

To What Types of Offences Should the *Criminal Code* Rules on Organizational Criminal Liability Apply?: A Comment on 9147-0732 *Québec Inc c Directeur Des Poursuites Criminelles et Pénales*

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

In 9147-0732 *Québec inc c Directeur des poursuites criminelles et pénales*¹ the majority of the Québec Court of Appeal² held that the provisions of the *Criminal Code*³ relating to the attribution of mental states to organizational offenders⁴ applied to a prosecution under Québec's *Building Act*.⁵ Even more problematically, none of the members of the Court discussed this conclusion in any detail, nor do they provide any statutory or common-law basis for this conclusion. In this contribution, I will discuss why this conclusion (seemingly assumed by the majority of the Court of Appeal) is worrisome, at least without significant justification by the Court. This is particularly so where recent jurisprudence from the Supreme Court

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¹ 2019 QCCA 373 [9147].

² To be clear, the dissenting judge (Justice Chamberland) considers solely whether a juristic person (in this case, a corporation) can access section 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], either directly (because a juristic person is protected by the *Charter* against cruel and unusual punishment) or through the indirect protection offered by the application of *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*]. On both alternatives, Justice Chamberland answers in the negative. In other words, Justice Chamberland finds no constitutional violation. He does not consider the broader issue of the source of criminal liability for the appellant.

³ *Criminal Code*, RSC 1985, c C46 [*Criminal Code*].

⁴ *Ibid*, ss 22.1, 22.2.

⁵ *La Loi sur le bâtiment*, RLRQ, c B-1.1 [*Building Act*].

of Canada would seem to suggest that the adoption of the *Criminal Code* standard should not be permitted in the civil-law context.⁶

In 9147, at trial, a statutory minimum fine of \$30,843 was imposed upon the defendant corporation for a violation of section 197.1 of Québec's *Building Act*. The defendant claimed that the statutory minimum fine provided for under the section was cruel and unusual punishment.⁷ Based at least in part on the *Criminal Code*,⁸ the majority held that juristic persons could seek the protection of section 12 of the *Charter*.

It is not entirely clear from the judgment whether, on the facts of the case, the fine would cause the particular defendant to go bankrupt or not. However, it is clear that the argument was that the bankruptcy of an organization would be a cruel and unusual result of a criminal fine, thereby (according to the majority, at least) potentially engaging section 12 of the *Charter*.

Section 197.1 of the *Building Act* reads as follows:

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

To be clear, in this contribution, I will not be tackling the other issues that confronted the Court of Appeal. The first of these is whether or not section 12 of the *Canadian Charter of Rights and Freedoms*⁹ can apply to organizations.¹⁰ The second of these is, assuming that section 12 applies, whether or not the application of a statutory mandatory minimum fine

⁶ The Court gives both English and French versions of all statutory and constitutional language used by it. When it does so, I will use the English version. I recognize that the French version is actually the authoritative version of Québec statutes and that both English and French versions of federal legislation (including the *Criminal Code*, *supra* note 3) are equally authoritative. Nonetheless, it is worth noting that nowhere in the judgment of the Court of Appeal was there any suggestion that any linguistic difference between the French and English versions of any case cited or any statute referred to would make even the slightest difference to the outcome of the case.

⁷ See 9147, *supra* note 1 at para 9, *per* Justice Chamberland, dissenting, but not on this point.

⁸ *Supra* note 3.

⁹ *Charter*, *supra* note 2.

¹⁰ 9147, *supra* note 1 at paras 44–82 (*per* Justice Chamberland, dissenting). See also 9147, *supra* note 1 at paras 104–28 (*per* Justice Bélanger, for the majority).

could constitute "cruel and unusual punishment" within the meaning of section 12, particularly where the fine could or will cause an insolvency of the organization.¹¹

My sole concern in this first contribution is whether or not the statutory rules with respect to the criminal liability of organizations provided for under sections 22.1 and 22.2 of the *Criminal Code*¹² should automatically apply to quasi-criminal offences created under provincial statutes.

In my view, the assumption that *Criminal Code* standards will and should apply to provincial offences is highly questionable. Admittedly, I have argued elsewhere that the harmonization of common-law standards with their statutory counterparts would have its advantages.¹³ Developments in the law subsequent to my earlier writing make it unlikely that harmonization is still possible.

Part I below lays out some of the important differences between the common law on this subject, on the one hand, and the statute on the other. Given that the province validly created the offence, the federal government cannot dictate the rules that apply to how the offence is to be proven against an organizational offender, as a matter of the division of legislative powers (Part II.A.). The provincial legislatures could incorporate the federal standards by reference. However, the wording of the provincial statute that would apply in 9147 does not incorporate this part of the *Criminal Code* (Part II.B.). Nonetheless, subsequent jurisprudence from the Supreme Court of would seem to be a significant barrier to the way that the Québec Court of Appeal implicitly treats the statutory standards in 9147 (Part II.C.). The judgment of the Québec Court of Appeal has been appealed to the Supreme Court of Canada. Unfortunately, there is little direct reference to this issue in the written advocacy before the court of last resort in this country (Part II.D.). This lack of attention could create serious problems for judges who may be asked in the future to apply the *Criminal Code* provisions to offences outside of the *Criminal Code* context.

¹¹ *Ibid* at paras 129–34 (*per* Justice Bélanger, for the majority). As mentioned above, since Justice Chamberland, dissenting, found no constitutional violation, there was no reason to discuss the effect of insolvency.

¹² *Supra* note 3, ss 22.1 and 22.2.

¹³ Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 *Alta L Rev* 171 [MacPherson, "The Civil and Criminal Applications of the Identification Doctrine"].

I. THE DIFFERENCES BETWEEN THE COMMON-LAW STANDARDS AND THE STATUTORY STANDARDS

A. Introduction

Any time that one is dealing with a provision which purports to hold a person liable for activity that government wishes to discourage, there is always a question as to whether or not organizational actors (corporations, partnerships, and others) can be held liable for this same activity. Corporations and other organizational actors have no "hands" with which to commit the actual activity (the *actus reus*), nor anything genuinely equivalent to a human "mind" with which to form the intent or other guilty state of mind that often is required to accompany the prohibited act (the *mens rea*). Therefore, the question often comes down to how the law will "attribute" to the organizational actor these basic characteristics so that the offence can at least potentially be applied to the organizational actor, often in addition to the human being who performed the *actus reus* with the requisite *mens rea*.

Prior to 2003, the attribution of mental states to corporations and other organizational actors was determined by the common law. These common-law standards were expounded upon in a number of cases including, but not limited to, *R v Canadian Dredge & Dock Co. Ltd.*¹⁴ and others.¹⁵

In 2003, Parliament amended the *Criminal Code*¹⁶ to alter the rules by which attribution was to occur. The changes were accomplished by either amendment and/or the addition of specific provisions to the *Criminal Code*.¹⁷ As should become obvious below, in my view, given that this is an amendment to the *Criminal Code*, for a number of reasons, these rules

¹⁴ [1985] 1 SCR 662, 19 DLR (4th) 314 [*Canadian Dredge*].

¹⁵ *R v Church of Scientology of Toronto* (1997), 33 OR (3d) 65, 99 OAC 321, (CA), per Justice Rosenberg, for the Court. An application for extension of time granted and application for leave to appeal to the Supreme Court of Canada was dismissed on April 9, 1998 (Chief Justice Lamer and Justices McLachlin, as she then was, and Iacobucci). See also *R v CIP Inc*, [1992] 1 SCR 843 [*CIP Inc*], per Justice Stevenson, for the Court. The Court applied the common-law rules to a prosecution of a *mens rea* offence under the auspices of the *Occupational Health and Safety Act*, RSO 1980, c 321.

¹⁶ *Supra* note 3.

¹⁷ See *An Act to Amend the Criminal Code (criminal liability of organizations)*, SC 2003, c 21 [Bill C-45].

should only apply with respect to offences requiring *mens rea*¹⁸ which are found in the *Criminal Code* itself.

B. The Common Law

Originally, this question of "corporate criminal liability" was left for the courts to decide. While there certainly were some earlier cases in the lower courts,¹⁹ the Supreme Court of Canada gave the first judgment in which it focused on this issue of the attribution of criminal behaviour to a corporation in only 1985.²⁰ The Court, writing through Justice Estey, held that it was possible for a corporation to be criminally liable for a *mens rea* offence under the *Criminal Code*.²¹ Drawing on earlier English jurisprudence²² from the civil context,²³ Justice Estey held that the concept of a "directing mind" would be used to describe a person whose *actus reus* and *mens rea* could be attributed to the corporation. In essence, a directing mind was a high-ranking official of the corporation who had the capacity to set policy for the corporation. This was to be distinguished from those individuals whose rights and obligations were to carry out the policy set by others.²⁴ The latter group of corporate agents may render the corporation

¹⁸ For the purposes of this contribution, I intend for the term "*mens rea*" to cover both subjective (intention, knowledge, recklessness, and willful blindness) and objective (criminal negligence) elements of mental fault. I nonetheless recognize that technically, criminal negligence is often considered separate from *mens rea* (a guilty mind). However, since it is quite clear that the amendments to the *Criminal Code*, *supra* note 3 are concerned with offences where the prosecution must prove either subjective or objective elements of mental fault, I am using the term "*mens rea*" as a shorthand to cover both of these.

¹⁹ See e.g. *R v Fane Robinson Ltd*, [1941] 3 DLR 409, 2 WWR 235, *per* Justice Ford, for the majority; *R v JJ Beamish Construction Co Ltd*, [1966] 2 OR 867, 59 DLR (2d) 6, *per* Justice Jessup, as he then was; *R v St Lawrence Corp*, [1969] 2 OR 305, 5 DLR (3d) 263, *per* Justice Schroeder, for the Court; *R v Parker Car Wash Systems Ltd* (1977), 35 CCC (2d) 37, *per* Justice Hughes; *R v PG Marketplace Ltd* (1979), 51 CCC (2d) 185, *per* Chief Justice Nemetz, for the majority.

