of the model of criminal liability in s. 22.1 and s. 22.2.

³² Bill C-45, footnote 26 at s-s. 1(2).

³³ See footnote 30 at p. 5.

b) Negligence Provisions – s. 22.1

Bill C-45 specifies how organizations can be held criminally liable for crimes of negligence, which involves a determination of the *actus reus* of the representative(s) and the *mens rea* of the senior officer(s). An organization is a party³⁴ to a negligence offence if (1) a representative, acting within the scope of their authority, is a party to the offence³⁵ or (2) two or more representatives engage in conduct similar as if a single representative was a party to the offence.³⁶ This constitutes the physical elements of negligence, such that it is the representative or representatives collectively who will commit the physical criminal act or omission. The first portion of this negligence offence codifies the main common law provisions in *Canadian Dredge* that imputed the acts or omissions of the “directing minds” to the corporation with the addition of an expanded definition of representative. However, the second portion introduces a new aggregation or cumulative standard that treats the acts or omissions of two or more representatives as one representative for the sake of imputing criminal liability to the organization (MacPherson 2003; Archibald, Jull, and Roach 2004; Dusome 2007). This clarifies and extends corporate criminal liability beyond *Canadian Dredge* and *The Rhone*. In addition, the negligence provisions define the role of senior officers for imputing criminal liability:

the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be

³⁴ Section 21 of the *Criminal Code* establishes that any person is a party to an offence if that person actually commits the offence, aids or abets another person to commit the offence, or counsels another person to commit an offence. See footnote 30 at p. 5.

³⁵ Bill C-45, footnote 26 at s-s. 22.1(a)(i).

³⁶ Bill C-45, footnote 26 at s-s. 22.1(a)(ii).

expected to prevent a representative of the organization from being a party to the offence.³⁷

This constitutes the mental elements of negligence, such that it is the senior officer or senior officers collectively who depart markedly from the standard of care that allowed the representative(s) of the organization to commit the offence. This second portion of the negligence offence also codifies elements of *Canadian Dredge*, as a senior officer's *mens rea* is the organization's *mens rea* as well. However, similar to the provisions for representatives, there is an explicit standard of aggregation for senior officers. In essence, senior officers must display a degree of collective responsibility, so even if the senior officer in charge of the division where the negligence occurs did not depart markedly from the standard of care that could have prevented the offence, the organization's *mens rea* can still be established if the other senior officers collectively departed from that standard of care (MacPherson 2003). Also, the negligence provisions seem to reflect the realities of decision-making in modern organizations, especially incorporated entities, where the senior officers rarely, if ever, get their hands dirty, yet it is their collective decision-making that may create criminogenic conditions. Overall, for an organization to be found guilty of committing negligence, it must be determined that the representative(s) of the organization committed the act or omission (e.g., an employee disengaging safety equipment that leads to the death of a worker) and that a senior officer or senior officers collectively should have taken the necessary steps to prevent the representative(s) from committing that act or omission (e.g., a senior manager not providing proper safety training to the negligent employee).

c) Fault-Based or Subjective Fault Provisions – s. 22.2

Bill C-45 also specifies how organizations can be criminally liable for fault-based or subjective fault offences, which requires a determination of the *actus reus* and *mens rea* of the

³⁷ Bill C-45, footnote 26 at s-s. 22.1(b).

senior officer(s). An organization can be criminally liable for crimes that require a possession or awareness of specific facts or intent. Unlike the provisions for negligence offences, the emphasis on subjective fault is solely with the senior officer(s) of the organization.³⁸ As such, "...with the intent at least in part to benefit the organization ..."³⁹ senior officers can impute criminally liability to the organization in three ways: (a) "acting within the scope of their authority, is a party to the offence;"⁴⁰ (b) "having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence;"⁴¹ or (c) "knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence."⁴²

The first portion directly references the common law, primarily in *Canadian Dredge*, which claims that if a directing mind is acting within their scope of authority and is a party to the offence, the corporation will be held criminally liable. *Bill C-45* essentially codifies this common law doctrine with the expanded definitions of organization and senior officer. The second portion allows the organization to be criminally liable if one of the senior officers directs other representatives of the organization to commit the offence for the benefit of the organization. This provision requires that the *mens rea* or intent is possessed by at least one of the senior officers, but the representative(s) actually commit the physical act or *actus reus*. The third portion introduces a provision that was not available before *Bill C-45* in common law for corporate criminal liability. It makes an organization criminally liable for fault-based offences if any senior

³⁸ See footnote 30 at p. 7.

³⁹ Bill C-45, footnote 26 at s. 22.2.

⁴⁰ Bill C-45, footnote 26 at s-s. 22.2(a).

⁴¹ Bill C-45, footnote 26 at s-s. 22.2(b).

⁴² Bill C-45, footnote 26 at s-s. 22.2(c).

officer is aware that any representative is or is about to be a party to the offence, except where a defence of due diligence can be established. In essence, policy setters or operational managers are not able to support, implicitly or explicitly, the criminal conduct of the organization's representatives, especially for the benefit of the organization. This provision also is significant in that it requires senior officers to actively take all reasonable measures to hinder the representative from committing the offence. Incidentally, this assumes that senior officers are required to *at least* communicate or have sufficient control over their representatives to hinder the criminal conduct (MacPherson 2003; Archibald, Jull, and Roach 2004). Overall, for an organization to be found guilty of committing a fault-based or subjective fault offence, it must be determined that – in an attempt to benefit the organization – one of the senior officers of the organization was a direct party to the offence; was directing the representatives of the organization to commit the offence; or was aware that representatives are going to commit an offence and did not actively attempt to hinder the conduct.

d) A Legal Duty to Protect Workers

Bill C-45 amends the *Criminal Code* to add a new duty for persons directing work: “Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”⁴³ In essence, this duty requires that everyone who employs or directs another person to work must take all reasonable steps to avoid harm to those workers or even the public (Archibald, Jull, and Roach 2004). A breach of this duty is not a criminal offence, but since an offence of criminal negligence is predicated upon a legal

⁴³ Bill C-45, footnote 26 at s. 217.1.

duty,⁴⁴ its codification in the *Criminal Code* ensures it is applicable to such an offence (Goetz 2003). Interestingly, this duty arises out the federal government’s reluctance to attribute a new criminal offence for killing workers. It was concluded that codifying a duty of reasonable care is “a better solution”⁴⁵ than specifying a new criminal *corporate manslaughter* or *corporate killing* offence.⁴⁶ The concern that other common law jurisdictions (i.e., the United Kingdom and Australia) have rejected specific corporate offences and that the *potential* legal challenges to excluding natural persons from such an offence signalled that there is no clear need for “special provisions.” The government ultimately argued in principle that “... the criminal law should apply to all persons without regard to how they choose to organize their affairs.”⁴⁷

e) Organizational Sentencing and Probation

Finally, *Bill C-45* amends the maximum fines available on summary conviction for organizations as offenders and introduces a new regime of sentencing principles in addition to, yet separate from, individual offenders, including the “optional conditions of probation” for organizations. In lieu of the inability to imprison an organization for criminal wrongdoing, *Bill C-45* increases the maximum fine to \$100,000 for summary conviction offences.⁴⁸ The court already has the ability to impose an unlimited fine for indictable conviction offences.⁴⁹ *Bill C-45*, however, introduces a new sentencing regime for organizations that exist alongside the general

⁴⁴ See footnote 18 at s-s. 219(1):

- (1) Every one is criminally negligent who
 - (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do,shows wanton or reckless disregard for the lives or safety of other persons.
- (2) For the purposes of this section, “duty” means a duty imposed by law.

⁴⁵ See footnote 25.

⁴⁶ See, for example, Tombs and Whyte (2007) and Almond (2009) for the United Kingdom’s approach to specific corporate offences; Sarre and Richards (2005) for Australia’s approach.

⁴⁷ See footnote 25.

⁴⁸ *Bill C-45*, footnote 26 at s-s. 735(1)(b).

⁴⁹ See footnote 18 at s-s. 735(1)(a).

guidelines available for sentencing all offenders.⁵⁰ These additional considerations for sentencing an organization include:⁵¹

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

This list of sentencing factors can be classified as aggravating [(a), (b), (c), (e), (g)] and mitigating factors [(d), (f), (h), (i), (j)] (Archibald, Jull, and Roach 2004). Aggravating factors are those which justify a heavier sentence; mitigating factors allow lenience. Sentencing factor (a) clearly emphasizes the economic advantages an organization obtained through the commission of a criminal offence, while sentencing factor (b) seems to emphasize the responsibility of the offender through deliberate planning of the offence. Sentencing factor (c) also seems to rely on

⁵⁰ See footnote 18 at s-s. 718-718.2.

⁵¹ Bill C-45, footnote 26 at s-s. 718.21.

the language in (b), as it targets the potential of an organization to siphon assets or declare bankruptcy to avoid monetary punishment. Sentencing factor (e) targets the complexities of corporate crimes, which often require more resources for police and prosecutors (Archibald, Jull, and Roach 2004), yet it is argued this punishes organizations for not pleading guilty and saving the authorities the significant expense of prosecution (MacPherson 2003). As with individual offenders, the organization's prior record, including its adherence or non-adherence to regulations (i.e., health and safety or anti-competition), also justifies a heavier sentence.

Perhaps most interesting, sentencing factor (d) mitigates the criminal punishment of an organization based on the *potential* effects of imposing such a penalty. This seemingly recognizes the importance of organizations, particularly corporations, for their employees who may very well be unemployed if the organization ceases operations as a result of a criminal punishment. Yet, it may also recognize the importance of ensuring corporations and elites do not lose profits (see Chapter 4). Sentencing factor (f) also mitigates a criminal punishment based on the overlap with the regulatory regime, while sentencing factor (h) effectively encourages organizations to voluntarily impose penalties on employees who are responsible for the commission of the offence. Similarly, sentencing factor (i) seemingly attempts to encourage voluntary restitution for victims of the offence, and, lastly, sentencing factor (j) recognizes the importance of preventing future harms by mitigating a sentence if the organization has taken "official" measures to prevent future offences (MacPherson 2003; Archibald, Jull, and Roach 2004). According to the Department of Justice, the government categorizes these sentencing factors under three conditions: "moral blameworthiness," as it targets the economic advantages gained through corporate crimes; "public interest," as it protects innocent employees; and "prospects of

rehabilitation,” as it encourages organizational offenders to penalize responsible representatives and offer restitution to victims.⁵²

Bill C-45 also introduces “optional conditions” when sentencing an organization, which allows the court to put an organization on probation.⁵³ While typically associated with individual offenders, probation for organizations similarly orders the offender to abide by certain probationary conditions, which can be supervised by a regulatory agency instead of the court. For corporate offenders, this might include providing restitution to victims and/or requiring the offender to inform the public of the offence, as well as implementing policies, standards, and procedures to reduce the likelihood of committing another offence.⁵⁴

Bill C-45: A “New” Standard of Criminal Liability?

In sum, from its early introduction in Canadian common law, corporate criminal liability has been a creature of an English standard of criminal liability, known as the identification doctrine, a standard Canadian jurisprudence has adopted with minor alterations on where law identifies the “directing minds.” The tragic circumstances surrounding the Westray tragedy and the stagnant efforts to prosecute criminal misconduct spurred debate as to how criminal law can protect workers, as well as the public, from corporate crimes. Despite the lack of scholarly consensus on what exactly Westray’s child, *Bill C-45*, represents in terms of corporate criminal liability,⁵⁵ it is clear this new law represents an attempt to set out a new spectrum of legal standards of criminal liability. First, the definition of “organization,” “representative,” and

⁵² See footnote 30 at p. 8.

⁵³ *Bill C-45*, footnote 26 at s-s. 732.1(3.1).

⁵⁴ *Bill C-45*, footnote 26 at s-s. 732.1(3.2).

⁵⁵ In the context of legal standards of corporate criminal liability, *Bill C-45* attracts a continuum of opinions, ranging from “[it] remain[s] firmly in the identification theory” to “the replacement of the identification doctrine with a broader regime of criminal liability” to even “a fundamental change, if not a revolution in corporate criminal liability...” (Dusome 2007:121; MacPherson 2003:253; Archibald, Jull, and Roach 2004:368), respectively.

“senior officer” in *Bill C-45* relies upon the identification standard, as the sole purpose of these provisions is to identify which types of organizations can be criminally liable based on the conduct of its representative(s) and/or senior officer(s). Similarly, the identification standard is present in parts of the negligence provisions, but there is also reference to an aggregation of two or more representatives and even two or more senior officers for the purposes of imputing liability to the organization. The identification standard is also present in the fault-based provisions, which are guided by identifying those senior officers who are a party to the offence and those senior officers who direct others to commit the offence. Perhaps most important, parts of *Bill C-45* seemingly move beyond the individualistic paradigm of corporate criminal liability as represented in the identification and aggregation standards. Both the negligence and fault-based provisions hint at a corporate fault model, albeit not to the same extent as Bucy’s (1990) corporate fault model (see Chapter 4). For both the negligence and fault-based provisions, the expectation that a senior officer (i.e., *the* organization) can prevent a representative from being a party to an offence speaks volumes to the culture an organization displays in relation to its commitment to oversee its representatives and ultimately mitigate or hinder misconduct. Despite these important changes, an individualist paradigm (i.e., identifying persons responsible for misconduct to attribute criminal liability to the organization) is still overwhelming represented within this most contemporary “Canadian-made” iteration of corporate criminal liability. As we shall see, this has had enormous consequences for the enforcement of *Bill C-45*.

In some senses, then, this “new” standard of corporate criminal liability in Canada, *Bill C-45*, continues to represent the “old way of doing business,” at least in terms of black letter law. However, more than ten years since it came into force, a larger question remains as to how these provisions operate as criminal law *in action* (Chambliss 1975). As such, the next section of this

chapter will examine prosecutions against incorporated entities for corporate crimes under *Bill C-45*, showing how this most contemporary “Canadian-made” iteration of corporate criminal liability influences the outcomes of these cases.