²⁰ *Canadian Dredge*, *supra* note 14.

²¹ *Supra* note 3.

²² See e.g. *Lennard's Carrying Co v Asiatic Petroleum Co*, [1915] AC 705 at 713, [1915] 3 WLUK 17 aff'g [1914] 1 KB 419, [1913] 7 WLUK 126; *Tesco Supermarkets Ltd v Natrass*, [1972] AC 153, [1971] 2 WLR 1166, *per* Lord Reid.

²³ When I refer to the "civil context", I am referring to non-criminal pecuniary liability (such as contractual, delictual, or tortious liability) not "civil law" from the continent of Europe, nor the Civil Code of Québec, as distinguished from the common law.

²⁴ In one case, Lord Justice Denning, as he then was, famously referred to the former group as the "brain" of the corporation and the latter group as its "hands". See *Bolton*

liable in contract or tort (where vicarious liability is available)²⁵ but under the common-law standards, would not render the corporation criminally liable for the *mens rea* offences committed by them, even where the offence occurs within the person's role as an agent of the corporation.

As a general rule, the “directing mind” of the organization that commits the *actus reus* with the requisite *mens rea* will still be liable for the underlying criminal act or acts.²⁶ Other jurisprudence also makes it clear that, in general, the designation of a person as a “directing mind” is dependent upon the sphere of corporate activity in which the action is taken.²⁷ Put another way, the designation of a person as a “directing mind” of a corporation is activity-specific in the sense that, in some activities, a person will be a “directing mind”; when carrying out other activities, the person may not be. Only in carrying out those activities where the person has policy-setting authority will the person be a “directing mind”.

In addition, Justice Estey recognized that there are certain situations where, even though a person may have the requisite degree of policy-setting authority to be a “directing mind” of a corporation, it would nonetheless be inappropriate to attribute the actions of that person to the corporation for the purposes of the criminal law. He defined three such situations. These are: (i) where the directing mind is operating outside of the sphere of duties assigned to him or her;²⁸ (ii) where the actions of the directing mind are in fraud of the corporation;²⁹ and (iii) where the actions of the directing mind were neither by design nor by result at least partly for the benefit of the corporation.³⁰ Though these are described as “defences”,³¹ the prosecution needs to prove that none of these “defences” apply on the facts.³²

(*HL*) (*Engineering*) *Co Ltd v TJ Graham & Sons Ltd*, [1957] 1 QB 159 at 172, [1956] 3 WLR 804 (CA).

²⁵ See *Rhône (The) v Peter A.B. Widener (The)*, [1993] 1 SCR 497, 101 DLR (4th) 188 [*Rhône*].

²⁶ *Canadian Dredge*, *supra* note 14 at 685–86.

²⁷ *Rhône*, *supra* note 25 at 521, *per* Justice Iacobucci, for the majority.

²⁸ *Canadian Dredge*, *supra* note 14 at 684.

²⁹ *Ibid* at 712–14.

³⁰ *Ibid* at 708–09.

³¹ *Ibid* at 714.

³² *Ibid* at 714–15.

C. The Statutory Rules

The 2003 amendments³³ to the *Criminal Code* (insofar as they are immediately relevant to the arguments offered here), provide as follows:

2 In this Act,

...

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;

...

representative, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

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

...

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

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

³³ Bill C-45, *supra* note 17.

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

As I have argued in another publication,³⁴ there are five major distinctions between the relevant statutory rules, on the one hand, and their common-law predecessors, on the other. The first of these is that the term "organization" clearly covers more non-human actors than does the term "corporation".³⁵ While there was some jurisprudence to suggest that non-corporate collective actors such as trade unions would be amenable to the criminal law,³⁶ the common-law rules were typically only applied to corporate actors. The statutory rules are quite explicit that partnerships and other forms of non-human actors are now specifically intended to be included.³⁷ Furthermore, paragraph (b) of the definition of "organization" makes it quite clear that any form of collectivity that would meet the elements set out therein would also qualify as an "organization" for the purposes of the statutory rules.

Secondly, the definition of "senior officer" (again, reproduced above) is significantly broader than the common-law definition of the term "directing mind".³⁸ The first part of the definition of "senior officer" ("a representative who plays an important role in the establishment of an organization's

³⁴ See Darcy L. MacPherson, "Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45" (2004) 30:3 Man LJ 253 [MacPherson, "Extending Corporate Criminal Liability?"].

³⁵ *Ibid* at 255–58.

³⁶ See the judgment of Justice McLachlin (as she then was), writing for the majority, in *UNA v Alberta (Attorney-General)*, [1992] 1 SCR 901, 89 DLR (4th) 609, "may be" (Justice McLachlin's words) a society under the *Criminal Code*. Justice Cory (with Chief Justice Lamer concurring) also found that the unincorporated trade union was subject to criminal contempt. See also *Maritime Employer's Assn v ILA Local 273*, [1979] 1 SCR 120 at 137, 89 DLR (3d) 289.

³⁷ See paragraph (a) of the definition of "organization" provided above.

³⁸ See MacPherson, "Extending Corporate Criminal Liability?", *supra* note 34 at 258–59.

policies") seems to replicate much of what is found in the common-law definition of a "directing mind". This is to say that the first part of the definition makes it clear that any person who sets policy for an organization is a "senior officer" of that organization. However, the second part of the definition of "senior officer" ("is responsible for managing an important aspect of the organization's activities") seems to extend the concept to people whose actions and mental states may be attributed to the organization for the purposes of the criminal law much lower in the organization than did the previous common-law rules. In other words, a person lower in the corporate or other organizational hierarchy need not be as high up in that hierarchy to hold the corporation or other organization criminally liable.

Third, the "activity-specific" nature of a "directing mind" designation under the common law no longer applies to a "senior officer" designation under the statute, at least insofar as paragraph 22.2(c) is concerned.³⁹ This is clear from the wording of section 22.2 generally. With respect to paragraphs 22.2(a) and (b), there is clear statutory language ("acting within the scope of their authority") to limit the scope of each of the paragraphs to only his or her authority within the corporation (and most probably, his or her authority as a senior officer).⁴⁰ This language is conspicuously absent from paragraph 22.2(c). Given its repetition in both paragraphs 22.2(a) and

³⁹ *Ibid* at 262-66.

⁴⁰ Neither paragraph 22.2(a) nor paragraph 22.2(b) is particularly clear as to what "authority" is being referred to in either or both of them. Does "authority" refer to their authority as senior officers? Alternatively, does it refer to their authority as mere representatives of the organization? Both are possible, since all senior officers are also, by definition, representatives of the organization of which they are senior officers. In my view, given that each paragraph refers to a senior officer, it is the authority given to that senior officer (the authority to set policy, or the authority to manage an important aspect of the organization's activities, or both) that is relevant in the two paragraphs. There are at least two reasons for this. First, with respect to paragraph 22.2(a), there is no reference at all to a "representative" nor is the involvement of a separate, more junior representative required to trigger the application of the paragraph. It is the senior officer's actions and mental state alone that is necessary for the application of the paragraph. Second, with respect to paragraph 22.2(b), it seems very unlikely that a person who could direct another employee or other representative of the organization to carry out functions that would result in criminal activity would not have some sort of managerial authority. If this is true, this would mean that, in most cases at least, the person giving direction is most likely a senior officer in any event, utilizing his or her managerial authority. Thus, in falling under paragraph 22.2(b), the authority utilized by the senior officer would virtually by definition be authority granted to him or her as a senior officer.

22.2(b), I have a great deal of trouble believing that its absence is an oversight by the legislative drafters. Thus, in my view, it is clear that the legislature does not care about how the senior officer learned of the wrongdoing of the non-senior officer representative. Regardless of how the information came to the senior officer, he or she is under an obligation to take all reasonable steps to prevent the wrongdoing of the non-senior officer representative. Therefore, it follows that the designation of "senior officer" is not activity specific. If one is a senior officer of the organization, one need not be aware of the wrongdoing in one's capacity as a senior officer in order to be under an obligation to prevent that wrongdoing. The knowledge of the wrongdoing may arise, for example, due to a personal friendship between the senior officer, on the one hand, and the non-senior officer representative, on the other. Despite the fact that the senior officer did not learn of the wrongdoing in his role as a senior officer of the organization, in my view, the senior officer is still required to take all reasonable steps to prevent the wrongdoing.

Fourth, in my view, paragraph 22.2(c) reverses the prior common-law rule that indicates that a "directing mind" of an organization will generally be liable for the underlying offence.⁴¹ Where a senior officer learns of the wrongdoing of a junior employee or other representative of the organization, the senior officer is under an obligation to take all reasonable steps to prevent the continuation of the offence. If the senior officer fails to take all reasonable steps to prevent the wrongdoing, the organization is at least potentially liable. In my view, three elements are required for paragraph 22.2(c) to come in to play. The first of these is criminal wrongdoing on the part of a representative of an organization, where that representative is not a senior officer of the organization. The second element is that a senior officer of the organization must become aware of an offence before it is completed (including before it is begun). Where the offence is part of an ongoing scheme, as long as the scheme continues, it is not "completed" for these purposes. Thirdly, the senior officer does not take all reasonable steps to prevent the offence from commencing or continuing. If all three of these elements are present, then (subject to my comments about defences, below), in general, the organization is liable for the offence of the representative, even though the representative is not a senior officer of the organization. In this scenario, the senior officer's liability is not determined under the auspices of paragraph 22.2(c). This paragraph relates

⁴¹ See MacPherson, "Extending Corporate Criminal Liability?", *supra* note 34 at 263.

only to organizational liability. The personal liability of the senior officer is determined by the law applicable to individuals. In general, knowledge of, or presence during, the wrongdoing of another (in this case, the representative of the organization who is not a senior officer) is not sufficient to ground liability for an individual (in this case, the senior officer of the organization)⁴². Thus, it is now possible to hold the representative who is not a senior officer liable for their personal wrongdoing.⁴³ It is also possible to hold the organization liable on the basis of paragraph 22.2(c), provided that any senior officer of the organization knows of the wrongdoing of the representative. But it is not necessarily possible to hold the senior officer of the organization (who is nonetheless the conduit to organizational liability) liable for the crime committed by the representative who is not a senior officer of the organization for which the organization may be held liable.

Finally, some of the opening words of section 22.2 (“with the intent at least in part to benefit the organization”) suggest a change to the previous defences at common law as well.⁴⁴ While there is as of yet no meaningful discussion of these words in the jurisprudence, it seems as though the first

⁴² On this point, see e.g. *Dunlop and Sylvester v The Queen*, [1979] 2 SCR 881 at 898, 99 DLR (3d) 301, *per* Justice Dickson, as he then was, for four members of the Court. An additional two members of the Court agreed in the result but on narrower grounds. Three justices dissented.

⁴³ It is worth noting that, in general, a representative of an organization will be an individual. After all, directors are, by definition, individuals. See the *Canada Business Corporations Act*, RSC 1985, c C44 at para 105(c) [CBCA]. Similarly, all employees must be individuals. See *Dynamic Industries Ltd v Canada*, 2005 FCA 211 at paras 43–44, *per* Justice Sharlow, for the Court, holding that corporations carry on businesses. While partners, agents, and contractors could each be individuals or corporations, it is important to remember the reason for this designation. First, all senior officers are representatives. A corporation cannot in any meaningful sense set policy for an organization. Nor can a corporation truly “manage” an important aspect of another organization. Human beings would *de facto* have to do the management. Second, under paragraph 22.2(b), a representative must carry out the act requested by a senior officer. As mentioned earlier, an organization has no hands with which to commit the act requested. Under paragraph 22.2(c), the representative must be a party to the offence. Thus, to find an organization to be a “representative” of a different organization would require the application of these rules to find that the act of a human being is the act of an organization that is the representative of a second organization. That would be unusual. However, notwithstanding my skepticism, there may be situations where this would be necessary. In unforeseeable circumstances, a broader approach may be required. But, nonetheless, as a general rule, representatives will be individuals.

⁴⁴ See MacPherson, “Extending Corporate Criminal Liability?”, *supra* note 34 at 268–69.

two defences at common law are left relatively unchanged. After all, it would be hard to suggest that a person would be acting outside of the scope of duties assigned to him or her, yet have the intent to benefit the organization.⁴⁵ It would be impossible to have fraud on the corporation where it is nonetheless intended to benefit the organization.⁴⁶ But, where there is no fraud on the corporation, and the third defence is all that remains, at common law the prosecution needed only prove either: (i) an intention to benefit the organization, whether realized or not; or (ii) an actual benefit to the organization, whether intended or not. Under the statute, on the other hand, an actual but unintended benefit accruing to the corporation through the otherwise criminal activity of a senior officer will not attract attribution for the purposes of the criminal law.

II. ANALYSIS

A. The Constitutional Issue

The first approach that one could take to these issues is to suggest that there is at least a small argument, on the basis of federalism, that the *Criminal Code*⁴⁷ should control the situation, regardless of which level of government passed the underlying offence. Such an argument might run something like as follows. Paragraph 91(27) of the *Constitution Act, 1867*⁴⁸ reads as follows:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and

⁴⁵ For a case exemplifying the application of this “defence” in the context of non-criminal civil law, see e.g. *Eastern Chrysler Plymouth Inc v Manitoba Public Insurance Corp*, 2000 MBQB 66, *per* Justice Morse.

⁴⁶ With respect to the “fraud on the corporation” “defence”, Justice Estey in *Canadian Dredge*, *supra* note 14, writes as follows (at 713): “Where the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line, he ceases to be the directing mind and the doctrine of identification ceases to operate.”

⁴⁷ *Supra* note 3.

⁴⁸ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, no 5 [*Constitution Act, 1867*].

for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

It is clear that offences created by the provincial legislatures are generally not part of the criminal law, because to define them as such would be to render these offences *ultra vires* the legislative bodies that had enacted them. For the purposes of the enactment of the offence, therefore, these provisions fall within paragraph 92(13) of the *Constitution Act, 1867*,⁴⁹ which reads as follows:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

13. Property and Civil Rights in the Province.

Such an approach to offences created by provincial legislation was acknowledged by Chief Justice Dickson, writing for the majority of Court, in *R. v. Big M Drug Mart Ltd.*⁵⁰ He writes:⁵¹

From the time of Confederation until the Privy Council decision in 1903 in *Hamilton Street Railway*, *supra*, it was the widely-held view that Sunday observance legislation fell within provincial purview under the *Constitution Act, 1867* as being a matter falling under either s. 92(13), property and civil rights within the province, or s. 92(16), a matter of merely local or private nature in the Province. Several of the provinces passed laws prohibiting Sunday activities.

Chief Justice Dickson continues, pointing out that the *Lord's Day Act*⁵² serves a religious purpose⁵³ and therefore, is inherently tied to public morals and is thus valid criminal law within the legislative jurisdiction of the federal Parliament.⁵⁴ However, in the same judgment, Chief Justice Dickson also writes:⁵⁵

⁴⁹ *Ibid.*

⁵⁰ *Big M*, *supra* note 2.

⁵¹ *Ibid* at 319.

⁵² *Lord's Day Act*, RSC 1970, c L-13.

⁵³ *Big M*, *supra* note 2. at 318-19.

⁵⁴ *Ibid* at 354.

⁵⁵ *Ibid* at 322.

In *dictum* [in *Ouimet v. Bazin*⁵⁶], Mr. Justice Duff used language which I would wish to adopt, at pp. 525-26:

It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion upon the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament. But it may be noted that since the decision of the Judicial Committee [sic] in *Hodge v. The Queen* [(1883), 9 App. Cas. 117], it has never been doubted that the Sunday-closing provisions in force in most of the provinces affecting what is commonly called the "liquor trade" were entirely within the competence of the provinces to enact; and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-section 15 of section 92 of the "British North America Act." [emphasis added].

Put another way, it is clear that provincial offences are not *per se* "criminal law" within the meaning of paragraph 91(27).⁵⁷ But, the cases do not answer whether in fact cases involving the prosecution of these offences are nonetheless "criminal matters", as the term is used in the closing words of paragraph 91(27). If it were possible to draw such a distinction, that is, that provincial quasi-criminal offences do not invoke the criminal law but are nonetheless "criminal matters", then it is possible that the procedural elements of criminal offences could fall to be determined by the federal Parliament.

To be clear, I am not advocating the argument made above. In my view, there are several factors which suggest to me that this argument should not be accepted. First, I take "criminal law" to be quite broad. Most of the provincial and territorial courts are concerned exclusively, or almost exclusively, with this subject-matter. To treat "criminal law" as one head of federal power and then effectively treat "procedure in criminal matters" as something more than "procedure in criminal law" would seem to expand the federal government power beyond reasonable limits. This conclusion is reinforced by the fact that the two are found within the same head of power.⁵⁸ If the Fathers of Confederation had intended for the term

⁵⁶ (1912), 46 SCR 502 at 525-26, 3 DLR 593.

⁵⁷ *Constitution Act, 1867*, *supra* note 48.

⁵⁸ The courts have sometimes refused to follow this logic in statutory interpretation. For example, see *Peoples Department Stores Inc v Wise*, 2004 SCC 68, [2004] 3 SCR 461, *per*

“criminal matters” to be assessed separate and apart from the term “criminal law”, they could have done so with a separate head of power. In my view, this decision was most likely a deliberate one. Criminal law is very broad and might be thought to include the ability to establish courts to consider criminal matters. Yet, this was not the intention of the Canadian constitutional framework. The provinces create the courts even though they are administering a federal statute. Similarly, courts generally control their own procedure, but in the case of criminal proceedings, procedure is controlled by the federal statute.

Finally, I return to Chief Justice Dickson, this time writing for the majority of the Court in *R v Edwards Books and Art Ltd.*⁵⁹ He writes as follows:

Applying the above principles to the appeals at bar, it is, in my opinion, open to a provincial legislature to attempt to neutralize or minimize the adverse effects of otherwise valid provincial legislation on human rights such as freedom of religion. All that is achieved by s. 3(4) of the *Retail Business Holidays Act* is the subtraction of a duty imposed elsewhere in the Act. Section 3(4) cannot be divorced from its context in valid provincial legislation in relation to property and civil rights: an exemption must be read in light of the affirmative provision to which it relates. I might add that it would be a peculiar result indeed if the federal Parliament and not the provincial legislature were the competent body to create exemptions from provincial legislation, whether motivated by religious or other concerns. Consequently, neither the Act nor the exemption is, in my opinion, *ultra vires* the province. [Emphasis added]

Admittedly, the facts of 9147⁶⁰ do not revolve around an exception to a prohibition. Rather, they revolve around how the penalty for the breach of a provincial statute is to be assessed.

Nonetheless, in my view, Chief Justice Dickson's words are apposite. The analogy is that, just as the Constitution requires that the level of government that validly creates the offence should also be able to dictate the exceptions to the offence (as in *Edwards Books*⁶¹), a provincial legislature that validly passes a quasi-criminal offence is also entitled to determine the method by which elements of the offence are to be attributed to non-human actors that are arguably implicated in the offence.