Bill C-45 as Criminal Law in Action

Prosecutions are rare events in the criminal justice system. The criminal justice *funnel* is often cited in which there is disparity between the incidents of crime and the number of prosecutions and ultimately convictions (Silverman, Teevan, and Sacco 2000). While predominately associated with individuals as criminals, it is equally applicable, and perhaps compounded, for incorporated entities as criminals. Nonetheless, an emphasis on examining prosecutions against incorporated entities under *Bill C-45* is worthwhile in two ways. First, it provides important empirical insights into the larger debate on the efficacy of *Bill C-45* and its revised standards of corporate criminal liability. This is especially significant given the difficulties the Crown encountered in prosecuting blatant criminal negligence in the Westray tragedy. Second, and perhaps more important, it can capture empirical insights into what cases are deemed prosecutable (and why), how corporate criminal liability law is being interpreted and applied, how judicial decisions are made, and the results of prosecution. In this sense, prosecutions produce judicial case documents that empirically capture how corporate criminal liability operates as criminal law in action. Thus, this provides an appropriate avenue for examining, in combination with the review of black letter law as described above, the contemporary corporate criminal liability landscape in Canada since *Bill C-45*.

Methodological Considerations

A content analysis of judicial case documents is utilized to assess the prosecutions under *Bill C-45*. However, this chapter modifies the practices and procedures found in more traditional

content analyses. Instead, it relies on the initial stages of a content analysis for establishing rigorous and objective (or non-arbitrary) selection, coding, and summary of cases. As such, Chapter 3 focuses only on the selection, coding, and summary of judicial cases, while Chapter 4 continues with an analysis based on the insights gleaned from both the judicial case data and the review of the black letter law of corporate criminal liability. As a methodology, content analyses are a staple in social scientific research. They are a “careful, detailed, systematic examination and interpretation of a particular body of material in an effort to identify patterns, themes, biases, and meanings” (Berg 2009:338). This is differentiated from discourse analysis, the dominant Foucauldian-inspired methodology, in which an analysis emphasizes how power relations are constituted in the languages and practices within discourse (Phillips and Hardy 2002). In socio-legal studies, content analyses are utilized to examine a wide range of legal phenomena in a rigorous manner (see, e.g., Fischer et al. 2002; Fradella 2003). As such, in the context of this chapter, the initial stages of a content analysis are aptly reliable for rigorously collecting legal documents, such as judicial case documents on corporate criminal liability, systematically reading them, identifying and recording consistent features, and presenting or summarizing the documentary data. In addition, a crucial aspect of this thesis is how to *sociologically* examine legal documents. Where legal studies and legal empiricism often contemplate how to scientifically understand *law itself*, sociological studies of law examine questions that *relate to* law and legal institutions (Hall and Wright 2008). Especially in this context of judicial case documents, legal scholars will examine these decisions through the conventional lens of law’s internal logic and its dynamics within legal traditions and principles. In turn, sociological scholarship of law can examine these decisions in terms of their influence on and shaping by larger institutional and societal characteristics (Heise 2002). In this sense, sociology, and to some

extent critical legal scholars, can examine how the judiciary and law constitute the dominant social, political, and economic conditions. Overall, this institutionalism challenges the legal studies' foothold on examinations of judicial case documents, where a sociological examination can provide insights into the intersection of broader social, political, and economic conditions within these documents.

Selecting Cases

As a framework for examining legal documents, the stages of a content analysis can be reduced to three main components: selecting cases for study, coding cases to identify and record consistent information, and analyzing the data. Selecting cases involves deciding which cases to select and how those cases will be sampled, which includes both the sampling frame and the selection method (Hall and Wright 2008). First, the sampling frame is the population of all relevant cases. In Canada, a population of potentially relevant legal cases exists through the Canadian Legal Information Institute (CanLII). This non-profit organization, managed by the Federation of Law Societies of Canada, makes available Canadian law free on the Internet, including access to court judgments, tribunal decisions, statutes, and regulations from all Canadian jurisdictions.

Second, the selection method is the determination of which cases will be sampled and studied. Several search queries were inputted into the CanLII database on March 7th 2014 to access the relevant cases. First, it is important to determine the broad scope of references to *Bill C-45* in all legal contexts to identify and select cases dealing with corporate criminal liability. The first search query contained in quotations "Bill C-45" and was restricted to decision dates between March 31st 2004, which was the date *Bill C-45* came into force, and March 7th 2014. CanLII produced 22 results. A cursory examination of these cases determined that the reference

to *Bill C-45* was too broad, as it encompassed cases that discussed other legislative changes under the “Bill C-45” marker. As such, a second search query was performed using the same restrictions under the quotations “Bill C-45: An Act to Amend the Criminal Code.” CanLII produced four results. One of these results referenced *Bill C-45* in a civil case dealing with the Canada Industrial Relations Board at the Federal Court and two civil cases dealing with the Labour Arbitration Awards in British Columbia. The fourth result produced a criminal case: *R. v. Metron Construction Corporation*. Due to these rather limited results, other search queries were performed, as judicial case documents may not cite exactly the full title of the Bill. The search query “criminal liability of organizations” was performed using the same restrictions. CanLII produced nine results. Three results referenced *Bill C-45* in criminal cases dealing with prosecutions against incorporated entities on appeal.⁵⁶ One result each referenced *Bill C-45* in the Canada Industrial Relations Board at the Federal Court and the Labour Arbitration Awards in Saskatchewan. Two results referenced *Bill C-45* in Citizenship and Immigration cases, and one criminal case against an incorporated entity was found: *R. v. Metron Construction Corporation*.

Once again, as a result of these rather limiting results, search queries were performed using specific references to the criminal code offences (i.e., s. 22.1 and s. 22.2) and other provisions enacted (i.e., 718.21 and the new definition of senior officer). A search query of “22.1” produced 2457 results referencing all types of legislation. A more specific search query of “22.1” and “senior officer” produced 13 results, including *R. v. Metron Construction Corporation*, but also a new criminal case: *R. c. Pétroles Global Inc.* Similarly, a search query of “22.2” produced 2013 results referencing all types of legislation. A more specific search query of

⁵⁶ All three of these criminal cases were prosecuted before *Bill C-45* came into force, so the legislative changes were referenced in terms of whether they applied retroactively [see *R. v. Atlantic Technologist Limited*, 2008 2008 CanLII 43757 (NL PC); *TFE Industries Inc. v. R.*, 2009 NBCA 39; and *R. v. Tri-Tex Sales & Service Ltd.*, 2006 CanLII 25401 (NL PC)].

“22.2” and “senior officer” produced 16 results, which included similar results as cited above. A search query of “718.21,” which contains the sentencing conditions for organizations, produced 25 results, most of which cited 718.21 in reference to other sentencing provisions (s. 718, 718.1, 718.2, and 718.21). However, one new result was identified: *R. c. Transpavé*. Since several of these results contained cases in Quebec, which are predominately in French, the English search queries may not translate well. Based on the official translation of *Bill C-45*, several French queries were performed to find new results. For instance, “senior officer” translates into “cadre supérieur.” A search query of “22.1” and “cadre supérieur” produced 5 results, one of which was a criminal case noted above: *R. c. Pétroles Global Inc*. A search query of “22.2” and “cadre supérieur” produced 8 results, four of which were criminal cases. Lastly, a search query of “718.21” and “cadre supérieur” produced 0 results.

Overall, a comprehensive search of the CanLII database produced only three criminal cases against incorporated entities citing *Bill C-45* since March 31st 2004: *R. v. Metron Construction Corporation*, *R. c. Transpavé*, and *R. c. Pétroles Global Inc*.⁵⁷ As a result, to assist in establishing the reliability of these results, secondary sources⁵⁸ that examine broad activity under *Bill C-45* were consulted to determine 1) if the CanLII results are acknowledged and 2) if prosecutions against incorporated entities occurred where a non-criminal outcome was reported. In the latter case, judicial case documents would not be available on the CanLII database. Wood (2011) and Keith (2011) provide a brief synopsis of the earlier prosecutorial activities under *Bill*

⁵⁷ *R. v. Metron Construction Corporation* contains two separate judicial case documents: the initial judgment (2012 ONCJ 506) and the appeal (2013 ONCA 541). *R. c. Pétroles Global Inc*. also contains multiple decisions (2012 QCCQ 5749 & 2013 QCCS 4262) and is currently under appeal (2013 QCCA 1604) as of March 17th 2014. Lastly, *R. c. Transpavé* contains one case document (2008 QCCQ 1598).

⁵⁸ These sources appear to subjectively select cases without any specific methodology in their examination of activity under *Bill C-45*, yet its value comes in determining the reliability of the CanLII database to provide all potential results of cases of corporate criminal liability (e.g., if a case is subjectively selected for examination and that case is not found in the CanLII database, the CanLII results may be unreliable).

C-45 for negligence-related offences, including both individual and organizational prosecutions. Between 2004 and 2009, 11 prosecutions against individuals and organizations were reported across nine separate negligence-related incidents. Most of these prosecutions target the individuals (e.g., owners, managers, supervisors, etc.) as opposed to the organization or incorporated entity itself.⁵⁹ Table 2 provides a comprehensive list of prosecutorial activities under *Bill C-45* since March 31st 2004 to March 7th 2014 for negligence-related offences.

Table 2: Prosecutorial Activity under *Bill C-45* for Negligence-Related Offences

	Individuals	Organizations
Prosecutions	8	3
Criminal Convictions	2	2
Non-Criminal Outcome*	6	1
Sources: Wood (2011); Keith (2011); Bittle (2012; 2013); (CCOHS 2014) *Outcome Unknown/ Charges Stayed/ Plea Bargained/ Regulatory Conviction/ Acquittal		

As such, only three prosecutions against organizations were reported since March 31st 2004. Transpavé would be the first organization to be charged and convicted criminally for negligence. Metron Construction Corporation would similarly be charged and convicted criminally for negligence. Millennium Crane Rentals was charged with criminal negligence, but the Crown withdrew criminal charges in March 2011 due to “no reasonable prospects of conviction” (Wood 2011). As a result, Millennium Crane Rentals is not found in the CanLII database. In addition, only one prosecution against an incorporated entity has been registered for a fault-based offence

⁵⁹ Seven prosecutions were against individuals: Fantini, Supervisor at Newmarket Ontario Construction Corporation, Lilgert, Scrocca, Gagné, Hritchuk, and Owner of Millennium Crane Rentals. Three prosecutions were against incorporated entities: Transpavé, Metron Construction Corporation, and Millennium Crane Rentals.

(i.e., fraud) since March 31st 2004: *R. c. Pétroles Global Inc. Pétroles Global Inc.* is still a case in progress, which explains its absence in the most recent secondary sources on prosecutorial activity under *Bill C-45*. Nonetheless, it is clear that the results of the CanLII database have reliably produced all relevant cases of corporate criminal liability against incorporated entities since March 31st 2004: *R. v. Metron Construction Corporation*, *R. c. Transpavé*, and *R. c. Pétroles Global Inc.* In this sense, methodologically, the selection method is relatively straightforward, as a sample is not required since the entire population is accessible and manageable to study collectively.

Another methodological consideration for selecting cases is the selection technique and reliability. In theory, the reliability of selecting cases is in the ability to reproduce findings using the same methods. To this end, as highlighted earlier, structured computerized searches on the CanLII database were performed to produce the selected cases. In this case, other researchers can specifically verify the exact search terms and search strategies noted. In addition, an effort was taken in these search terms and search strategies (i.e., objective/non-arbitrary language) to be as narrow as possible to produce the most relevant cases.

Coding Cases

Once cases are selected, codes are implemented to systematically read and record consistent information. Judicial case documents are not constructed utilizing standardized procedures, so given this natural diversity a wide range of questions can be crafted for study. Since the goal of this chapter is to provide insights of how the most contemporary “Canadian-made” standard of corporate criminal liability operates as criminal law in action, it will be useful to code these cases using four broad factors (Hall and Wright 2008): 1) the *parties’ identities and attributes* (i.e., facts of the case); 2) the *types of legal issues raised*; 3) the *basic outcome of the*

case or issue; and 4) the *bases for decision*. In addition, the reliability of these codes, as with selecting cases, is explicitly rooted in its objectivities. In this sense, these codes chosen were objective and relatively straightforward for consistent application. For instance, despite the structural diversities in judicial case documents, the selected cases, first, are all criminal legal disputes. As such, they all are required to identify the parties and their attributes, so this factor provides an objective means to record basic facts about a case. Second, all criminal legal disputes involve questions of law, especially for criminal cases on appeal. In this sense, if criminal legal disputes produce a judicial decision, it requires that a judgment be made on the legal issues raised between the state and the accused. This factor provides an objective means to record what is at issue. Third, all criminal legal disputes have some basic outcome to the issues under dispute, so this factor provides an objective means to record the results of prosecution (i.e., a judgment). Lastly, and perhaps most importantly, judicial decisions on criminal legal disputes provide a judgment and its rationale. This factor provides an objective means to record how judgments are *reasoned* (i.e., through objective facts of law and/or subjective judicial reasoning).

Analysis of Cases

After cases are coded, the next stage of a content analysis contends with how to present the data (see cases below) and analyze the data (see Chapter 4). In essence, there are two broad ways of presenting and analyzing case data: quantitatively and qualitatively. A quantitative analysis of data often employs statistical methods, such as counts, frequencies, and percentages. However, this thesis favours a qualitative analysis of data, which does not involve any numbers. A qualitative analysis focuses on *themes and patterns* that can be more appropriately captured through conceptual descriptions and narrative illustrations as opposed to strictly numerical representations (e.g., Fradella 2003). As an interpretative approach to analyzing qualitative data

(see Berg 2009:339), this method provides a foundation for sociologically analyzing how the judiciary and law constitute the dominant social, political, and economic conditions. In other words, this approach is apt at providing sociological insights into the intersection of broader social, political, and economic conditions within the judicial case documents. Chapter 4 will take up this task of analyzing the socio-legal environment of corporate criminal liability through its construction and operation within Canadian criminal law. However, the rest of this chapter will now give attention to presenting the qualitative judicial case data as categorized by the codes.

R. c. Transpavé

Transpavé was published on March 17th 2008, which is the earliest result in the CanLII database that referenced *Bill C-45* under the established conditions.⁶⁰ As a criminal case, the *parties' identities and attributes* are relatively straightforward and highlighted clearly in the case document. The lead Crown prosecution is Her Majesty the Queen and the defendant is *Transpavé Inc.*, an incorporated entity based in Quebec. This case document noted that the company was convicted of criminal negligence causing death under the *Criminal Code* when it pled guilty to the charge at an earlier hearing. Criminal negligence was related to the death of a worker, Steve L'Ecuyer, who died on October 11th 2005 when a loading machine crushed him as he attempted to remove excess blocks from the production line. Since the company pled guilty to the charge, a trial did not occur, so the case document available on CanLII is only a sentencing document. As such, in this context of sentencing, the *types of legal issues raised* are also relatively straightforward. As noted by Justice Chevalier,

⁶⁰ *R. c. Transpavé* 2008 QCCQ 1598 was decided in Saint-Jerome, Terrebonne, Quebec, so it was only published in French. A copy of the French version available on CanLII was professionally translated into English. Quotations will cite this English translation.

In attempting to determine the just sentence which must be imposed upon a guilty part, the Court must keep in mind the fundamental principles of sentencing, that is the sentence, on the one hand, must be proportionate to the gravity of the offence and the degree of responsibility of the offender, and on the other hand, it must be adapted to the mitigating or extenuating circumstances surrounding the commission of the offence on the offender.

Transpavé will be the first case to primarily determine what this “just sentence” will resemble under *Bill C-45*’s new sentencing regime for organizational offenders (s. 718.21). In other words, the legal issue in *Transpavé* is this determination of a just sentence for an incorporated entity under these circumstances of the organization’s guilt in committing criminal negligence in the death of Mr. L’Ecuyer. The case document provides these important circumstances before an analysis of sentencing. First, the company is prosecuted for criminal negligence as a result of a provincial regulatory investigation into the death of Mr. L’Ecuyer. This report, cited in the case document, noted that “someone had disengaged” a security system that used optical beams to sense whether a person was under the machine’s loading mechanism. Second, since *Transpavé* pled guilty, it failed to exercise its duty of care recently codified under *Bill C-45*. Chevalier noted that the company “should [have] foresee[n] the risks associated with its enterprise.” In other words, the company,

... failed in its duty of efficiency by not implementing the appropriate security measures to offset the risks. It had a duty to properly train its employees not only on production methods but also on how to do the work in a safe manner. Knowing that sometimes the optical beam of the security system was disengaged, it had to make sure that it was always on when the palletizer machine was in operation.

Third, it was noted that the company itself or its senior officers were “without the knowledge” that the security optical beam, which prevents the machine from operating if disturbed, had been

disabled at the time of the incident. Lastly, Chevalier provided context on the company's structure and behaviour after the incident:

Transpavé is not a multinational company, but a family-run business. It employs about one hundred people during the production period. It has never paid dividends to its owner-shareholders, reinvesting its profits year after year to modernize its operation and remain competitive. The owners were also very much affected by this *accident*. As early as the next day they called in a psychologist to help the employees. They personally called each employee to inform them of the location and date of the funeral of their colleague. They went to the funeral home to offer their condolences to Mr. L'Ecuyer's family and reiterated their condolences through their attorneys at the hearing. It is therefore not an insensitive company, as we can see. (*emphasis mine*)

Nevertheless, the seriousness of the offence is "obviously very high because it resulted in a man's death." As such, as for the *basic outcome of the case or issue*, the Court sentenced Transpavé to pay a fine of \$100,000 for criminal negligence causing death, as well as a victim surcharge fee of \$10,000. Perhaps most enlightening in this case document is the extensive commentary establishing and justifying the *bases for decision*:

1. The company "has derived no benefit due to the commission of this offense."
2. "There was no planning or preparation whatsoever for the commission of the offence ..." and "... it is not by direct or positive action that the company committed the offences, but rather inaction, in a passive manner, without any planning."
3. "The Company did not attempt to conceal assets or convert them in order to declare itself unable to pay a fine. On the contrary, it spent hundreds of thousands of dollars to make sure that such a tragic *accident* does not happen again" (*emphasis mine*).

4. “The fine that the Court must impose should not jeopardize the viability of the company and the loss of employment of about a hundred people who are earning good wages.”
5. “No Regulatory criminal charges had ever been brought against Transpavé or its officers with respect to the facts of the case ...”
6. The company “spent more than a half a million dollars” to “make sure that such an *accident* would never again take place.” (*emphasis mine*).
7. The company finally complied fully with all the recommendations of the provincial regulatory agency report into the death of Mr. L’Ecuyer.

Chevalier lastly emphasized that since Transpavé earned a net profit of \$750,000 in 2007, and given the \$750,000 spent in 2006 and 2007 to “correct the situation and be at the forefront,” the \$100,000 fine and \$10,000 victim surcharge fee “would satisfy the ends of justice.” Thus, this fine is not “unreasonable in the circumstances ...” since it “underlines the importance of the recognition by Transpavé of its guilt and its sense of responsibility that it demonstrated afterwards” and it “ensures the survival of the company and the maintenance of about one hundred jobs.” Overall, this case document relied heavily on the sentencing provisions (s. 718.21) established under *Bill C-45* to determine this “just sentence” for Transpavé.

R. v. Metron Construction Corporation

Metron contains two case document decisions: the first published by the Ontario Court of Justice on July 13th 2012 and an appeal published by the Ontario Court of Appeal on September 4th 2013. As with *Transpavé*, *Metron* is a criminal case, so the *parties’ identities and attributes* are also relatively straightforward. The lead Crown prosecution is Her Majesty the Queen and the defendant is Metron Construction Corporation (Metron), an incorporated entity registered in

Ontario that engaged in the construction industry. The case document noted that Metron entered a guilty plea to one count of criminal negligence causing death. The events leading to this plea involve an agreement between Metron to restore concrete balconies on two high-rise buildings located in Toronto. On December 24th 2009, five workers and the site supervisor, Fayzullo Fazilov, climbed onto a swing stage to travel back to the ground from the 14th floor. The platform collapsed and four workers and the site supervisor fell 14 floors to the ground. One person survived, but the site supervisor and four workers died of their injuries. A sixth person was properly secured to the platform via a safety line and did not fall. An investigation into the swing stage that collapsed found that it violated Occupational Health and Safety regulations, and subsequent testing of the swing stage revealed it was not properly constructed even for two workers, let alone six. As a result of these circumstances and events, both parties agreed that:

Mr. Fazilov, who it is agreed met the definition of a ‘senior officer’ of Metron, and therefore Metron, failed to take such reasonable steps to prevent bodily harm and death by: directing and/or permitting six workers to work on the swing stage ... when he knew or should have known that it was unsafe to do so; directing and/or permitting six workers to board the swing stage knowing that only two lifelines were available; and permitting persons under the influence of drugs to work on the project.

In the end, it was through the “acts and omissions of its senior officer” that Metron was guilty of criminal negligence. The *types of legal issues raised* are also relatively straightforward given a guilty plea was registered that avoids a trial. Similar to *Transpavé*, this initial case document emphasizes the legal issues regarding sentencing an incorporated entity guilty of a negligence-related offence since *Bill C-45*. First, both parties established their positions regarding sentencing with both agreeing that “little precedent” existed to impose a penalty on a corporate offender since *Bill C-45*. The Crown first emphasized the tragic consequences of this offence that resulted in four deaths and seriously injured another, including the “inherent dangerous conduct

of a senior officer of the corporation allowing 6 individuals to be on a scaffold with only 2 lifelines ...” Evidence was also filed demonstrating that the President and sole Director of Metron is also the President and sole Director of Formstructures Inc. The websites of both companies appeared identical, including the 23 years each company was in business and the list of projects completed. Since Formstructures Inc. is a “reincarnation of Metron,” it was argued that while the latter is in a difficult financial position, the former was a viable business, leading to speculation that Metron had converted assets to reduce its liability. The Crown submitted that a \$1,000,000 fine was appropriate given the circumstances and events. However, the defence emphasized that the “real responsibility for the *accident* lay with the faulty construction of the swing stage for which Metron was not responsible and that taking into account the Corporations prior ‘good character’ and current financial situation a fine of \$100,000 would be appropriate” (*emphasis mine*).

Justice Bigelow of the Ontario Court of Justice relied on the provisions under *Bill C-45* in determining a sentence for Metron, including 22.1 (negligence-related offence), the definition of a “senior officer,” 217.1 (the duty to protect workers), and 718.21 (sentencing factors for organizations). Before an analysis of sentencing, Bigelow cited *Transpavé* as the only precedent available, taking particular note of the emphasis in *Transpavé* on the impact a fine would have on the economic viability of the corporation and the continued employment of its employees. As for the *basic outcome of the case or issue*, Bigelow was “satisfied that a fine of \$200,000 plus the Victim Fine Surcharge of 15% or \$30,000 ...” is appropriate given the circumstances and events. In addition, through the sentencing factors for organizations established under *Bill C-45*, Bigelow provided extensive commentary establishing and justifying the *bases for decision*:

1. Despite being offered \$50,000 to complete the project by a certain date, there was no evidence that this was related to the incident. Thus, it was found that there was not “any advantage realized by Metron as a result of the offence.”
2. “ ... for almost 2 months Metron was in violation of a number of health and safety regulations with respect to the swing stage which collapsed. In my view [Bigelow] this is an aggravating factor. However, there is no evidence of planning or complexity of the offence.”
3. Despite the Crown providing evidence that Metron attempted to convert or conceal assets to reduce its liability, it had “fallen well short of establishing beyond a reasonable doubt any attempt to hide or convert assets ...”
4. “... Metron can pay a fine of \$100,000 in the reasonably near future but that any fine significantly larger than that may well drive the company into insolvency.”
5. “By entering a guilty plea Metron has reduced the cost to the public purse of prosecuting this matter substantially.”
6. “I agree with the approach taken ... where the court does take into account the economic circumstances of the corporation in imposing sentence ...” In this sense, it is an error in principle to “impose a fine without an investigation into the defendant’s ability to pay it ...”
7. The President and sole Director of Metron, Joel Swartz, entered a guilty plea for violations under the *Occupational Health and Safety Act* arising from this incident, totalling \$90,000 plus a 25% surcharge, which is a mitigating factor.

Overall, Justice Bigelow placed significant emphasis on the impact that a sentence *might* have on the economic viability of the organization and the continued employment of its employees:

The financial future of Metron is impossible to predict with any degree of certainty given the outstanding litigation both by and against Metron which makes attempting to determine the impact of a fine on it extremely difficult. However, based on the evidence before me with respect to the economic viability of Metron I am of the view that imposing the penalty recommended by the Crown would likely result in the bankruptcy of the Corporation and would be in violation of the statutory requirements that I take into account the offender's ability to pay.

Nonetheless, despite the emphasis that the initial outcome of this case sends “a clear message to all businesses of the overwhelming importance of ensuring [the] safety of workers whom they employ,” Bigelow displayed some reservation in this sentence: “... I am also of the view that a fine well above that suggested by the defence is appropriate [\$100,000].” In the end, according to Bigelow, given the regulatory convictions against the President of Metron, the financial status of the company, its prior “good character,” and the seriousness of the breaches of its legal duty established under *Bill C-45*, a \$200,000 fine is considered satisfactory.

Metron was appealed to the Ontario Court of Appeal by the Crown soon after and another case document obtained from CanLII was released on September 4th 2013. The *parties' identities and attributes*, including the circumstances and events around the incident (i.e., facts, applicable *Criminal Code* provisions, and the sentencing hearing discussions and findings), are unchanged. However, the *types of legal issues raised* differ from the initial case document in important ways. In this sense, the first legal issue raised by the Crown is the procedures utilized to determine the sentence:

... the sentencing judge erred in using the sentencing range developed under provincial health and safety legislation to determine the sentence without regard to the higher level of culpability inherent in criminal offences and the particular gravity of the offence of criminal negligence.

Second, the Crown objects to the grounds used by the sentencing judge to set the fine, particularly his emphasis on the respondent's ability to pay. Lastly, the Crown argues that these errors by the sentencing judge have resulted in a sentence (\$200,000) that is "manifestly unfit" given the circumstances of the incident.

As for the *basic outcome of the case or issue*, Justice Pepall, with the agreement of Justices Rosenberg and Watt, granted leave to appeal the sentence, allowed the appeal, and sentenced Metron to pay a fine totalling \$750,000. An understanding of the *bases for decision* comes from the case document's extensive analysis of the appeal points raised by the Crown. First, on the issue of the use of the *Ontario Health and Safety Act (OHSA)* sentencing range by the sentencing judge to determine a criminal sentence, Pepall emphasized the differences between the regulatory convictions and criminal convictions in terms of moral blameworthiness: "... the concepts of fault and ensuing blameworthiness are distinguishing features between offences under the [*Criminal*] Code and those under regulatory regimes." Since Metron pled guilty to criminal negligence, it acknowledged that one of its representatives "demonstrated a marked and substantial departure from the standard that could be expected of a reasonably prudent person." In this sense, the sentencing judge was indeed entitled to consider the range of sentences under the *OHSA*, but reliance on this jurisprudence, which resulted in the \$200,000 fine, reflects "a failure to appreciate the higher degree of moral blameworthiness and gravity associated with the respondent's criminal conviction for criminal negligence causing death and the principle of proportionality ..." In essence, an incorporated entity "should not be permitted to distance itself

from culpability due to the corporate individual's rank on the corporate ladder or level of management responsibility.”