Justices Major and DesChamps, speaking for the Court. In the case, it was held that the statutory fiduciary duty of directors (CBCA, *supra* note 43 at para 122(1)(a)) is owed solely to the corporation, while the duty of care, skill and diligence (CBCA, at para 122(1)(b)) is owed to a broader group, including creditors. Notwithstanding certain aberrations, however, in my view, the general principle is nonetheless sound.

⁵⁹ [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books*].

⁶⁰ *Supra* note 1.

⁶¹ *Supra* note 59.

If this argument is sound, it then follows that it is for the National Assembly of Québec to decide the attribution rules that will apply with respect to offences committed by corporations and other juristic persons under the *Building Act*.⁶² If this is so, then there is no need to reference the *Criminal Code*⁶³ at all. Yet, the majority refers to it at length.⁶⁴

B. Incorporation by Reference

The argument made above can only directly impact the right of Parliament to mandate the means by which a mental state is attributed to a corporation or other organizational actor when dealing with provincial offences that involve a *mens rea* component.⁶⁵ Put another way, even if, as alleged above, Parliament does not, through its criminal law power, have the right to dictate to a provincial legislature how attribution should occur, this does not mean that the provincial legislatures cannot choose to have rules that are similar to those in the *Criminal Code*.⁶⁶ The legislature of any province would clearly have the ability to incorporate by reference the

⁶² *Supra* note 5.

⁶³ *Supra* note 3.

⁶⁴ 9147, *supra* note 1 at paras 95-99.

⁶⁵ It is important to remember that the rules regarding attribution (whether common-law or statutory) are designed to apply only to offences where the prosecution needs to prove an element of mental fault (whether intention, knowledge, willful blindness, or criminal negligence). On this point, see e.g. *Criminal Code*, *supra* note 3, s 22.2 (with respect to intention, knowledge or willful blindness). See also *Criminal Code*, s 22.1 (with respect to criminal negligence); see also *Canadian Dredge*, *supra* note 14 at 674 (with respect to the common law).

However, these are cases where the common-law rules from *Canadian Dredge* have been applied to strict liability offences (as defined in *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, 85 DLR (3d) 161, *per* Justice Dickson, as he then was, writing for the Court). On this point, see e.g. *R v Fitzpatrick's Fuel Ltd*, [2000] NJ No 149, 2000 CarswellNfld 273 (Prov Ct), *per* Judge Handrigan. In my view, this is an error, because Justice Estey, in *Canadian Dredge*, specifically eschewed such an approach (see *Canadian Dredge*, *supra* note 14 at 674). However, since 9147 does not involve an offence of strict liability, a discussion of this issue is outside the scope of this contribution and will have to wait for another day.

⁶⁶ *Supra* note 3. See also *CIP Inc*, *supra* note 15. *CIP Inc* makes it clear that provincial offences (there is specific reference to the *Provincial Offences Act*, RSO 1980, c 400, s 99, as providing the framework for appeals) are governed by provincial statutes. This reference suggests that the default position is that offences at the provincial level are properly dealt with by procedural legislation at the provincial level as well. Admittedly, there was no federal legislation on the issue of attribution at the time, but there was only one tangential reference to the *Criminal Code* in the case.

federal statutory standards on attribution. My contention in this part of the contribution is to suggest that the National Assembly has not done so.

To justify this view, it is necessary to set out provisions of the *Québec Code of Penal Procedure*.⁶⁷ These provide as follows:⁶⁸

1. This Code applies with respect to proceedings in view of imposing a penal sanction for an offence under any Act, except proceedings brought before a disciplinary body.
2. In this Code, unless the context indicates otherwise, “Act” means any law or regulation.
- 2.1. The provisions of this Code that apply to legal persons also apply to partnerships, with the necessary modifications.
- ...
- 8.1. Except in the case of a statement of offence for the contravention of a municipal by-law, a contribution of the following amounts shall be added to the total amount of the fine and costs imposed on the issue of a statement of offence for an offence under the laws of Québec:
 - (1) \$20, if the total amount of the fine does not exceed \$100;
 - (2) \$40, if the total amount of the fine exceeds \$100 without exceeding \$500; and
 - (3) 25% of the total amount of the fine, if it exceeds \$500.⁶⁹

The contribution becomes payable as a fine as soon as a defendant enters a plea of guilty or is convicted or deemed convicted of an offence, whether or not the contribution is mentioned in the judgment. Except as regards imprisonment, the rules provided in this Code for the recovery of a fine, including those relating to costs of execution, apply to the recovery of the contribution and the contribution is deemed, for such purposes, to form part of the fine. However, in the case of partial payment of a fine, the contribution is deemed paid last.

From each contribution collected, the first \$10 shall be credited to the Crime Victims Assistance Fund established under the *Act respecting assistance for victims of crime* (chapter A-13.2), and the following \$8 shall be credited to the Access to

⁶⁷ CQLR, c C-25.1.

⁶⁸ This English translation is drawn from the Canadian Legal Information Institute, supported by Canadian Federation of Law Societies. This is available at: *Code of Penal Procedure*, CQLR, c C-25.1, online: <www.canlii.org/en/qc/laws/stat/> [perma.cc/QG7D-7KBV].

⁶⁹ Interestingly, the Québec Court of Appeal did not consider the application of Article 8.1 in 9147, *supra* note 1. However, as discussed *below*, on the appeal from the decision of the Québec Court of Appeal to the Supreme Court of Canada, the respondent specifically raised the cost of the fine as including the surcharge imposed by Article 8.1 of the *Code of Penal Procedure*.

Justice Fund established under the *Act respecting the Ministère de la Justice* (chapter M-19).

- 8.2. In search- and seizure-related matters, subsections 1 and 3 to 10 of section 488.01 and section 488.02 of the *Criminal Code* (R.S.C. 1985, c. C-46) apply, with the necessary modifications and despite any inconsistent provision of any Act, to an application for and the execution of a warrant, telewarrant, order or other judicial authorization, for the purposes of a penal investigation, that allows the use of an investigative technique or method or the performance of any act mentioned in the warrant, telewarrant, order or authorization, where the application or execution concerns a journalist's communications or a thing, document or data relating to or in the possession of a journalist.

A judge having jurisdiction to issue a warrant, telewarrant, order or other judicial authorization referred to in the first paragraph has jurisdiction to exercise the powers necessary for the application of subsections 9 and 10 of section 488.01 of the *Criminal Code*.

...

61. The rules of evidence in criminal matters, including the *Canada Evidence Act* (Revised Statutes of Canada, 1985, chapter C-5), apply to penal matters, adapted as required and subject to the rules provided in this Code or in any other Act in respect of offences thereunder and subject to article 283 of the *Code of Civil Procedure* (chapter C-25.01) and the *Act to establish a legal framework for information technology* (chapter C-1.1).

The provisions of the *Criminal Code* (Revised Statutes of Canada, 1985, chapter C-46) relating to video and audio evidence apply, having regard to the resources put at the disposal of the court, to the trial of proceedings instituted in accordance with this Code.

Articles 1 and 2 collectively make clear that the *Code of Penal Procedure* is intended to apply to provincial offences not prosecuted before specific disciplinary tribunals. Article 2.1 makes clear that the *Code of Penal Procedure* is intended to apply to juristic persons, as well as partnerships. Of course, both corporations and partnerships are specifically included as "organizations" under the federal *Criminal Code*.⁷⁰ But, it is equally clear, from the definition of "organization" added to the *Criminal Code* by Bill C-45⁷¹, that "organization" is broader than simply corporations and partnerships. The words of article 2.1 would suggest that partnerships would not otherwise qualify as "legal persons" under the law of Québec. Given this, it seems unlikely that all of the "associations of persons" will be caught under paragraph (b) of the definition.

⁷⁰ *Supra* note 3.

⁷¹ *Supra* note 17.

Next, article 8.1 is included because the article was amended in 2015.⁷² Similarly, article 8.2 was added in 2018.⁷³ Thus, it is difficult to assert that the intent of the National Assembly was not attempting to deal with the changes to the *Criminal Code* by incorporating those changes that it felt were appropriate for use in this particular provincial statute. The specific references to sections 488.01 and 488.02 of the *Criminal Code*⁷⁴ (in article 8.2 of the *Code of Penal Procedure*⁷⁵) would seem to quite clearly be a narrow incorporation by reference to certain provisions of the *Criminal Code*. If the National Assembly had intended provisions of the *Criminal Code* to apply to fill any actual or perceived gaps in the *Code of Penal Procedure*, it certainly had the opportunity to legislate accordingly and did not do so. Similarly, article 61 contains a reference to the *Criminal Code* as well, but again, it is a narrow reference to evidentiary matters. To be clear, articles 8.2 and 61 contain the only references to the *Criminal Code* within the *Code of Penal Procedure*.

Thus, to give effect to the suggestion by the Québec Court of Appeal in 9147⁷⁶, that the federal statutory standards as part of a case concerned with the violation of a provincial quasi-criminal regulatory statute, is highly questionable. This is especially true when the National Assembly has defined in the statute dealing with provincial offences (the *Code of Penal Procedure*⁷⁷) when and how the federal statute (the *Criminal Code*⁷⁸) may apply to these offences, and the use made by the Court of Appeal does not fall within the circumstances contemplated by the legislature.⁷⁹

⁷² An Act mainly to implement certain provisions of the Budget Speech of 4 June 2014 and return to a balanced budget in 2015-2016, SQ 2015, c 8, s 345.

⁷³ An Act to Protect the Confidentiality of Journalistic Sources, SQ 2018, c 26, s 9.

⁷⁴ *Supra* note 3.

⁷⁵ *Supra* note 67.

⁷⁶ *Supra* note 1.