Second, on the issue of the ability of the respondent to pay, Pepall argued that an organization's ability to pay should not be treated “as a prerequisite to the imposition of a fine.” As such, the emphasis placed on the economic viability of a corporation by the sentencing judge is “properly a factor to be considered but it is not determinative.” In other words, the sentencing judge placed too much weight on the respondent's ability to pay given that it is not a statutory requirement to prevent bankruptcy when imposing a penalty. Lastly, on the issue of sentencing, Pepall is quite clear that “the sentence of a fine of \$200,000 was manifestly unfit.” It is not proportionate to the gravity of the offence and the degree of responsibility of Metron, and it fails to convey “the need to deliver a message on the importance of worker safety.” According to Justice Pepall,

Indeed, some might treat such a fine as simply a cost of doing business. Workers employed by a corporation are entitled to expect higher standards of conduct than that exhibited by the respondent. Denunciation and deterrence should have received greater emphasis. They did not. The sentence was demonstrably unfit.

As a result of the “material errors” in the initial case document, the appeal court took it upon itself to “impose a fit and just sentence.” Following the specific sentencing provisions for organizations under *Bill C-45*, Pepall noted the lack of advantage realized by the respondent as a result of the offence; the lack of evidence of concealment of assets beyond a reasonable doubt; Metron's guilty plea, “thereby saving the time and cost associated with a trial ...”; the President of Metron pleading guilty under *OHSA* violations; and the lack of a prior criminal record. Overall, Metron was convicted of a “very serious offence” and fined \$750,000 based on the nature and gravity of the offence, the number of victims, and the sentencing factors listed above.

R. c. Pétroles Global Inc.

As mentioned earlier, *Pétroles Global Inc.* is the only registered prosecution against an incorporated entity for an offence other than negligence (i.e., fault-based offences, such as fraud). Based on the intent of *Bill C-45* with *Westray* in mind, including the inclusion of a duty to protect workers, it is perhaps unsurprising that, thus far, the thrust of prosecutorial action under *Bill C-45* has largely targeted negligence-related offences. Nonetheless, *Global* fits the search parameters of the CanLII database, as it utilizes the language and provisions established under *Bill C-45* in its criminal prosecution against an incorporated entity under the *Competition Act*.⁶¹

Pétroles Global Inc. (Global) contains two case document decisions: a preliminary inquiry published on May 30th 2012 and a trial hearing published on August 9th 2013.⁶² At the request of *Pétroles Global*, and in terms of the *parties' identities and attributes*, a preliminary hearing was held between the Crown and the company, which is a small-operating energy supplier of gasoline to independent and company-owned stations in Ontario, Quebec, and the Maritimes. The company contains only three private shareholders, two of whom are the President and Vice-President of the company, while the third shareholder is a construction company, Demik Construction Limited. Compared to multi-national oil suppliers, *Pétroles Global Inc.* produces minuscule revenue and has little market share. A regulatory investigation by the Competition Bureau was initiated when a retailer not associated with *Global* complained that he suffered “undue influence” over the pricing of gasoline. Following field observations, telephone

⁶¹ However, caution should be noted that the insights produced from the two case documents under *Global* must be treated as provisional, given it is currently under appeal as of March 7th 2014 (2013 QCCA 1604). Undoubtedly, there are benefits to be gleaned from how corporate criminal liability operates as criminal law in action for these fault-based offences, but there are potential issues of reproducing these *Global* results if an appeal decision is available in the near future.

⁶² Both *R. c. Pétroles Global Inc.* 2012 QCCQ 5749 and 2013 QCCS 4262 were decided in Saint-François, Sherbrooke, Quebec, so it was only published in French. A copy of the French version available on CanLII was professionally translated into English. Quotations will cite this English translation.

wiretaps, and the collection of documents, the Competition Bureau charged three Global employees with conspiracy to prevent or weaken competition through gasoline price fixing in Sherbrooke and Magog, from May 2005 to May 2006. As the initial case document revolves around a preliminary hearing, the *types of legal issues raised* differ substantially from typical trial case documents or sentencing documents. The only issue under dispute at this preliminary hearing was the determination of whether Christian Payette, a General Manager at Pétroles Global, and/or Pierre Bourassa and Daniel Leblond, two regional or territorial managers, were senior officers within the meaning of s. 22.2 of the *Criminal Code*, which would trigger criminal liability to the company. As for the *basic outcome of the case or issue*, Justice Chapdelaine concluded there is enough evidence that Pétroles Global should stand trial for the charges related to price fixing under the *Competition Act*. Specifically, Payette, as a General Manager for operations in Quebec, and Bourassa and Leblond, as regional managers in Quebec, are considered senior officers of the company.

Chapdelaine also provided commentary establishing and justifying the *bases for decision*. The language and provisions established under *Bill C-45* are utilized in this decision and referenced in terms of the expanding scope of liability for senior officers as representatives who play “an important role in the establishment of an organization’s policies or [are] responsible for managing an important aspect of the organization’s activities.”⁶³ In this sense, as we shall see, this judicial decision relied heavily on a determination of the title of these employees, the functions they performed, and the scope of their responsibility, including an assessment of the relative importance of their activities within the company. For example, this would be the difference between the activities of a clerk and a manager on profit making. Thus, Chapdelaine

⁶³ Bill C-45, footnote 26 at s-s. 1(2).

noted in the rationale for his decision that in this case, while the President handled the administration of the company, and the Vice President handled operations, two General Managers “assumed the management of daily operations in their respective regions.” This included Payette who oversaw the daily operations of the stations in Quebec and New Brunswick and supervised six regional managers who were themselves responsible for 30 to 35 stations. According to Chapdelaine, there was no evidence that the Vice President played any role in the approval of expenditures or was involved in decision-making of gasoline prices. However, there was evidence that Payette not only had knowledge of price fixing, but he also actually approved changes in pricing. These actions did not benefit Payette since he did not receive a commission, so his actions were with the interest of benefitting the company. As such, according to Chapdelaine, Payette is a senior officer of Global and his actions triggered the criminal liability of Global by participating in the offence (22.2a), directing Bourassa and Leblond to commit the offence (22.2b), and/or knowing that these managers were going to commit the offence and failing to take appropriate measures to prevent them from committing the offence (22.2c).

A second case document available on CanLII under *Global* was published on August 9th 2013. Since the initial case document only dealt with the question of whether Pétroles Global Inc. could stand trial for the actions of its senior officers, this second case document represents the actual trial proceedings. As such, there are very similar, if not identical, discussions regarding the *parties’ identities and attributes*, including the circumstances and events around the incident (i.e., facts, applicable *Competition Act* and *Criminal Code* provisions, and the preliminary hearing discussions and findings). However, during this time between case documents (2012 and 2013), more information was published regarding how Payette, Leblond, and Bourassa colluded to fix gasoline prices since they all pled guilty to these criminal charges under the *Competition Act*. In

essence, they developed a system learned at a previous company, Olco, which was dependent on selling more gasoline per liter for it to succeed. As noted by Justice Tote, “It was the corporate culture at Olco ... [that] was tolerated and there was no penalty.” When Global purchased Olco and appointed Payette General Manager of the same region, they continued this practice. As for the *types of legal issues raised*, “the only issue is to determine whether the accused should be held criminally responsible for the acts of Christian Payette, Pierre Bourassa and Daniel Leblond.” Specifically, under the senior officer provisions of *Bill C-45*, did Global “delegate Payette management in an important area of activity for the company?”

As for the *basic outcome of the case or issue*, Justice Tote convicted Global under the criminal provisions of the *Competition Act* for conspiring to fixing prices through “an agreement or arrangement with several people in order to prevent or unduly lessen competition in the retail sale of the regular gasoline in Sherbrooke, Magog, and Victoriaville ...” Justice Tote also provided commentary establishing and justifying the *bases for decision*. Similar to Justice Chapdelaine’s decision, the language and provisions established under *Bill C-45* are utilized as providing grounds for expanding liability for senior officers as representatives who play “an important role in the establishment of an organization’s policies or [are] responsible for managing an important aspect of the organization’s activities.” In this sense, it was determined that Payette had been delegated the responsibility for current operations for Global’s station network in Quebec and the Maritimes. This network consisted of more than 200 stations that covered two-thirds of its entire network. He even supervised six regional managers, including Leblond and Bourassa. Thus, “significant operational powers have been delegated to Payette.” In addition, Payette was responsible for ensuring that station owners, or land managers, implement the profitability report each quarter. Payette even approved expenditures of more than \$1,000 before

it was submitted to the head office. Thus, Justice Tote concluded that Payette, the General Manager of Global's operations in Quebec and the Maritimes, is a senior officer according to the *Criminal Code* provisions established under *Bill C-45*. Payette himself participated in the collusion to raise prices (22.2a) and knowingly allowed the regional managers to participate in the collusion without intervening (22.2c), which benefited Global exclusively. Sentencing has been reserved for another hearing, yet Global was granted a motion for leave to appeal at the Quebec Court of Appeal as of September 19th 2013 (see footnote 61).

Summary of Key Findings

Parties' identities and attributes. All case documents are criminal legal disputes between the Canadian state, as represented by the Queen, and an incorporated entity, ranging from a traditional manufacturing business to a construction business to even an energy supplying business. The facts of *Transpavé* and *Metron* were quite similar, involving death of workers as a result of criminal negligence.⁶⁴ However, *Pétroles Global* involved serious fraud in terms of collusion to fix gasoline prices. In addition, in terms of the parties' attributes, all three cases of corporate criminal liability involved relatively small private companies with no public shareholders. *Transpavé* was described as a "family-run business" and not a multinational corporation; *Metron* only employed two permanent staff and the rest were on contracts for construction projects; and *Pétroles Global* was structured hierarchically, yet only one individual ran the network under investigation.

Types of legal issues raised. *Transpavé* and *Metron* both dealt with the legal issue of determining a just sentence for an incorporated entity that entered a guilty plea for negligence-

⁶⁴ In addition, there was surprisingly explicit use of the language of accidents throughout the case documents that involved death in the workplace (see Chapter 4; Tombs and Whyte 2007).

related offences. An appeal of *Metron* also decided that the sentencing judge erred in relying on *OHS* sentencing ranges to determine the fine, erred in placing emphasis on the ability of the defendant to pay, and pronounced a sentence that was “manifestly unfit,” according to the Crown. Incidentally, neither *Transpavé* nor *Metron* raised the issue of whether certain representatives of these organizations, such as the site supervisor at *Metron*, *could* impute criminal liability to the incorporated entity for negligence-related offences. In this sense, since *Transpavé* and *Metron* both pled guilty, there was no trial to make such a determination, although it is assumed as a result of this guilty plea within each case’s circumstances that lower-level management can impute this liability for a company. Nonetheless, the insights these cases provide are used in the formulation of a sentence utilizing the organizational sentencing factors under *Bill C-45*. However, the only prosecution against an incorporated entity under *Bill C-45* for a fault-based offence explicitly deals with the legal issue of whether certain representatives’ positive actions could trigger the criminal liability of a company. Unlike the previous cases, it is to be determined if *Pétroles Global* will be sentenced for a fault-based offence since the case is currently under appeal in Quebec.

Basic outcome of the case or issue. The outcomes of *Transpavé* and *Metron* are monetary fines ranging from \$100,000 to \$750,000. There was no indication that corporate probation or any of the other options introduced in *Bill C-45* were considered. In the context of criminal negligence causing death, these results seem relatively lenient given the circumstances of tragic loss of human life. Since *Pétroles Global* primarily engaged with the issue of which representatives in the company can trigger its criminal liability as opposed to sentencing, and since the company did not plead guilty, the court decided that a General Manager of the company is a senior officer if certain conditions – the functions they perform and the scope of their

responsibility – are fulfilled; criminal liability is not assigned simply as a result of his or her job title. In essence, criminal liability can be imputed to lower-level managers for fault-based offences, as well as negligence-related offences, a determination that goes beyond the directing minds conception of corporate criminal liability before *Bill C-45*.

Bases for decision. Judicial decision-making in *Transpavé* and *Metron* relied heavily on the organizational sentencing factors established under *Bill C-45*. First, these case documents demonstrated a clear emphasis on the economic viability of the company in determining a sentence. In this sense, there was a clear concern for protecting the economic interests of these businesses. For instance, in *Transpavé*, the Justice explicitly mentioned how his decision would “ensure the survival of the company and the maintenance of about one hundred jobs.” Even in the *Metron* appeal decision, where the fine was increased from \$200,000 to \$750,000, consideration was placed on the “importance of a corporation to a community or its value as a source of supply or as an industry participant,” including whether the imposition of a fine would significantly affect the company’s employees. In addition, since both parties avoided trial by entering a guilty plea, the substantial costs associated with litigation saved were a mitigating factor in sentencing. Second, all case documents highlighted a lack of legal precedents to formulate “appropriate” decisions – despite the fact that the provisions under *Bill C-45* have been in force for nearly 10 years. In fact, as mentioned, *Pétroles Global* is the only prosecution against an incorporated entity for a fault-based offence, while *Transpavé* and *Metron* are the only two cases for negligence-related offences, in 10 years. Lastly, in all case documents, there was a significant regulatory influence on criminal proceedings. For instance, all criminal prosecutions were initiated by regulatory agency investigations in Ontario and Quebec (i.e., health and safety and anti-competition). In *Transpavé*, the company’s implementation of the regulatory agency’s report

into the death of the worker was a mitigating factor in sentencing. In *Metron, OHS* case laws were initially utilized as guidelines to limit the potential fine, and the regulatory conviction of the President was a mitigating factor in sentencing – even the appeal Justice mentioned that *OHS* guidelines can be considered (though it was deemed inappropriate to rely on it for criminal sentencing). In *Pétroles Global*, the regulatory investigation and criminal conviction of Payette for collusion in price fixing gasoline was instrumental in determining whether Payette as a General Manager was a senior officer of the company, which triggered its criminal liability.

In sum, this chapter first examined how a “Canadian-made” approach to corporate criminal liability was constructed in criminal law through *Bill C-45*. Second, this chapter examined how *Bill C-45* as codified corporate criminal liability operates as criminal law in action. Ultimately, in combination with the review of the black letter law of corporate criminal liability, the empirical insights gleaned from the rigorous and objective selection, coding, and summary of judicial cases provide a basis for analyzing the socio-legal environment of corporate criminal liability in Canadian criminal law.

Chapter 4

The Socio-Legal Environment of Corporate Criminal Liability

This chapter situates the Canadian construction and operation of corporate criminal liability in criminal law through three arguments: 1) The legal construction of the incorporated entity as a juristic person is privileged within legal, cultural, political, and economic institutions; 2) The ability of criminal law to be an effective mechanism of social control against corporate crime is diminished when corporate criminal liability is constituted through a privileged socio-legal environment for the incorporated entity; and 3) In order to achieve meaningful legal accountability for corporate crime, criminal law must balance a model of corporate criminal liability that does not negate individual liability for corporate agents, yet ultimately recognizes the complexities of the social, economic, and organizational structures and practices that shape corporate criminal activities. Overall, this chapter analyzes the socio-legal environment of corporate criminal liability in Canadian criminal law.

The Incorporated Entity: Constituting Social Privilege

The legal foundation of modern capitalism exists through several key institutions: property, inheritance, the contract, and the concept of the corporation or the incorporated entity (Swedberg 2003).⁶⁵ As discussed in Chapter 2, the incorporated entity is recognized as a separate legal personality in law, capable of owning property, forming contracts, and suing both natural and juristic persons. James Coleman (1982) argues that society, overall, is asymmetric between

⁶⁵ These institutions initially developed through medieval merchant law, which continues to form the legal basis of modern capitalism. Specifically, these coherent set of rules developed in the 11th and 12th century institutionalized several economic activities, such as patents and trademarks, bonds, mortgages, and even the economic corporation as a legal entity (see Swedberg 2003).

natural persons and these juristic persons, as juristic persons, particularly the modern corporation, exercise much more power than natural persons do. Marxist scholars have argued that law reflects the interests of elite members of society through both instrumentalism, where law acts on behalf of economic power as an instrument for a ruling class, and structuralism, where the institutions within the state reproduce class relations and class domination under capitalism (Brickey and Comack 1987; see also Spitzer 1983; Snider 1993). As this thesis has suggested, juristic persons possess special rights, advantages, and even immunities not available to natural persons. As such, the legal construction of the incorporated entity as a juristic person contributes, through its privileged position in legal, cultural, political, and economic institutions, to the asymmetry between legal persons.

Legal Privilege. A natural person does not require law for its existence, yet juristic persons require incorporation law, or corporate law, for every activity from birth to death. Various provisions of corporate law detail everything from the definition of the corporate form (the main organizing frame of the incorporated entity); the separate legal personality that possesses similar inalienable rights to natural persons; the fiduciary responsibilities to maximize profit; and the rules on bankruptcy and corporate takeovers that govern its demise. The construction of the incorporated entity in corporate law reveals two areas of privileged treatment: 1) the corporate form as the main organizing frame attains limited liability; and 2) the juristic person takes advantages of the narrow constitution of criminal law, especially in regards to criminal responsibility.

The corporate form gains enormous advantages from the privilege of limited liability, a provision that restricts the liability of owners and shareholders to the financial amounts invested in the corporation. As the cornerstone of the modern public corporate form, limited liability acts

as veil, privileging shareholders by limiting their personal liability to the financial equity capital they have invested in the corporation (Glasbeek 2002). If the corporation is sued civilly or prosecuted criminally, shareholders will not be liable in any way – even though shareholders appoint members as directors of the corporation to make decisions on their behalf. As Glasbeek (2007:263) argues, the incorporated entity is a legally constructed site of irresponsibility, as limited liability acts as a “crucible for deviant behaviour” by making it logical for corporate agents to take socially, environmentally, and economically harmful actions in the name of profit maximization.

Despite the rhetoric on upholding the notion of the rule of law within liberal democratic states, the construction of the incorporated entity as a separate legal personality also takes advantage of the strict constitution of *mens rea* within criminal law. As discussed in Chapter 2, the legal history of corporate criminal liability is the struggle by the state and legal scholars to align an individualistic construction of the criminal through *mens rea* with corporate crimes committed by the incorporate entity. As such, the incorporated entity benefits from conceptual controversies within a criminal justice system and a system of criminal law historically constituted for individuals. The notion of *mens rea* requires that an *individual* must possess the requisite guilty mind to be convicted for a crime. For juristic persons, this application of *mens rea* to the incorporated entity exposes an individualistic dilemma within criminal law. If a juristic person, say, a multi-national corporation, fails to uphold minimal standards of safety in the workplace and as a result negligently causes the death of a worker, these high standards of criminal liability for *individuals* must apply. The very existence of the distinct standards of corporate criminal liability (imputation, aggregation, and identification) as discussed in Chapter 2 attempt to overcome this dilemma by assigning liability to a juristic person through the actions of

a natural person. Indeed, most corporate criminal liability models in Western legal regimes do not place fault within the incorporated entity *itself* (as the “corporate culture” model rejected in the hearings formulating *Bill C-45* would have done). As the Westray tragedy demonstrated, criminal prosecutions against corporate misconduct often fail as a result of the legal complexities of assigning criminal liability to the company through the directing minds doctrine. In addition, the corporate structure of the offending company in Westray maximized these legal complexities during criminal prosecution, as the complicated structure of ownership made it difficult for the prosecution to identify the *individual* parties who bore direct responsibility for the tragedy. Post-Westray, *Bill C-45*, overall, is no better off than before, as these legal complexities assigning criminal liability to an incorporated entity still exist. Thus, the ambiguities produced in criminal law by applying an individualistic construction of *mens rea* to juristic persons makes it more difficult for the Crown to prosecute, convict, and obtain meaningful sentences.

Finally, the incorporated entity as a juristic person can avoid criminal prosecution for corporate crime due to the “bifurcated” nature of the regulatory system between administrative and criminal regulation (Tombs and Whyte 2007; Bittle 2012). Whether through administrative law, tort law, contract law, or criminal law, each regulatory regime attempts to discourage misconduct, yet the degree to which society grades wrongful behaviour differs between these regimes in term of compensation, symbolic impact, retribution, and/or specific and general deterrence (Glasbeek 2002; see also Pascal 2011). For instance, society grades motoring offences more seriously in a criminal context (e.g., negligence causing death) than in a civil law tort context (e.g., injured bicyclist who sues the driver), which influences whether criminal deterrence or compensation is sought, respectively (see also Bittle and Snider 2013). In addition, hegemonic cultural conceptions of crime and crime control occupy a significant role in determining which

regulatory system applies to natural and juristic persons (see below). Indeed, criminal regulation is supposed to be reserved for the most condemnable misconduct; thus, criminal law is supposed to stigmatize such actions and offer severe sanctions, including the ultimate sanction, the ability to remove or limit the freedoms of individuals. However, the legal complexities regarding the incorporated entity under criminal law do not incentivize the Crown or police to utilize criminal law with its high standard of proof. The most prominent types of corporate crime (i.e., environmental, health and safety, and financial-related) are increasingly being regulated through the administrative regulatory regime for seemingly criminal offences. With its lower standard of proof, less complex offences (i.e., strict and absolute liability), and the lack of criminal protections granted to an accused (i.e., legal rights of accused persons under the *Charter of Rights and Freedoms*), the administrative regulatory regime is seen as offering a more certain, faster system for prosecuting corporate crime. Despite the adherence to criminal equality in Canadian common law (“... a crime is a crime no matter who commits it”), this administrative regulatory overlap with criminal regulation grants special privilege to the incorporated entity as a juristic person, as opposed to natural persons, in avoiding criminal prosecution for corporate crime (Glasbeek 2002:120).

Cultural Privilege. The privileges of the incorporated entity are not restricted to the legal sphere. The incorporated entity, particularly the modern multi-national corporation, occupies a privileged position in Western culture. Individuals wear corporate brands on their clothing, computers, cars, and even daily coffees. However, this level of cultural privilege is not just restricted to corporate branding or the 24/7 saturation of corporate advertising, as the incorporated entity is privileged in how the dominant culture classifies deviance and crime. This has serious implications for the way government and non-government actors respond to corporate crime.

A broad culture of normativity exists that serves to dilute behaviour that in other contexts can be seen as deviant. This “consensus-producing machinery in society” reclassifies situations and individuals so their behaviour is considered legitimate (Brants 2007:315). Scientific, religious, and even legal discourses all contribute to the consensus-producing machinery in which *some* individual and collective actors negate their own responsibility. In the context of the corporate criminality borne by the incorporated entity, the consensus-producing machinery culturally normalizes corporate crimes, influencing how the state legally responds to “real” crime as the dominant culture defines it. In this sense, it is difficult not to overstate the role of culture in the constitution of the criminal. For instance, the media continually expose people to conventional street crime as opposed to corporate crime and the white-collar criminal. Through every cultural medium (i.e., television, newspapers, films, Internet, etc.), people are overexposed to a portrait of crime that is restricted to its stereotypical types (i.e., murder, robbery, rape) and the stereotypical offender (i.e., poor, lower class, racial minority) (Box 1983). Ultimately, state action, reflecting the dominant culture, extinguishes corporate crime from the “real” crime conversation. As Box (1983:16) argues,

Corporate crime is rendered invisible by its complex and sophisticated planning and execution, by non-existent or weak law enforcement and prosecution, and by lenient legal and social sanctions which fail to reaffirm or reinforce collective sentiments on moral boundaries.

Snider (2000; 2002) similarly argues how corporate crime has effectively disappeared through decriminalization, deregulation, and downsizing. As it stands, the cultural scripts of crime and the criminal, at least in Canadian society, minimize both corporate harms and the white-collar criminal from the crime conversation (Boyd, Chunn, and Menzies 2002; Bittle 2012). The state has enormous power and influence in defining crime and deviance through

criminal laws. However, the state is influenced by the same cultural scripts as individual citizens, so it also reflects the defining down of corporate deviance in both the corporate criminal law reform process (see Bittle 2012) and the content of corporate criminal liability (Garland 1996). In this sense, where the cultural scripts on crime and the political law and order agenda obsess about “all the street thugs, youth gangs, home invaders, illegal (im)migrants, pot growers and squeegee kids that our society can produce,” corporate deviance is effectively reclassified, or defined down, by the dominant culture (Menziez, Chunn, and Boyd 2001:13 cited in Bittle 2012). For environmental harm, these cultural scripts present the perspective of environmental degradation as occurring mainly in developing countries. However, as in occupational health and safety law, this cultural perspective is ideologically rooted in neoliberal and neoconservative beliefs that mask the significant environmental harms committed predominately through the incorporated entity in so-called industrialized developed countries (Boyd, Chunn, and Menziez 2002; see also Paehlke 1995). For occupational health and safety, Tombs and Whyte (2007) argue that the common perception of injuries and deaths in the workplace as accidents is culturally rooted in the popularity of the notion of the accident-prone worker. This cultural script on crime and deviance not only fuels victim blaming, but also omits these ‘accidents’ from hegemonic definitions of crime while diffusing corporate responsibility and ultimately criminal liability.

In effect, the cultural reclassification or defining down of environmental or health and safety-related harms shapes how the legal system ultimately responds to these corporate crimes. While criminal offences could be applied to these avenues of corporate crime, much of the regulatory burden is upheld through administrative regulation, as mentioned earlier. In Canada, for instance, environmental harm is federally regulated through Environment Canada and the *Canadian Environment Protection Act*, which contains mostly strict and absolute liability

offences, and health and safety is regulated through provincial bodies (e.g., the Ministry of Labour in Ontario through the *Occupational Health and Safety Act*). These agencies and models of regulation for corporate harm are based on a cooperative/compliance model instead of criminal deterrence. Overall, mainstream cultural notions of crime and deviance ensure that the state's crime control policies define down the incorporated entity's role in the facilitation of corporate crime, reflecting the general cultural reclassification of corporate deviance and harm. The result, as Glasbeek (2002:118) highlights, is that "... when corporate actors commit crimes they are rarely charged; if charged, they are rarely convicted; and if convicted, they are rarely punished severely."

Political Privilege. The incorporated entity exercises significant political power through its privileged relationship with the state. A brief history of regulation against commercial activities provides insights into the burgeoning relationship between the business sector and the state. One of the earliest forms of formal regulation to protect workers occurred in England during the 19th century when corporate crime threatened the social order of production and the *status quo* relationships between the ruling and the working classes. This began with the regulation of factory working conditions (Snider 1993; Carson 1994). From 1802 to the 21st century, additional laws regulating the conditions of work were initiated, debated, and sometimes passed. The original laws limited the hours of work in a day and mandated ventilation for factory workers. The development of these laws stemmed from social movements pressing for regulation, but there was also motivation to encourage regulation within the system itself (Carson 1994). Snider (1993:95) explores this in terms of the risk to the "very survival of the capitalist system." Working conditions were so abhorrent that the ruling class recognized the importance of reform namely in its own interests, since there was a legitimate threat that the working class would rebel

through riots and physical protest. At this time, workers were illiterate and did not possess any democratic suffrage in unions, instead using their bodies as weapons to demand change. While such laws were indeed enacted to respond (minimally) to the plight of the working class, enforcement of factory crimes struggled with the dominant ideological perspectives of the politicians who had to pass these regulations and their propertied business supporters. Most politicians at the time viewed capitalism as the engine of prosperity and the factory owners as nation builders and not criminals. As such, enforcement of factory crimes was nearly nonexistent during the 19th century (Carson 1994).