⁷⁷ *Supra* note 67.

⁷⁸ *Supra* note 3.

⁷⁹ In an earlier case decided by the Superior Court of Québec (*R c Pétroles Global inc*, 2013 QCCS 4262 [*Pétroles Global inc*]), the Court (Justice Tôt) clearly applied the amendments to the *Criminal Code* made by Bill C-45, *supra* note 17 to a case involving the criminal provisions of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*].

Similar to the main case under consideration in this contribution, provisions of the *Competition Act* make specific reference to specific provisions of the *Criminal Code* which apply in prosecutions under the *Competition Act*. Subsection 2(1) of the *Competition Act* reads, the relevant part as follows: “**computer system** has the same meaning as in subsection 342.1(2) of the *Criminal Code*”. Section 14.1 of the *Competition Act* makes specific reference to sections 487.012, 487.013, 487.015, 487.016 and

487.018 of the *Criminal Code*. Subsection 23(2) of the *Competition Act* makes the federal attorney-general, as opposed to her or her provincial counterparts, the proper prosecutor under the *Competition Act*. Under subsection 30.18(3) of the *Competition Act*, the *Criminal Code* is used to deal with the logistical elements of detaining or releasing suspects arrested pursuant to a warrant under the *Competition Act*. Section 30.24 uses the definition of “court of appeal” under section 2 of the *Criminal Code* to define certain appeal rights under the *Competition Act*. Similarly, under subsection 33(8) of the *Competition Act*, the definition of “superior court of criminal jurisdiction” under the *Criminal Code* is used to define the meaning of “court” (in part) under the *Competition Act*. Under subsection 34(5) of the *Competition Act*, Part XXI of the *Criminal Code* provides the statutory backbone for the conduct of appeals from judicial decisions under the *Competition Act*. Under section 34 of the *Competition Act*, the term “superior court of criminal jurisdiction” is used; subsection 34(8) of the *Competition Act* incorporates, by reference, the definition of the same term under the *Criminal Code*.

Paragraph 52.02(1)(a) of the *Competition Act* provides that the Director of Competition may use investigatory powers provided under either the *Competition Act* or the *Criminal Code* to assist other states in investigations. Subsection 67(2) of the *Competition Act* allows for the election of trial by jury (or not) for indictable offences under the *Competition Act*. Subsection 67(3) of the *Competition Act* defines certain offences under the *Competition Act* that must be tried in a “superior court of criminal jurisdiction”, as defined under the *Criminal Code*. Subsection 67(4) of the *Competition Act* removes any right of a corporate offender to a jury trial. Section 68 of the *Competition Act* says that the venue of a trial can be determined by either the *Competition Act* or the *Criminal Code*. Subsection 73(1) of the *Competition Act* makes the Federal Court of Canada the “superior court of criminal jurisdiction”, in accordance with both the *Competition Act* and the *Criminal Code*. Under subsection 73(3) of the *Competition Act*, Part XXI of the *Criminal Code* provides the statutory backbone for the conduct of appeals from judicial decisions under the *Competition Act*, for appeals from the decisions of the Federal Court of Canada.

There are several reasons why I am not dealing with the *Pétroles Global inc* decision in the main text of this contribution. First, the Québec Court of Appeal in 9147 did not address *Pétroles Global inc* at all. The purpose of this contribution is to deal directly with the holdings in 9147. Also, as a matter of *stare decisis*, the decision in 9147 is not bound by *Pétroles Global inc*. If the latter case had come after 9147 temporally, in fact, the reverse would have been true. Further, since *Pétroles Global inc* was considering the *Competition Act* (a federal statute), there would be no reason for Justice Tõth to wrestle with the constitutional issue raised herein, since there was no provincial statute to be considered.

However, *Pétroles Global inc* shows that the decision in 9147 is not alone in failing to deal with the issue of the proper scope of the new statutory rules. *Pétroles Global inc* does not consider whether, in fact, the provisions of the *Competition Act* could have intended for the application of sections 22.1 and 22.2 of the *Criminal Code*, which the Superior Court purported to apply in its decision. In my view, each reference to the *Criminal Code* within the *Competition Act* is relatively narrow and does not make room for the application of the statutory rules. In order to make this argument, it was necessary to reproduce a summary of each reference to the *Criminal Code* within the

C. The Supreme Court of Canada has Made Statements That Suggest the Common Law Should Apply

A careful reader might suggest that simply because the *Criminal Code* provisions do not apply directly, this does not prevent judges from modifying the common law so that the common law rules would match the statutory provisions later passed by Parliament. In fact, as I mentioned earlier,⁸⁰ I was previously of this view as well. However, recent jurisprudence of the Supreme Court of Canada would seem to suggest that this opportunity (for harmonization of the common-law standards to their statutory counterparts by judicial edict) is no longer available.

The entire oral judgment of the Supreme Court of Canada in *Christine DeJong Medicine Professional Corp v DBDC Spadina Ltd*⁸¹ reads as follows:

BROWN J. — We agree with Justice van Rensburg, dissenting, at the Court of Appeal that the respondents' claim for knowing assistance must fail, and we adopt her reasons as our own.

In view of the statement of the majority at the Court of Appeal that this Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, invited a "flexible" application of the criteria stated in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 for attributing individual wrongdoing to a corporation, we respectfully add this. What the Court directed in *Livent*, at para. 104, was that *even where those criteria are satisfied*, "courts retain the discretion to refrain from applying [corporate attribution] where, in the circumstances of the case, it would not be in the public interest to do so" (emphasis added). In other words, while the presence of public interest concerns may *heighten* the burden on the party seeking to have the actions of a directing mind attributed to a corporation, *Canadian Dredge* states *minimal* criteria that must always be met. The appeal is allowed, with costs throughout.

The facts of the case in *DeJong* are quite complicated and generally do not serve the point being made here. The issue was one where a rogue (Walton)⁸² had defrauded two different sets of investors, each of whom had

Competition Act. However, beyond this, a detailed discussion of *Pétroles Global inc* is beyond the scope of this contribution and will have to wait for another day.

⁸⁰ MacPherson, "The Civil and Criminal Applications of the Identification Doctrine", *supra* note 13.

⁸¹ 2019 SCC 30 [*DeJong*], rev'g *DBDC Spadina Ltd v Walton*, 2018 ONCA 60 [*Walton*].

⁸² *Walton*, *supra* note 81 at para 1. It is worth noting that all of the references used with respect to the *Walton* case at the Court of Appeal level are taken from the judgment of Justice Blair, for the majority. As should be obvious from the judgment reproduced above, this judgment was later overturned by the Supreme Court of Canada in *DeJong*, *supra* note 81.

invested in Walton's scheme through a different set of corporate vehicles.⁸³ When the scheme was discovered, one set of investors sued the other set of investors, claiming that, since Walton was the directing mind of the second set of corporate vehicles, that set of corporate vehicles was to have Walton's intent to defraud the first set of investors attributed to the corporations.⁸⁴ Therefore, the second set of corporate vehicles were alleged to be liable to the first set of investors on the theory that the second set of corporate vehicles provided knowing assistance in Walton's breach of fiduciary duty to the first set of corporate vehicles (that is, the corporate vehicles through which the first set of investors had made their investments).⁸⁵

In other words, this was a civil case where the common-law rules described above were sought to be used to attribute a rogue's fraudulent intent to a corporate vehicle. Though there was certainly some criminal wrongdoing underlying the facts, this was not a criminal case. The judgment of Justice Brown, speaking on behalf of the Supreme Court of Canada,⁸⁶ is important here because the judgment makes it clear that, in the civil context at least, it is not possible for the courts to “water down” the requirements for attribution provided for the judgment in *Canadian Dredge*.⁸⁷

It is virtually beyond debate that the intention of Parliament in passing Bill C-45⁸⁸ was to make it easier to pursue organizations for criminal wrongdoing involving *mens rea* offences. In the Backgrounder⁸⁹ that accompanied the introduction of Bill C-45, the government of the day wrote as follows:

Expanded Conditions for Liability

The Government's proposals also update the law on corporate criminal liability by ensuring it reflects the current structures of modern organizations. The proposed measures would make corporations criminally liable:

- as a result of the actions of those who oversee day-to-day operations but who may not be directors or executives;

⁸³ Walton, *supra* note 81 at paras 3–5.

⁸⁴ *Ibid* at para 51.

⁸⁵ *Ibid* at paras 68–96.

⁸⁶ DeJong, *supra* note 81.

⁸⁷ *Supra* note 14.

⁸⁸ *Supra* note 17.

⁸⁹ Canada, Department of Justice, *Backgrounder: Criminal code Amendments Affecting the Liability of Corporations* (Ottawa: Department of Justice, 2003) (on file with the author).

- when officers with executive or operational authority intentionally commit, or direct employees to commit, crimes to benefit the organization;
- when officers with executive or operational authority become aware of offences being committed by other employees but do not take action to stop them; and
- when the actions of those with authority and other employees, taken as a whole, demonstrate a lack of care that constitutes criminal negligence.⁹⁰

The effect of the first four changes made by Bill C-45 (and described above in the excerpt) put this intention to expand into effect. Even with the change to the defences described above (which clearly makes it easier for an organizational offender to use defences), it is clear that the overall impact of Bill C-45 is to lessen the prosecution's burden in pursuing non-human offenders.

As such, in my view, for the judiciary to unilaterally decide to apply Bill C-45 to provincial offences which require proof of *mens rea* would run directly counter to the assertion by Justice Brown, on behalf of the unanimous Supreme Court of Canada, that there should be no lowering of the rules for attribution of mental states at common law.

Therefore, it would appear that the only remaining option is to treat the common-law rules, as defined under *Canadian Dredge*⁹¹ and its progeny,⁹² as being applicable to provincial offences outside of the context of the *Criminal Code*.⁹³

A careful reader may point out that this interpretation may lead to certain incongruities in the law. The most notable of these is that it will be easier to convict a corporation or other organization of a *mens rea* offence under the *Criminal Code* than it would be to convict the same organization

⁹⁰ In *AG's Reference (No 2 of 1999)*, [2000] 3 All ER 182 (CA) at 191, Lord Justice Rose, for the Court, held that, in order for an offence of criminal negligence to be made out against a corporate defendant, the act or omission that would constitute criminal negligence must be laid at the feet of a single individual. In some cases, this is not a hard requirement to satisfy. However, in other cases, prosecutions under the common-law rules have been stymied by this rule because there were a variety of errors and omissions by a number of individuals. See e.g. Canada, Labour and Advanced Education, *The Westray Story: A Predictable Path to Disaster: Report of the Westray Mine Public Inquiry* (Report), by K. Peter Richard, Commissioner (Halifax, Nova Scotia: Queen's Printer for the Province of Nova Scotia, 1997), online: <novascotia.ca/lae/pubs/westray/execsumm.asp> [perma.cc/FG4X-FU76].

⁹¹ *Supra* note 14.

⁹² See e.g. the cases listed *supra* note 15.

⁹³ *Supra* note 3.

under quasi-criminal statutes under provincial jurisdiction. However, as mentioned above, it is always open to the provincial legislation (or the federal Parliament, as the case may be) to expressly adopt similar or identical standards to those provided under Bill C-45, either by reproducing the statutory language of the *Criminal Code* in the appropriate provincial statute or by incorporating that language by reference. However, until the provincial legislation does so, in my view, it is inappropriate for the courts to simply ignore the issue.

D. The Case Has Been Appealed to the Supreme Court of Canada, But Scant Attention Has Been Paid to This Issue

The Supreme Court of Canada granted leave to hear the government's appeal in 9147.⁹⁴ The appeal was heard on January 22, 2020. What is interesting about this particular issue is that neither of the direct parties (neither the Attorney-General of Québec,⁹⁵ nor the corporate respondent⁹⁶), nor many of the interveners (The Attorney-General of Ontario,⁹⁷ The Canadian Civil Liberties Association,⁹⁸ The British Columbia Civil

⁹⁴ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Docket), online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38613> [perma.cc/9CX7-D9S5].

⁹⁵ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Factum of the Appellants), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM010_Appelants_Procureure-générale-du-Québec-et-al.pdf> [perma.cc/3A3J-THMB] [9147 Appellant's Factum].

⁹⁶ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Factum of the Respondents), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM020_Intimée_9147-0732-Québec-Inc..pdf> [perma.cc/RPN5-K5EC] [9147 Respondent's Factum].

⁹⁷ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Factum of the Intervener, The Attorney General of Ontario), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM060_Intervener_Attorney-General-of-Ontario.pdf> [perma.cc/9XC7-Y75U] [9147 AG Factum].

⁹⁸ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Memorandum of the Intervener, Canadian Civil Liberties Association), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM050_Intervener_Canadian-Civil-Liberties-Association.pdf> [perma.cc/JCF5-QATZ]. This factum makes no reference to any provision of either the federal *Criminal Code*, *supra* note 3 nor the Québec Code of Penal Procedure, *supra* note 67.

Liberties Association,⁹⁹ The Canadian Constitution Foundation¹⁰⁰ and the Director of Penal Prosecutions of Quebec¹⁰¹) seem to have addressed head-on the issue of what law applies.

There is an important point to be made here. While it is important to lay out the arguments of each of the parties that address the *Criminal Code* and respond in some way to those arguments, this is not, for example, meant to be a full response with respect to the application of section 12. Rather, the goal here is to show only that reliance on the *Criminal Code* on these facts is, at best, questionable, and at worst, may be entirely misplaced. A fuller argument about the potential application of section 12 of the *Charter*

⁹⁹ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Factum of the Intervener, British Columbia Civil Liberties Association), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM040_Intervener_BritishColumbia-Civil-Liberties-Association.pdf> [perma.cc/SV6C-ZYKT]. This factum focuses entirely on international human-rights law, and its impact on section 12 (as well as the consideration of section 12 jurisprudence in the arena of international law).

¹⁰⁰ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Factum of the Intervener, Canadian Constitution Foundation), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM070_Intervener_Canadian-Constitution-Foundation.pdf> [perma.cc/N2TA-9FD4].

¹⁰¹ *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Mémoire Directrice Des Poursuites Pénales, Intervenante), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM080_Intervenante_Directrice-des-poursuites-penales.pdf> [perma.cc/7FUV-WZF7]. This factum focuses largely on human-rights law in various jurisdictions, as well as a brief discussion of the ambit of section 12. There is but one reference to the federal *Criminal Code* in a footnote to the following sentence: “Finally, legal persons certainly have a separate legal personality which ensures that their criminal liability can be incurred.” The original French wording was as follows: “Enfin, les personnes morales bénéficient certes d’une personnalité juridique distincte qui fait en sorte que leur responsabilité criminelle peut être engagée.”

While the footnote in the factum (para 65, n 84) cites sections 22.1 and 22.2 of the federal *Criminal Code*, this is inappropriate for at least two reasons. First, while these sections do cover corporations, which clearly do have a separate legal personality apart from those that oversee or run its day-to-day operations (directors and officers) and those who provide capital (shareholders), the sections also cover organizations that do not have a separate legal personality (partnerships are an example). For a discussion of the application of these rules to partnerships, see e.g. Darcy L. MacPherson, “Criminal Liability of Partnerships: Constitutional and Practical Impediments” (2009) 33:2 *Man LJ* 329. Second, of course, the common law had already recognized corporate criminal liability even without the statutory rules. Therefore, reference to the statutory rules is not necessary to the point being made by the intervener. The reference therefore only serves to “muddy the waters” rather than provide a clear argument to the Court.

(though some aspects of such an argument might appear here) is, in my view, better left to another day.¹⁰²

There is one area where the appellant mentioned the *Criminal Code*¹⁰³ in its factum.¹⁰⁴ Paragraphs 107 through 109 read as follows (footnotes omitted):¹⁰⁵

107. Among other things, they [the judges of the majority] point out that section 718.21 of the *Criminal Code* makes it possible to consider various factors when imposing a sentence on an organization, including the effect that the sentence would have on the economic viability of the organization, its structure and retention of its employees.
108. In this regard, the Attorney General of Quebec is of the view that the inclusion of such a factor in the *Criminal Code* in a sentencing provision cannot in any way serve to confer protection constitutional to purely economic rights.
109. The protections conferred by the Canadian *Charter* constitute a minimum and the legislator can adopt measures relating to aspects which are not protected by the [C]onstitution. The enunciation in the *Criminal Code* of a factor relating to the economic viability of an organization cannot therefore be assimilated, for that reason alone, to a consideration which must be taken

¹⁰² A case where an organizational offender is charged with either a *Criminal Code* offence or where the statute containing the offence provision specifically incorporates the same language, by reference to the provisions of the *Criminal Code* with respect to organizational offenders, would decidedly raise issues regarding the effect of the *Criminal Code* on the potential application of section 12 of the *Charter*, without any of the other complicating factors that are examined here.

¹⁰³ *Supra* note 3.

¹⁰⁴ 9147 Appellant's Factum, *supra* note 95.

¹⁰⁵ In the original French, the factum, in the relevant portion, reads as follows (footnotes omitted):

107. Entre autres, ils soulignent que l'article 718.21 du *Code criminel* permet de considérer divers facteurs lors de l'imposition de la peine à l'endroit d'une organisation, notamment l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés.
108. À cet égard, la Procureure générale du Québec est d'avis que l'énoncé d'un tel facteur au *Code criminel* dans une disposition relative à la détermination de la peine ne peut servir à conférer, d'aucune façon, une protection constitutionnelle aux droits purement économiques.
109. Les protections conférées par la *Charte canadienne* constituent un minimum et le législateur peut adopter des mesures relatives à des aspects qui ne sont pas protégés constitutionnellement. L'énonciation dans le *Code criminel* d'un facteur concernant la viabilité économique d'une organisation ne peut donc pas être assimilée, de ce seul fait, à une considération devant être prise en compte afin de déterminer si les personnes morales peuvent bénéficier ou non de l'article 12 de la *Charte canadienne*.

into account in determining whether or not legal persons can benefit section 12 of the Canadian *Charter*.

It is worth noting that the appellant is responding to the argument of the majority of the Court of Appeal that section 718.21 of the *Criminal Code* should in any way influence the proper interpretation of section 12 of the *Charter*. In my view, this is not the same as agreeing that the rules provided for under section 22.2 of the *Code* (or any other provision of Bill C-45,¹⁰⁶ for that matter) should apply to provincial offences.¹⁰⁷

Similarly, the respondent seems to have assumed that the Court of Appeal was correct in its assertion that section 718.21 of the *Criminal Code*¹⁰⁸ should be applied here.¹⁰⁹

¹⁰⁶ *Supra* note 17.

¹⁰⁷ The Attorney-General of Ontario, in its intervention, makes a similar argument in its factum, where the following is written: “Contrary to the majority’s view, Parliament’s decision to require a judge sentencing an organization to consider, under s. 718.21 of the *Criminal Code*, the impact of the sentence on the economic viability of the organization and the continued employment of its employees does not change the scope of s. 12. To hold otherwise would give Parliament’s sentencing guidelines constitutional status – which this Court has repeatedly refused to do. See: [R v] *Lloyd* [[2016] 1 SCR 130], *supra* note 28 at paras 41–47.” (See 9147 AG Factum, *supra* note 97 at 10–11, n 40).