These insights on the special relationship between the business sector and the state are also reflected in the early Canadian experience of regulating corporate crime. For instance, there is overwhelming evidence that the business sector have exercised direct control over the nature and content of laws for its own interests (Snider 1993; see also Goff and Reasons 1978). A history of health and safety law and regulation in Canada exposes the influence of the business community on legislation. For instance, Snider (1993) documents one of the earliest forms of health and safety regulation, the 1884 *Ontario Factories Act*, which experienced significant resistance from the business community.⁶⁶ Despite the incremental improvements on working conditions, the state would only grant some of the protections workers sought – after the business community accepted these conditions for its own interests. In a similar respect, Snider (1993) also documents the influence of business interests on early anti-combines legislation. The 1889 *Anti-Combines Act* set to place limitations on corporate mergers that produced monopolies and reduced competition, attracting (initially) significant resistance from the business community.

⁶⁶ Businesses typically resist health and safety regulation on the grounds that they challenge the owner's rights to their employees and workplace; they challenge contract rights between owners and workers; and they add costs to production without any benefit to capital accumulation (Snider 2000).

Although such legislation that passed ultimately quelled the concerns of corporate elites who could not compete, it rarely displayed any effect on illegal competition and instead reinforced capitalist ideology by proclaiming the value of free enterprise and competition (Goff and Reasons 1978). This privileging of business over public interests in anti-combines legislation would continue through the 1900s to the Second World War. The Mackenzie King era, for example, witnessed policy changes that did not perceive the potentially harmful aspects of increasing mergers between companies. As such, King displayed a friendly attitude towards big business, while also encouraging arms-length policy towards corporate activities. Over this time, every consideration to make policy more effective over deviant business practices has exposed the special privileging given to the state-corporate relationship.

Overall, these historical insights expose the privileging of business interests in the state, a privileging that exists to this day. There are many ways in which governments privilege the positions and interests of the corporation to the extent that “we have to give [them] pretty much what they want” (Glasbeek 2002:233). For instance, there is a strong corporate network of think tanks, lobbyist, and influence peddlers that make sure governments are constantly aware of the positions and interests of the business sector. The implications for privileging this state-corporate relationship revolve around the manipulation, coercion, and obfuscation of public policy (Glasbeek 2002). In essence, the state’s increasing dependence on the corporate sector for jobs and investment compels governments to consult with businesses about whether or not regulation should be directed towards them and, if so, what the standards of regulation ought to be. In criminal law, the construction of *Bill C-45*, for instance, witnessed powerful legal actors testifying at Parliamentary hearings, providing a strong oppositional voice to proposals on corporate criminal liability and acting as a surrogate for corporate Canada – who *chose* not to

testify (see below). In itself, the privileging of this relationship makes administrative regulatory law more attractive to lawmakers than criminal law for corporate deviance. Even in the realm of anti-competition law, for instance, there is direct evidence of how powerful business interests shaped the drafting of anti-competition policies (see Glasbeek 2002:242; Day et al. 2004).

At the end of the day, the political privileges of the incorporated entity have ensured that criminal justice policy is effectively diluted. Corporate interests are complex and multi-faceted, however. Thus, some business in some contexts may, in fact, *support* corporate crime legislation, reflecting the historical patterns, as mentioned earlier, of businesses recognizing the importance of reform namely in their own interests (Khanna 2003). Most corporate criminal legislation typically imposes relatively low costs on companies and avoids certain legislative responses that could be potentially more effective (e.g., corporate culture model of corporate criminal liability). In this sense, corporate interests do not necessarily oppose all corporate crime legislation. Since governments are under pressure to address public concern after high-profile cases of corporate crime, corporations may position themselves as willing partners to legislative change especially if they think it will be ineffective. Overall, the state-corporate relationship reproduces the political privileges of the incorporated entity.

Economic Privilege. The incorporated entity has gained enormous economic privilege since the ascendancy of the neoliberal state. Neoliberalization can be interpreted as a political project designed to “re-establish the conditions for capital accumulation and to restore the power of economic elites” (Harvey 2007:19). In essence, neoliberalism offers a laissez-faire approach to economics that holds markets *ought* to operate freely without government interventionist policies (Turner 2008). In this sense, neoliberalism is rooted in the ideals of libertarianism (i.e., personal freedom), challenging the prominent state interventionist theories of Keynes (Harvey 2007).

Neoliberal proponents (e.g., Martin Friedman and the Chicago School of Economics) seek to destabilize the refuge given to Keynesian economics, which guided economic policy in all Western countries from the Great Depression in the 1930s to the 1970s. A more general neoliberal political economy developed during the economic crises of the 1970s that sought to destabilize institutional aspects of inflation. Several international agencies were established under these neoliberal doctrines. For instance, the International Monetary Fund, designed to restrict inflation, was crucial for the maintenance of markets and free trade, especially during these economic crises of the 1970s. In addition, the two major practical proponents of neoliberalism at the time, Ronald Reagan and Margaret Thatcher, perceived the power of trade unions, the welfare state, the regulation of market activity, taxation, and barriers to competition as institutional parasites for economic growth and prosperity (Turner 2008). The United States and the United Kingdom would lead the world in reducing the “red tape” within government management and intervention within the economy, giving more freedom to the market and to the value of free competition. In principle, they said, government intervention as a form of public policy is inherently inefficient relative to the free market. Where Keynesian policies as a form of collectivist economics brought the expansion of the state into the lives of its citizens through welfare programs, employment opportunities, and economic prosperity for the economically marginalized, neoliberal policies seek to guarantee individual freedoms through the institutionalization of strong individual property rights, the rule of law, and state institutions that ensure the free functioning of markets and free trade (Harvey 2007; Turner 2008). Overall, deregulation of economic activity, privatization of state-owned assets, and reduction of welfare programmes and supports mark the broader historical shift from Keynesian economics to neoliberal economics. Neoliberal economics continues to dominate the contemporary economic

landscape, including in Canada (Turner 2008; see Snider 2000; Bittle 2012; Bittle and Snider 2014 for the Canadian perspective).

The adoption of neoliberalism also has had enormous implications for crime – and especially corporate crime. Harvey (2007:79) argues that neoliberalism contains a “burgeoning disparity between the declared public aims of neoliberalism – the well-being of all – and its actual consequences – the restoration of class power.” As Harvey (2007:80) reminds us,

... the drive towards market freedoms and the commodification of everything can all too easily ... produce social incoherence. The destruction of forms of social solidarity ... leaves a gaping hole in the social order. It then becomes peculiarly difficult to combat anomie and control the resultant anti-social behaviours such as criminality ...

Where the adoption of neoliberal policies produces social incoherency (e.g., between classes or the environment), neoliberalism simultaneously argues for harsh law and order policies for “real” criminals while pushing for deregulation of corporate (mis)conduct. For white-collar or corporate criminals, governments negate their claim to be an effective provider of crime control in society. For instance, a responsabilization strategy seeks to decentralize state control upon corporate crime, instead relying on private agencies and individuals for cooperation/compliance (Snider 1990; Garland 1996). As mentioned earlier, defining defiance down is another strategy designed to decriminalize regulation that is too “costly” to the state. In the context of corporate crime, the economic costs of criminalizing corporate (mis)conduct are potentially too costly to an economy built upon neoliberal theories of regulation. These theories claim that government interventionist policies over-regulate economic activity, including through the inefficient traditional state institutions of crime control. However, it is also claimed that the goals of legal regulation and enforcement are better achieved through the “natural, invisible, disciplining hand of the market” (Tombs and Whyte 2007:158). Perhaps the most important implication for the regulation of crime

within neoliberalism is the disappearance of certain forms of crime. Corporate crime scholars (Snider 2000) and others (Box 1983) argue that the adoption of neoliberal doctrine on deregulation has caused corporate crime to be decriminalized and downsized, resulting in its disappearance from the public agenda. Neoliberal knowledge claims have legitimated the disappearance of corporate crime, such that “corporate crime was abolished because specialized knowledge claims which benefited dominant groups were believed, popularized and acted upon” (Snider 2000:180). Empirically, there is also evidence that the adoption of neoliberal theories of regulation has been disastrous for the lives of many marginalized citizens (see Snider 2004).

This ascendancy of neoliberalism in Western economic institutions has provided support for the globalization of capital that has allowed corporate capitalism to flourish. At its basic level, capitalism is defined as an economic system where the means of production are privately owned, and that all human beings strive to accumulate more wealth (Glasbeek 2002). As such, the incorporated entity as a legal construction is an enormously valuable tool for increasing the capacity to accumulate more wealth. As compared to an economic partnership, the incorporated entity provides a much stronger legal form for investors to limit the risk of their equity capital in an enterprise. The corporate form incentivizes the investor to not risk capital in a partnership but to invest in more enterprises. In this sense, the incorporated entity is a much more efficient tool for the accumulation of wealth than a partnership, which does not provide limited liability, operational cost-savings, or any financial obligations beyond the capital invested (Glasbeek 2002). Large multi-national corporations today control overwhelming amounts of resources as owned by private shareholders worldwide. In 1999, the three largest corporations (GM, Ford, and ExxonMobil) had more revenues than the national budgets of most nation states except for seven. The top six corporations in total also had more annual revenues than the combined national

budgets of 64 nations that contain over half of the world's population (Glasbeek 2002). Through this form, the incorporated entity is able to attract more investment, production, and distribution than an individual entrepreneur, making it a privileged asset for the accumulation of wealth (Barnett 1981). In this sense, the modern multi-national corporation, as a legal construction in corporate law, occupies a significant role within a modern neoliberalized economy, as governments, other businesses, and individuals are increasingly relying on the corporation under this form of capitalism for the continued accumulation of *more* wealth.

With the rise of neoliberalized economies, Pearce and Snider (1995b) note the external and internal pressures placed upon the nation state. Externally, the dominance of corporate capitalism in Western economics has fuelled the need to increase profits, leading the state to legitimize almost every avenue of profit generation (see Snider 2000). Internally, the state experiences pressures to create more jobs, lower high unemployment rates, and reduce “real” crime. This can be theoretically understood through the Marxist structuralist perspective as a balancing act between the need of a state for accumulation *versus* legitimation (Brickey and Comack 1987). In other words, the state must ensure it maintains and creates the conditions necessary for the growth of capital. However, it must also maintain and create the conditions of social harmony for non-elites. In this sense, these external and internal pressures challenge the neoliberal state to: 1) promote cooperation and compliance for corporate crimes and white-collar criminals in an effort to not stifle economic growth (Snider 1990; Bittle and Snider 2006) and 2) promote coercive deterrence for “real” crime in an effort to restore social harmony for the economically relevant classes. Overall, the incorporated entity gains enormous economic privilege as the dominant vehicle for achieving neoliberal doctrine within corporate capitalism.

Bill C-45 as Socio-Legal Phenomenon

The privileged socio-legal environment of the incorporated entity exerts enormous influence over the Canadian construction and operation of corporate criminal liability in criminal law. First, the construction of corporate criminal liability displayed evidence of this privileging throughout the legislative reform process of *Bill C-45* and, as a result, its technical content. Second, the operation of corporate criminal liability through judicial case documents appears to, in itself, display evidence of this privileged socio-legal environment for the incorporated entity.

The Construction of Corporate Criminal Liability. The development of *Bill C-45* as codified corporate criminal liability was first animated through legal discourses. Law, in this sense, functioned as capital “T” truth (Bittle and Snider 2006; Bittle 2012). That is, emphasis was placed in committee hearings on the established legal principles related to criminal liability, as there was clear reference in these hearings to the importance of retaining individual responsibility in relation to the traditional application of *mens rea*. This raised doubts about the viability of any paradigms of corporate criminal liability not constructed within an individualistic paradigm, such as the corporate culture model. Under criminal law traditions that prevailed over 100 years of Canadian jurisprudence, a corporate culture model is unorthodox. This raised concerns regarding the legal complexities of assigning *mens rea* to the incorporated entity itself for criminal offences under such a model, since this has traditionally required a culpable individual. This individualistic bias produced a particular image of corporate criminal liability in these hearings to committee members, such that an individual must first be found to possess the requisite guilty mind to impute liability to the incorporated entity. As such, the desire of these lawmakers in the committee hearings to retain law’s traditional application of *mens rea* limited the reform opinions under *Bill C-45* (Bittle 2012). This was revealed in the insistence from dominant legal voices that

the narrow constitution of criminal *mens rea* must be upheld since this application of *mens rea* to incorporated entities produces less legal complexities and does not violate already established legal principles.

Cultural discourses on crime and the criminal also shaped the development of *Bill C-45*. Throughout the reform process, attention was given to the cultural scripts that prevent corporations or corporate agents from being perceived as criminals (Bittle 2012). This required that harms committed by the corporation (i.e., occupational health and safety death or injury, environmental harm, etc.) could not be equated with actual or “real” crime. One perspective, once again raised by powerful legal voices in committee hearings, was that corporate crime is incredibly rare and so the introduction of certain corporate criminal liability legislation in criminal law (i.e., corporate culture model) is too extreme to regulate certain corporate (mis)conduct that ought to be (“naturally”) regulated through administrative means. In other words, these voices reflect the cultural privileges of the incorporated entity in terms of the constitution of the criminal, arguing that there is an unbridgeable *difference* between death as manslaughter in the streets and death as an accident in the workplace. In a context of negligence, neither situation requires the intent to cause the death of a person on the street or a worker in the factory. In fact, the only difference between these situations is the context of the incident, yet one is viewed as a crime and the other an accident. While *Bill C-45* would, indeed, pass as codified corporate criminal liability, this ideological perspective of crime that viewed incidents of corporate crime as not real crime but as accidents ultimately diluted the scope or reach of criminal law to regulate corporate activities.

Finally, neoliberal and corporate capitalist discourses reflecting the political privileges of the incorporated entity animated the development of *Bill C-45*. The reform process displayed

evidence of the state-corporate relationship through the strong oppositional voice to certain legislative proposals (i.e., the corporate culture model) in Parliamentary hearings. While corporate Canada was invited to attend Parliamentary hearings, they did not attend. Corporate Canada instead took advantage of its vast lobbying network to voice its positions or opinions on this matter of corporate criminal liability. Several corporate lawyers who represent numerous corporations (albeit not directly representing any particular corporate client during hearings) testified and provided this strong oppositional voice. It would be unusual and unorthodox for any legislative body to invite and solicit the positions or opinions of known or potential “street” criminals to public hearings on how to reform criminal law that will eventually apply to them, yet, in a sense, as Bittle (2012:121) describes it, corporations “entered through the back entrance.” There was also evidence during the reform process that politicians, some more than others, were deeply concerned about possible effects on corporate interests. As Bittle (2012) points out, legislative proposals and witness testimony were viewed through a corporate lens. Once again, it would be unusual for any legislative body to consider the “street” criminals’ perspective in examining legislative proposals. In essence, the state-corporate relationship enjoyed by the incorporated entity was active within the reform process. As Bittle and Snider (2006:489) suggest:

Parliament is asked to further the public good and the putative “needs” of the economic system. Protecting business interests by keeping changes in criminal liability within strict bounds is important to corporate capital and its political allies. Risk-taking economic activity is valorized by and central to capitalist economic systems. Restrictions defined as “extreme” by economic elites send the wrong sort of messages to national and international investors. They add to the costs of production, make it harder for business to compete in the vaunted global marketplace, and broadcast the message that Canada is not “open for business.” Politicians see jobs departing as businesses with the ability to regime-shop flee to cheaper locales.

Perhaps the most striking aspects of this reform process were the influence of neoliberal doctrine. For instance, there was discussion on responsabilizing workplace safety so workers, and indeed unions, would share responsibility for “accidents” in the workplace, which was debated in the reform process in terms of a joint or shared liability between workers/unions and owners/managers (Snider and Bittle 2006; Bittle 2012). In addition, there was particular concern with the *potential* impact of certain legislative proposals on the corporation, based on the strong influence of corporate capitalism (Bittle 2012). The potential of director chill, the spectre that those on corporate boards would be forced to resign if *Bill C-45* made their positions criminally liable, was repeatedly raised. There was even concern about the potential effects for the economy if corporations simply relocated as a result of strict laws. Overall, the legislative reform process of *Bill C-45*, a crucial stage in the construction of corporate criminal liability, displayed evidence of the legal, cultural, political, and economic privileges of the incorporated entity.

The Technical Content and Operation of Bill C-45. As a result, the technical content of *Bill C-45* as codified corporate criminal liability in Canadian criminal law appears to display evidence of the privileged socio-legal environment for the incorporated entity. As discussed in Chapter 3, an overall individualistic regime of corporate criminal liability is displayed within the negligence-related offence and fault-based offence provisions. In this sense, this most contemporary iteration of corporate criminal liability in Canadian criminal law still relies on identifying responsible *individuals* to attribute criminal liability to the incorporated entity, as opposed to using the corporation’s structure, goals, or policies to impute criminal fault (i.e., *mens rea*) for both negligence-related and fault-based offences. Although this corporate fault model was discussed during its reform process – government lawyers went so far as drafting a version of this model – *Bill C-45* privileges the technical authority of criminal law. In relation to the

individualistic bias within *mens rea* and the previous common law on corporate criminal liability (i.e., *Sault Ste. Marie*, *Canadian Dredge*, and *The Rhone*), *Bill C-45* relies heavily on the identification doctrine to impute criminal liability to incorporated entities as based on the criminal intent and acts of its senior officers and/or representatives. Second, these newly established criminal offences apply to “organizations,” defined as “any public body, body corporate, society, company, firm, partnership, union, municipality, or association of persons created for a common purpose that holds itself out to the public as an association of persons” (s. 2, *Criminal Code*), not just to the for-profit corporation. With the Westray tragedy acting as the main impetus for legislative reform, the inclusion of organizations speaks volumes to the level of political economic privilege given to the incorporated entity. However, as the government justifies it, “it is important to ensure that the same rules for attributing criminal liability apply to all forms of joint enterprises carried out by individuals, regardless of their structure” (Department of Justice 2013c:4). In addition, this validates the cultural privileges of the incorporated entity in terms of the continued reclassification or defining down of corporate misconduct in criminal law. As Glasbeek (2013:16) suggests, the provisions on organizations “tells the world that it is not the profit motive that causes wrongdoing ...” In this sense, *Bill C-45* does not address the profit motive inherent within capitalism and, as such, its privileged vehicle, the for-profit corporation, which is directly implicated within environmental, health and safety, and financial-related corporate misconduct.

Finally, the inclusion of a new sentencing regime for organizations also appears to reflect the privileged socio-legal environment for the incorporated entity. For instance, there is regulatory overlap in sentencing factor (f), which mitigates a criminal sentence if any regulatory penalty was imposed on the organization or one of its representatives for the same conduct. These

sentencing factors also mitigate a criminal sentence if an organization unilaterally penalized a representative(s) for their role(s) in the commission of the offence, if the organization gave restitution to the victim of the offence, and if the organization took measures to reduce its likelihood of committing another offence. Perhaps the most striking sentencing factor is that every sentence for an organizational offender must be considered in terms of its *potential* impact on the “economic viability of the organization and the continued employment of its employees.” It would be unusual for an individual offender causing the death of a pedestrian by drinking and driving to be given a lenient sentence if that sentence (incarceration or fine) could *potentially* strain the financial status of, or the social coherency within, the offender’s family. Ultimately, this sentencing factor ensures that even if an incorporated entity is charged and convicted, there is less of a chance that the sentence will be proportional with the damages and losses caused.

More than 10 years since the provisions of *Bill C-45* were proclaimed into force, the first striking evidence of its impact is how seldom it has been used. Despite an exhaustive search of cases that utilize the provisions established under *Bill C-45*, only 12 cases have been prosecuted using *Bill C-45*’s re-definition of corporate criminal liability. In particular, only eight individuals have been prosecuted under negligence-related offences, leading to two criminal convictions and six non-criminal outcomes. Only three organizations were prosecuted under negligence-related offences, resulting in two criminal convictions and one non-criminal outcome (see Chapter 3, Table 2). Further, only one prosecution has been registered against an organization for an offence other than negligence. In combination, these 12 cases represent 11 *Criminal Code* cases and 1 criminal case under the *Competition Act*. The inclusion of an anti-competition case was surprising since the other cases were all prosecuted under the *Criminal Code*. To explain it, we must look more carefully at the *Competition Act* itself.

Reflecting the political economic realities of a neoliberalized corporate capitalist state, the *Competition Act*, which regulates competition in Canada, was revised and reformulated in 1985 (see Day et al. 2009). Changes at this time included the decriminalization of most anti-competitive offences, which are now predominately civil offences under the Act. As it stands today, the *Competition Act* contains only two criminal offences: price-fixing and bid rigging.⁶⁷ The one criminal anti-competition case under *Bill C-45, Pétroles Global*, is based on clear evidence of energy price manipulation by one of its senior officers, so it seems a logical tactic for the Crown to pursue in terms of expressing moral condemnation through criminal law.

However, the fact that a criminal anti-competition case used a provision taken from *Bill C-45* raises the question of how *Criminal Code* provisions apply to prosecutions under different statutes. According to the *Interpretation Act*, which regulates the rules governing federal consolidated statutes, the *Criminal Code* governs any indictable or summary criminal offence created by a federal statute.⁶⁸ In other words, since the *Competition Act* contains criminal provisions (price-fixing and bid rigging), the Crown must utilize criminal liability rules established under the *Criminal Code* if it prosecutes an organization for the criminal actions of its employees. *Pétroles Global* was charged with conspiring to fix prices under the *Competition Act*,

⁶⁷ *Competition Act* R.S.C., 1985, c. C-34, s. 45 and s. 47.

⁶⁸ *Interpretation Act* R.S.C., 1985, c. I-21

34. (1) Where an enactment creates an offence,
- (a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
 - (b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; ...
- (2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

which is a “true” criminal offence,⁶⁹ so the applicable *Criminal Code* provisions, as introduced in *Bill C-45*, must be utilized. Criminal offences in general are constructed in the language of individuals, so the provisions from *Bill C-45* allow these individuals involved in the conspiracy to impute liability to the incorporated entity, as regulated by the *Interpretation Act*. Therefore, any federal statute that contains criminal offences can theoretically apply to an incorporated entity for that offence if the “senior officer” or a “representative” is a party to a negligence or fault-based offence (s. 22.1 or 22.2).

While this explains the one criminal prosecution under the *Competition Act*, it raises even more questions about this lackluster enforcement record, if the provisions of *Bill C-45* can apply to *Criminal Code* offences, criminal *Competition Act* offences, and even criminal environmental offences under the *Canadian Environmental Protection Act*. As such, the lack of any “true” crime prosecutions against corporations for the environmental harms caused by their employees, as well as the minimal criminal prosecutorial activity for health and safety offences under *Bill C-45*, would appear to suggest there are serious disincentives to the criminal prosecution of an incorporated entity. Despite the existence of these tools to criminally prosecute, as per *Bill C-45* and the *Interpretation Act*, and given that these areas are also regulated through provincial administrative regimes, the Crowns are clearly tempted to use the quicker, less expensive administrative regulatory system for these corporate crimes, reserving their limited resources to pursue what is seen as “real” crime. For instance, administrative regulatory regimes often employ strict or absolute liability offences for environmental violations and health and safety harms.

⁶⁹ The *Criminal Code* provides the rules on how to attribute criminal liability to an incorporated entity for “true” criminal offences, which requires *mens rea* and *actus reus* (see Table 1). As such, the offences under *Bill C-45* are in this criminal categorization – and not strict or absolute liability offences. The *Competition Act* does not stipulate its criminal provisions are strict or absolute liability offences, so it requires the rules established in the *Criminal Code* to criminally prosecute an organization for the actions of its employees.

These offences do not require proving the guilty mind of an individual to impute criminal liability to the incorporated entity, as the guilty act is all that is expected to obtain a conviction. This regime also avoids the high standard of proof in criminal law (i.e., guilty beyond a reasonable doubt). As discussed above, this system of criminal law makes the Crown less inclined to lay criminal charges against corporations. Glasbeek (2013) and Bittle (2012) even point out that this “bifurcated” criminal justice system incentivizes the Crown to utilize *Bill C-45* as a symbolic tool to secure regulatory guilty pleas and avoid the legal complexities of criminal proceedings.

In addition, the judicial case documents appear to display in themselves evidence of the privileged socio-legal environment for the incorporated entity. First, there was significant regulatory overlap within these criminal proceedings. The criminal cases against *Transpavé*, *Metron*, and *Pétroles Global* were all initiated through regulatory investigations in Ontario and Quebec. In *Transpavé*, the company complied fully with the recommendations of the provincial regulatory report, spending half a million dollars to implement the report’s safety recommendations. Further, since neither the company nor any of its employees were charged or convicted of a regulatory offence in this matter, all of these aspects were utilized as mitigating factors during sentencing. In *Metron*, the President and sole Director of the company pled guilty to regulatory violations arising from the incident, which was considered a mitigating factor during sentencing and, as such, the penalty was reduced. In addition, *Metron* utilized Ontario’s occupational health and safety case law, which are regulatory decisions, to determine the sentencing guidelines for a criminal conviction. This was initially used as a guideline to limit the potential fine during sentencing. In *Pétroles Global*, a regulatory investigation into complaints of price-fixing led to the criminal conviction of a senior officer of the company. As a result, this criminal conviction was instrumental in determining whether this individual’s role within the

company was important for the management of the operations that were under criminal investigation; if they were, the company could be charged with a criminal offence. In other words, this senior officer could be said to have the requisite “guilty mind” to impute criminal liability to the incorporated entity. The regulatory overlap seemingly acts as a barrier for the criminal prosecution of owners or organizations for corporate misconduct. For instance, the Crown in British Columbia has just announced that as a result of “flaws” in a regulatory investigation, criminal charges will not proceed against the operators of a sawmill explosion that killed two and injured 24 people. The Crown on April 14th 2014 cited the lack of “direct evidence on how much Lakeland Mills directors and management knew about sawdust conditions at the mill, and the risks of an explosion” (CBC News 2014).

Beyond the regulatory advantages for the incorporated entity in avoiding criminal prosecution, the legal complexities of prosecuting organizations for the actions of its employees were clear throughout the case data. In *Pétroles Global*, it took a preliminary hearing and a full trial simply to determine that the criminal actions of a senior officer could impute criminal liability to the company. In these cases where a company under criminal prosecution digs in its heels, the scope of inquiry becomes enormous – and expensive. *Pétroles Global* required Justice Toth to conduct an entire legal history of the common law of corporate criminal liability, a review of legislative changes, and a detailed review of the operational structure of the company, including the roles and responsibilities of the employees under investigation. This entire process only resulted in a determination that this particular individual fit the definition of a senior officer as defined by the *Criminal Code* provisions established under *Bill C-45*. In addition, the high standard of proof in criminal proceedings also appears to grant advantages to the incorporated entity. Despite Transpavé and Metron pleading guilty, and thus avoiding the necessity for the

Crown to prove guilt, the difficulties encountered in balancing criminal law's high standard of proof were clear in the case data. In *Metron*, for instance, evidence was filed demonstrating that the company attempted to convert or conceal its assets to avoid its liability. The President and sole Director of Metron was also the President and sole Director of another company. The websites of both these companies appeared identical. As such, the Crown argued that while Metron was in a difficult financial position, this other company was a viable business. Justice Bigelow rejected this evidence on the basis that it had "fallen well short of establishing beyond a reasonable doubt any attempt to hide or convert assets." As a result of the financial difficulties of Metron, Bigelow would limit the penalty to a fine the company could reasonably pay.