¹⁰⁸ Section 718.21 of the *Criminal Code*, *supra* note 3 reads as follows: “A court that imposes a sentence on an organization shall also take into consideration the following factors: (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.”

¹⁰⁹ In 9147, the relevant portion of section 718.21 on which the Court of Appeal relies is paragraph (d), reproduced *ibid*. The argument runs, briefly and roughly, as follows: on the facts, the application of the statutory minimum fine may result in the insolvency of the corporation. The intention of paragraph 718.21(d) is to protect employees from losing their jobs as a result of criminal wrongdoing over which the employee had no

Based on the test in *R v Nur*,¹¹⁰ the respondent argues as follows:¹¹¹

- [24] The first part of the test is to determine the just and proportionate sentence. The Court teaches that a court must refer to the sentencing objectives set out in section 718 of the *Criminal Code*.^[112] Also, it must assess the aggravating and mitigating circumstances. In addition, it must take into account the fundamental principle of sentencing under section 718.1 of the

means of control nor any responsibility. The insolvency of the corporation will result in the loss of jobs. Therefore, the penalty is unduly harsh to innocent parties (the employees not involved in the wrongdoing). It could then follow that the penalty is grossly disproportionate to the evil sought to be punished. As mentioned above, issues dealing with either (i) the potential scope of section 12 of the *Charter* or (ii) assuming that section 12 were potentially activated on these facts, whether the insolvency of the defendant is “punishment” are not the subject-matter of this contribution and will each have to wait for another day.

¹¹⁰ 2015 SCC 15, [2015] 1 SCR 773.

¹¹¹ In the original French, the *factum*, in the relevant portion, reads as follows:

- [24] La première partie du test consiste à déterminer la peine juste et proportionnée. La Cour enseigne qu’un tribunal doit se référer aux objectifs de détermination de la peine énoncés à l’article 718 du *Code criminel*. Également, il doit évaluer les circonstances aggravantes et atténuantes. De plus, il doit tenir compte du principe fondamental de la détermination de la peine suivant l’article 718.1 du *Code criminel* qui veut que la peine soit proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant. Pour la seconde partie du test, la Cour enseigne que le tribunal doit comparer la peine juste et proportionnée avec la peine minimale obligatoire prévue par la loi. Si cette dernière le contraint à rendre une peine exagérément disproportionnée, la peine est alors incompatible avec l’article 12. Par ailleurs, mentionnons que les facteurs établis par la Cour pour déterminer si une peine est exagérément disproportionnée sont toujours d’actualité.

- [25] À maintes reprises, les tribunaux ont appliqué le principe de proportionnalité de la peine à l’égard des personnes morales pour imposer une peine juste et proportionnée. Les articles 718 à 718.21 du *Code Criminel* ont été considérés par les tribunaux. Par ailleurs, ceux-ci ont utilisé les termes suivants: peine appropriée, peine juste, amende juste et appropriée, amende adéquate, determining a fit sentence, fit fine, appropriate fine, just and appropriate sentence, just and proper penalty, just sanction, proper quantum of the fine, fair and effective sentence.

¹¹² Section 718 of the *Criminal Code*, *supra* note 3 reads as follows: “The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.”

Criminal Code [113], which requires that the sentence be commensurate with the gravity of the offence and the degree of responsibility of the offender. For the second part of the test, the Court teaches that the court must compare the fair and proportionate sentence with the mandatory minimum sentence provided by law. If the latter compels him to make an excessively disproportionate sentence, then the sentence is incompatible with s. 12. Furthermore, it should be noted that the factors established by the Court to determine whether a sentence is excessively disproportionate are still valid.

- [25] Time and again, the courts have applied the principle of proportionality of sentence to legal persons in order to impose a fair and proportionate sentence. Sections 718 to 718.21¹¹⁴ of the *Criminal Code* have been

¹¹³ Section 718.1 of the *Criminal Code*, *supra* note 3, reads as follows: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

¹¹⁴ Sections 718 and 718.21 are reproduced above (nn 112 and 108 respectively). Section 718.1 is also reproduced above (n 112). Sections 718.01 (offences against children), 718.02 (offences against peace officers and other justice system participants), 718.03 (offences against certain animals), 718.04 (offences against vulnerable persons), and 718.201 (intimate partner violence) provide additional sentencing considerations with respect to specific offences, types of offences, or the circumstances of the commission of the offence. However, while these are important principles of sentencing, these are not relevant to the facts of 9147, nor are these provisions particularly relevant to the broader point being made here.

Section 718.2 reads as follows: “A court that imposes a sentence shall also take into consideration the following principles: (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor, (ii) evidence that the offender, in committing the offence, abused the offender’s intimate partner or a member of the victim or the offender’s family, (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years, (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation, (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, (v) evidence that the offence was a terrorism offence, or (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act* shall be deemed to be aggravating circumstances; (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; (c) where consecutive sentences are imposed, the combined sentence should not be

considered by the courts. They also used the following terms: appropriate sentence, fair sentence, fair and appropriate fine, adequate fine, determining a fit sentence, fit fine, appropriate fine, just and appropriate sentence, just and proper penalty, just sanction, proper quantum of the fine, fair and effective sentence.

To be fair, the statutory wording with respect to sentencing does not generally displace a judge's discretion¹¹⁵ to impose a fit sentence.¹¹⁶ In other words, though the respondent specifically references section 718.21, a fit sentence is always the goal. Remember that the goal of the respondent is to justify the claim that the punishment of the statutory minimum fine is so disproportionate as to be cruel and unusual.

Interestingly, however, the respondent also specifically refers to the *Code of Penal Procedure* to justify its position. The respondent writes as follows in its factum:¹¹⁷

unduly long or harsh; (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”

¹¹⁵ See Allan Manson, *Essentials of Canadian Law: The Law of Sentencing* (Toronto: Irwin Law, 2001) at 81.

¹¹⁶ For a discussion of the exceptions to the general rule, see *ibid* at 78–80.

¹¹⁷ 9147 Respondent's Factum, *supra* note 96 [footnotes omitted]. In the original French, the factum, in the relevant portion reads as follows:

[59] Une personne qui agit comme un entrepreneur au sens de la *Loi sur le bâtiment* (art. 7 et 46) et qui ne possède pas de licence s'expose à une amende. Des amendes minimales obligatoires sont prévues par cette loi pour la personne physique et la personne morale. Pour la personne physique, l'amende est actuellement de 11 461\$ (art. 197.1). Toutefois, en ajoutant le montant de la contribution (2 865\$) qui correspond à 25% du montant de l'amende minimale et les frais du constat (2 511\$), l'amende totale s'élève à 16 837\$. Cela signifie qu'une personne physique qui exécute sans licence des travaux de rénovation d'une salle de bain en la peinturant (art. 7, 9, 41, 46) pour le bénéfice de son propriétaire au montant de 250\$ avec taxes, s'expose à une amende de 16 837\$. Il en est de même pour la personne qui offre, sans licence (art. 7 et 46), d'exécuter des travaux de peinture d'un bâtiment dans une annonce publicitaire. En effet, il suffit de donner lieu de croire que l'on est un entrepreneur en construction pour commettre une infraction. Il n'est pas nécessaire de réaliser les travaux pour s'exposer à une amende de 16 837\$. Par ailleurs, une personne qui offre sans licence de réaliser des travaux de peinture en lien avec un bâtiment dans une annonce publicitaire et qui exécute ensuite sans licence des travaux de rénovation d'une salle de bain en la peinturant pour un montant de 250\$ avec taxes et ce, pour le bénéfice du propriétaire, s'expose à une amende totale de 33 674\$.

[60] Pour la personne morale, l'amende minimale obligatoire pour ne pas détenir une licence est de 34 378\$. Cependant, en ajoutant le montant de la contribution (8 594\$) qui correspond à 25% du montant de l'amende minimale et les frais du constat (2

- [59] A person who acts as a contractor within the meaning of the Building Act (ss. 7 and 46) and who does not hold a license is liable to a fine. Mandatory minimum fines are provided for by this law for individuals and legal persons. For the individual, the fine is currently \$11,461 (s. 197.1). However, by adding the amount of the contribution (\$2,865) which corresponds to 25% of the amount of the minimum fine and the costs of the finding (\$2,511), the total fine amounts to \$16,837. This means that a natural person who performs renovations of a bathroom without a license by painting it (ss. 7, 9, 41, and 46) for the benefit of its owner in the amount of \$250 with taxes, is exposed to a fine of \$ 16,837. The same applies to a person who offers, without a license (ss. 7 and 46), to carry out painting work on a building in an advertisement. Indeed, it suffices to give reason to believe that one is a construction contractor to commit an offense. It is not necessary to carry out the work to be liable to a fine of \$ 16,837. In addition, a person who offers an unlicensed offer to carry out painting work related to a building in an advertisement and who then performs unlicensed renovations of a bathroom by painting it for an amount of \$ 250 with taxes, for the benefit of the owner, is liable to a total fine of \$ 33,674.
- [60] For a legal person, the minimum mandatory fine for not holding a license is \$ 34,378. However, adding the amount of the contribution (\$8,594) which corresponds to 25% of the amount of the minimum fine and the costs of the finding (\$2,743), the total fine is \$45,715.82. If we take the example cited above for unlicensed renovation of a bathroom, for a contract of \$500 with taxes, and we apply it to a legal person, that person is exposed to a \$45,715 fine. It is the same for the legal person who offers, without a license, (art.7 and 46) to carry out painting works of a building in an advertisement without however carrying them out. In addition, a legal person, through its administrator, who offers, without having a license, to carry out painting work in connection with a building in an advertisement and who then performs, without a license, renovation work on a bathroom by painting it for an amount of \$500 with taxes and this, for the benefit of the owner, is liable to a total fine of \$91,430.