There also appears to be evidence of the cultural privileges of the incorporated entity within the case data. Especially in *Transpavé* and *Metron*, cases dealing with death in the workplace, there was a rather striking reliance on the language of accidents (Tombs and Whyte 2007). In *Transpavé*, Justice Chevalier on numerous occasions referenced the death of Mr. L'Ecuyer as an accident: "The owners were also very much affected by this accident" and "[the company] spent hundreds of thousands of dollars to make sure that such a tragic accident does not happen again." In *Metron*, there was not as much of a display of this cultural language, except for Metron's legal counsel who argued that the "real responsibility for the accident lay with the faulty construction of the swing stage for which Metron was not responsible ...". In terms of sentencing, both cases imposed relatively low sentences for the deaths of workers, ranging from fines of \$100,000 to \$750,000. In addition, although *Bill C-45* made it possible for judges to impose probationary conditions upon an organization, this option was never utilized. Cultural scripts are indeed apparent within these judicial case documents.

Finally, perhaps the strongest evidence comes from the political economic privileges of incorporated entities found in the case data. These three cases are prosecutions against relatively small private companies with no public shareholders. *Transpavé* is described by Justice Chevalier as a “family-run business.” As a small construction contractor, *Metron* employed contractors for its constructions projects and had only two permanent clerical staff. *Pétroles Global*, compared to multi-national oil suppliers, produced minuscule revenue and had minimal market share within the larger energy market. Despite its corporate form, only one individual ran the network under investigation. Politically, the prosecution of these relatively small companies does not risk damaging the state-corporate relationship. In particular, there is little to no risk of jeopardizing financial contributions and support from more powerful corporations to dominant political actors. The case data also appear to display rather striking economic influences. In terms of sentencing, both *Transpavé* and *Metron* had their sentences reduced or limited as a result of the sentencing factor established in *Bill C-45* that requires an assessment of the potential impact a sentence may have on the economic viability of the organization. In both *Transpavé* and *Metron*, there is clear emphasis on protecting economic interests (i.e., financial viability of the company and the maintenance of jobs) when sentencing these organizations. Reflecting the economic realities of corporate capitalism within a neoliberal state, the prosecution of these small companies and the codification and utilization of a legal provision requiring the assessment of the *potential* impact a sentence may have on an organization are meant to ensure that law enforcement of corporate offences poses no risk of damaging the economy of a particular region or province. Overall, as the construction and operation of corporate criminal liability in criminal law demonstrates, enforcing corporate crime is negated when corporate criminal liability is constituted through a

privileged socio-legal environment for the incorporated entity. Thus, finally, this chapter questions how criminal law can achieve meaningful corporate criminal liability.

Criminal Justice Policy Alternatives

In order to achieve meaningful legal accountability for corporate crime, a paradigm-shifting perspective on the constitution of corporate criminal liability in criminal law is required. Alternatives to current criminal justice policy can garner valuable insights from the sociological studies of corporate crime. In the context of corporate criminal liability, it is useful to consider the distinction between the agency model and the structure model of corporate criminal liability. These two schools of thought produce different perspectives and recommendations on policy alternatives. For instance, as discussed in Chapter 2, the diversity of corporate crime causality reflects this distinction between agency and structure. First, traditional causes of crime rely on the individualistic paradigm. Corporate crime scholarship has examined this through the micro or psychological explanations in which fault is placed within individuals at the centre of corporate crime (Snider 1993). Criminal law and *mens rea* fits well within the agency model, as fault for corporate crime is placed within the guilty mind of the individuals who, through their actions, impute criminal liability to the corporation. However, especially within scholarship on corporate crime, the organizational and macro factors occupy a significant role in understanding and analyzing corporate crime. Corporate crime scholarship has examined corporate goals, corporate structures, and the larger organizational environment in which corporations operate. In combination with the macro perspective, which examines dominant social and cultural value systems, these structural aspects demonstrate how an organization encourages or inhibits individuals from engaging in corporate criminal activities within a social and cultural capitalist system that valorizes profit maximization. As a result, these structural explanations of corporate

crime provide a stronger exposition of the complexities of the social, economic, and organizational structures and practices that shape corporate criminal activities. As such, it is not simply the individual possessing individual criminality in a corporate setting. However, as this thesis has shown, criminal law places enormous emphasis on an individual's *mens rea* without a determination of the role played by the organizational context. Thus, given the enforcement failures of *Bill C-45* under this agency model of corporate criminal liability, criminal justice policy should examine how these valuable insights from the sociological studies of corporate crime can be utilized in criminal law.

In this respect, criminal law must undergo a paradigm shift with respect to the constitution of corporate criminal liability. Bucy (1990) provides a model of corporate criminal liability that does exactly this. In her corporate ethos model, individual *mens rea* is abandoned for corporate *mens rea*. The model not only assumes that each incorporated entity possesses a distinct and identifiable ethos but that the incorporated entity, as a legal personality, has an ethos or identity outside of the individuals within the organization. As a paradigm-shifting model of corporate criminal liability, the corporate ethos, as opposed to corporate culture or a corporate personality, becomes the test to identify and prove corporate intent (i.e., *mens rea*). Under this standard, a criminal conviction against an incorporated entity would require the Crown to prove that the corporate ethos encouraged corporate agents within the organization to commit a criminal act. As such, it contains four elements that must be proven beyond a reasonable doubt: (1) the existence of a corporate ethos (2) that encourages (3) criminal conduct (4) by agents of the corporation (Bucy 1990). While this task may seem daunting, compared to an individual standard of corporate criminal liability, this model allows an investigator to utilize the corporate ethos that encouraged criminal conduct as the main focus of attention, as opposed to strictly the individual

(i.e., senior officer or representative), to determine criminal liability. Evidence can first be gathered from the internal structure of the organization. Its corporate hierarchy, for instance, can be examined to determine the nature of the supervision between management and employees. The investigator can also examine the organizational goals to determine whether illegal conduct was required to achieve these goals. In addition, evidence can be gathered from the organization's commitment to educating and monitoring employees (Bucy 1990).

There are several advantages to adopting this standard of corporate criminal liability. Due to the legal privileges of the incorporated entity, in which regulatory overlap often dilutes criminal prosecutions, the corporate ethos standard reinforces the need for criminal law and criminal prosecutions by providing a method to identify and prove corporate intent through its agents. As such, this method is practical and completely capable of being adopted within the legal confines of criminal law tradition. As opposed to an individual standard of corporate criminal liability, the corporation's hierarchy, goals and policies, previous treatment of prior offenses, and effort to educate and motivate their employees to comply with the law are workable avenues for investigating corporate crime. In particular, this model encourages responsible corporate behaviour through this encouragement of internal control mechanisms. In addition, this model does not take away from the ability of criminal law to target an individual's role within the facilitation of corporate crime. In a sense, this model serves to balance a separate obligation for individual criminal liability. Finally, as Bucy reminds us, this model relies heavily on corporate crime scholarship, using its insights to encourage a new way at achieving legal accountability by emphasizing internal controls within the incorporated entity (see Braithwaite 1989).

As a paradigm-shifting standard of corporate criminal liability, there are considerable challenges to instituting this alternative model as criminal justice policy. As demonstrated above,

there exists a privileged socio-legal environment in which the incorporated entity enjoys legal, cultural, political, and economic benefits not granted to natural persons. In other words, there are considerable legal, cultural, political, and economic barriers to reform. As such, this raises the question of how meaningful corporate criminal liability can be negotiated when the bodies that will be affected are both powerful and privileged. First, it is perhaps taken for granted that a mechanism of legal accountability for corporate crime exists, as it does in virtually all developed countries. Granted, its deficiencies are extensive, yet the existence of corporate criminal liability in criminal law in itself suggests these barriers are not impermeable or static. If we view the Canadian state as acting as both an organizer and buffer in maintaining the conditions necessary for both capital accumulation and social harmony, hope for policy alternatives rests in the ability of the state to implement changes to restore social harmony. Historically, changes in corporate criminal liability have often been in response to egregious incidents of corporate crime. In a sense, there exists a *catch 22* with regard to corporate criminal liability: legislation that is more effective is required to target the most egregious incidents of corporate crime, yet another egregious incident of corporate crime is required to obtain legislation that is more effective. Ultimately, another incident of egregious corporate crime that attracts significant public criticism will occur that will force the state to address this public outrage, perhaps question the existing constitution of corporate criminal liability in criminal law, and ask whether it is an effective means of mitigating these harms against the public. When this happens there really is no option left in terms of expanding or improving corporate criminal liability within the existing individualistic paradigm.

While the legal history of corporate criminal liability has demonstrated an incremental expansion of corporate criminal liability, the individualistic paradigm, at least in Canadian

criminal law as codified in *Bill C-45*, has been exhausted. The identification standard can only go so far up the corporate ladder in which it may contribute to even more legal complexities within the strict confines of *mens rea*. These complexities lie in the identification of responsible individuals. The realities of decision-making in modern organizations, especially in a geographically diverse country like Canada, are that responsibility for day-to-day operations is often diffused. The higher liability goes up the corporate ladder, the less likely the truly responsible individuals will be found and the more difficult cases will become attempting to prove that those at the higher echelons of the corporation knew or ought to have reasonably known that criminality was occurring. Of course, while those at the higher echelons of a corporation rarely, if ever, get their hands dirty, it is their collective decision-making that may create criminogenic conditions, hence the need for a corporate fault model of corporate criminal liability. Despite the privileged socio-legal environment for the incorporated entity that presently exists, the state must respond to the next egregious incident of corporate crime to maintain the social harmony on which capitalism depends. The public, by questioning the failures of the current construction and operation of corporate criminal liability in criminal law, will once again push for change. Thus, rather crudely, a paradigm-shifting standard of corporate criminal liability will truly be the only game in town for satisfying public criticism for more effective legal accountability.

Summary

This chapter has explored and analyzed the socio-legal environment of corporate criminal liability in Canadian criminal law. In doing so, it has argued that the legal construction of the incorporated entity as a juristic person is privileged within legal, cultural, political, and economic institutions. In addition, it showed that the ability of criminal law to be an effective mechanism of

social control against corporate crime is diminished when corporate criminal liability is constituted through a privileged socio-legal environment for the incorporated entity. This chapter concluded that as a result of the failures of the current constitution of corporate criminal liability, meaningful legal accountability for corporate crimes could be accomplished in criminal law through a model of corporate criminal liability that recognizes the complexities of the social, economic, and organizational structures and practices that shape corporate criminal activities while balancing a separate obligation for individual liability of corporate agents.

Chapter 5

Conclusion

Corporate Criminal Liability in Canada: *All Bark and No Bite*

This thesis has explored corporate criminal liability in criminal law as a mechanism of social control for corporate crime. Scholarship on corporate crime has consistently reaffirmed the overwhelming financial and human costs of crime committed through the incorporated entity. The hyper-globalized context of the 21st century has fostered the disappearance of many laws and regulations against corporate crime, which implicates how law responds to incidents of corporate crime. This thesis has examined these implications in terms of corporate criminal liability that acts as a legal mechanism for the social control of corporate crime. Much controversy and debate surrounds this issue, and two major schools of thought currently infuse the debate on how corporate criminal liability should control corporate crime. The first is the *agency model* in which emphasis is placed on the rational actions of individuals as corporate agents in terms of facilitating corporate activities, both legal and illegal. The second is the *structure model* in which emphasis is placed on the social, economic, and organizational environments in terms of shaping corporate criminal activities. This thesis has aimed to invigorate these debates and controversies within the sociology of corporate crime.

In particular, the thesis has prioritized the need to provide systematic empirical research within the sociology of corporate crime. Emphasizing *Bill C-45* as codified corporate criminal liability and as criminal law in action required an examination of both the black letter law of corporate criminal liability and the judicial case documents on prosecutions against incorporated entities for corporate crime. In so doing, this thesis has aimed to utilize these empirical insights to

not only contribute to the debates and controversies within the sociology of corporate crime but also to provide an empirical foundation on which to fashion coherent and effective policy and leave a lasting reform.

Underlying this thesis is the assumption that law occupies a significant role within the social control of crime – and law ought to occupy a role in controlling corporate crime. While this thesis has demonstrated the failures of *Bill C-45* as both codified corporate criminal liability and criminal law in action, this should not take away from the value empirical socio-legal insights can provide for alternative criminal justice policies.

Overall, it should be clear that large institutional barriers to mitigating corporate crime remain. Criminal law contributes enormously to the accountability problems of contemporary corporate criminal liability, but significant prosecutorial barriers exist as well. As it stands, this thesis has attempted to show how prosecutors in Canada have used their legal tools to prosecute incorporated entities for the criminal activities of their agents, as per *Bill C-45* and the *Interpretation Act*, yet the criminal enforcement record remains inadequate. As such, more research is required on the legal consciousness of prosecutors concerning corporate crime and corporate criminal liability. Survey research or interviews would be optimal to gauge, say, the professional knowledge and opinions of prosecutors dealing with cases of corporate crime. In an ideal situation, observational research would provide excellent data on how prosecutors decide whether to prosecute cases of corporate crime, especially within a bifurcated criminal justice system. This type of study would have the potential to expose the influence of larger socio-legal factors within the legal bureaucracy.

To conclude, as a result of the legal, cultural, political, and economic privileges of the incorporated entity, corporate criminal liability is a product of a socio-legal environment that

inhibits the ability of criminal law to be an effective mechanism of social control for corporate crime. Only when corporate criminal liability recognizes the complexities of the social, economic, and organizational structures and practices that are shaping corporate criminal activities can it become an effective mechanism for regulating the most harmful corporate misconduct. Otherwise, as this thesis demonstrates, corporate criminal liability will continue to be *all bark and no bite*.

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Appendix A

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c. 21

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City of Sault Ste. Marie v. Her Majesty The Queen [1978] 2 S.C.R. 1299

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