The problem with the argument put forward by the respondent is not that it is incorrect to rely upon the provincial statute. On the contrary, I

743\$), l'amende totale est de 45 715\$. Si nous reprenons l'exemple invoqué précédemment visant les travaux de rénovation sans licence d'une salle de bain, pour un contrat de 500\$ avec taxes, et que nous l'appliquons à une personne morale, celle-ci s'expose à une amende de 45 715\$. Il en est de même pour la personne morale qui offre, sans licence, (art.7 et 46) d'exécuter des travaux de peinture d'un bâtiment dans une annonce publicitaire sans toutefois les réaliser. Par ailleurs, une personne morale, par le biais de son administrateur, qui offre, sans posséder de licence, de réaliser des travaux de peinture en lien avec un bâtiment dans une annonce publicitaire et qui exécute ensuite sans licence des travaux de rénovation d'une salle de bain en la peignant pour un montant de 500\$ avec taxes et ce, pour le bénéfice du propriétaire, s'expose à une amende totale de 91 430\$.

believe that this is the correct approach. Rather, the issue is that both the Court of Appeal and the respondent for the Supreme Court of Canada seems to be treating the criminal law in a scattered way. They want to take some references for their argument from Column A (in this case, the provincial *Code of Penal Procedure*) while taking other references for their argument from Column B (in this case, the federal *Criminal Code*). In my view, such an approach cannot be justified. This is particularly so where the provincial statute specifically dictates a different set of organizational offenders who are subject to its provisions then does the federal legislation.

Another controversial approach is that presented in the *factum*¹¹⁸ of the Association of Defence Lawyers of Montreal¹¹⁹ as an intervener. The Association writes as follows:¹²⁰

¹¹⁸ See *Attorney General of Quebec, et al v 9147-0732 Québec inc*, 2019 QCCA 373 (Mémoire De L'Association Des Avocats De La Défense De Montréal), online (pdf): </www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM030_Intervenante_Association-des-avocats-de-la-défense-de-Montréal.pdf> [perma.cc/9QSL-L8UV] [9147 Mémoire De L'Association Des Avocats De La Défense De Montréal].

¹¹⁹ The name of the Association in French is “L'Association Des Avocats De La Défense De Montréal”

¹²⁰ In the original French, the paragraph reads as follows:

22. La définition englobante d'« organisation » à l'article 2 du *Code criminel* est un reflet législatif de cette réalité. En modifiant le *Code criminel*, LRC (1985), c C-46 [*Code criminel*] en 2004, le Parlement a facilité l'application du droit criminel aux personnes morales, augmentant ainsi leur exposition à des « peines ».
24. Deuxièmement, selon le principe d'interprétation évolutive de la *Charte*, l'interprétation de l'Article 12 doit aussi tenir compte des changements nombreux et constants apportés aux législations régissant les activités des personnes morales. L'éventail actuel limité des peines et traitements applicables aux personnes morales n'est pas exclusivement dû au fait qu'elles ne peuvent pas être emprisonnées. Il résulte surtout d'un choix législatif appelé à évoluer, comme l'illustre l'adoption récente de la partie XXII.1 du *Code criminel* sur les accords de réparation. Or, « [l]a Charte vise à établir une norme en fonction de laquelle les lois actuelles et futures seront appréciées » [note 24: R c *Big M Drug Mart Ltd.*, [1985] 1 RCS 295, opinion majoritaire, à la page 343], (nous soulignons).
27. Pour déterminer si une peine est exagérément disproportionnée dans le cadre des deuxième et troisième catégories, les considérations retenues par cette Cour incluent (a) la nécessité de la peine pour l'atteinte d'un objectif pénal régulier, (b) les effets de la peine sur le contrevenant en cause ou sur un autre contrevenant (dans une application raisonnablement prévisible de la disposition contestée) et (c) la conformité de la peine aux principes reconnus en matière de détermination de la peine. En ce qui concerne cette dernière considération, l'article 718.21 du *Code criminel* prévoit expressément des facteurs à prendre en compte dans la détermination de la peine d'une organisation incluant, à l'alinéa d), « l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés » [Most footnotes omitted].

22. The comprehensive definition of "organization" in section 2 of the *Criminal Code* is a legislative reflection of this reality. By amending the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*] in 2004, Parliament facilitated the application of the criminal law to legal persons, thereby increasing their exposure to "punishment."
24. Second, according to the principle of progressive interpretation of the Charter, the interpretation of s. 12 must also take account of the numerous and constant changes made to the laws governing the activities of legal persons. The current limited range of penalties and treatment for legal persons is not exclusively due to the fact that they cannot be imprisoned. It is primarily the result of a legislative choice that is set to evolve, as illustrated by the recent adoption of Part XXII.1 of the *Criminal Code* on remediation agreements. However, "[t]he Charter seeks to establish a standard by which current and future laws will be assessed" [note 24: *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at 343, *per* the majority], (emphasis added).
27. In determining whether a sentence is grossly disproportionate in the second and third categories,^[121] the considerations adopted by this Court include (a) the need for the sentence for the achievement of a regular penal objective, (b) the effects sentencing of the offender or another offender (within a reasonably foreseeable application of the impugned provision) and (c) compliance of the sentence with accepted principles of sentencing. With respect to the latter consideration, section 718.21 of the *Criminal Code* expressly provides for factors to be taken into account in the sentencing of

¹²¹ In the previous paragraph (paragraph 26 of the Association's factum), the following is written [footnotes omitted]:

The approach of this Court can be distilled into an analytical framework regrouping three distinct and alternative categories: (a) First category: Although its existence is rarely recalled in contemporary times, there is a range of penalties and treatments which are inherently cruel and unusual, regardless of the circumstances, such as corporal punishment; (b) Category Two: Punishment or treatment will be cruel and unusual because it is grossly disproportionate to the punishment or treatment appropriate to the person claiming protection under s. 12; (c) Category Three: Punishment or treatment will be cruel and unusual because it is grossly disproportionate to other reasonably foreseeable applications of the penalty or treatment (excluding that of the person claiming protection under Article 12).

In the original French:

L'approche de cette Cour peut être distillée en un cadre analytique regroupant trois catégories distinctes et alternatives : (a) Première catégorie : Bien que son existence soit rarement rappelée à l'époque contemporaine, il existe un éventail de peines et de traitements qui sont intrinsèquement cruels et inusités, sans égard aux circonstances, tels que les châtimens corporels. (b) Deuxième catégorie : Une peine ou un traitement sera cruel et inusité parce qu'exagérément disproportionné par rapport à la peine ou au traitement approprié pour la personne qui invoque la protection de l'Article 12. (c) Troisième catégorie : Une peine ou un traitement sera cruel et inusité parce qu'exagérément disproportionné par rapport à d'autres applications raisonnablement prévisibles de la peine ou du traitement (excluant celui de la personne qui invoque la protection de l'Article 12).

an organization, including, in paragraph (d), "the effect that the penalty on the economic viability of the organization and the continued employment of its employees."

Each of these paragraphs has indications that the Association believes that the *Criminal Code* applies in the case. Paragraph 22 begins by citing the comprehensive definition of "organization" provided for in section 2 of the *Criminal Code*.¹²² Despite the fact of the Association represents Québec lawyers, the factum makes no reference at all to the Québec *Code of Penal Procedure*.¹²³ Interestingly, the same paragraph seems to draw a parallel between increased amenability to the criminal law, on the one hand, and increased penalties, on the other. This seems to assume that increased penalties under the *Criminal Code* apply on these facts. However, I would agree with the Association that the source of the wrongdoing (in this case, the provincial legislation that created the offence, that is, the *Building Act*¹²⁴) and the penalties for it should generally emanate from the same level of government (the *Code of Penal Procedure*). Despite this, the factum of the Association makes no reference whatsoever to any provincial legislation.

Frankly, this is why this issue is so important. If the lawyers appearing before the Supreme Court of Canada do not even recognize that there is an issue as to what statute applies, how can a proper foundation for a constitutional argument even be laid? Even more importantly perhaps, given that this will be the first case before our country's highest court where the amendments introduced by Bill C-45¹²⁵ could be considered, any discussion of the breadth of the application of those amendments will be essentially unchallenged because there will be no earlier cases (from the Supreme Court of Canada or otherwise) that future courts will be able to consider. Thus, it is exceptionally critical that the Supreme Court of Canada take its time to properly consider what law applies.

In paragraph 24, the Association makes reference to Part XXII.1 of the *Criminal Code*. However, in my view, this is very problematic, for a number of reasons. The first of these is that the facts of 9147¹²⁶ preceded the passage of Part XXII.1.¹²⁷ Therefore, how can a constitutional question based on the

¹²² *Supra* note 3.

¹²³ 9147 Mémoire De L'Association Des Avocats De La Défense De Montréal, *supra* note 118; *Code of Penal Procedure*, *supra* note 67.

¹²⁴ *Supra* note 5.

¹²⁵ *Supra* note 17.

¹²⁶ *Supra* note 1.

¹²⁷ See *Criminal Code*, *supra* note 3, ss 715.3–715.43.

facts of 9147 be resolved on the basis of, or even influenced by, the legislative choices made by Parliament after those facts arose?

Perhaps even more importantly, in my view, paragraph 24 of the *factum* misinterprets the effect of Part XXII.1 of the *Criminal Code*. A remediation agreement is not punishment. If a remediation agreement is entered into between the prosecutor and the alleged organizational offender, any charges against the alleged organizational offender are stayed¹²⁸ and once the terms of the remediation agreement are fulfilled by the alleged organizational offender, the charges cannot be reinstated.¹²⁹ In other words, where the remediation agreement is fulfilled, the organizational offender is never convicted of an offence with respect to the facts underlying the remediation agreement.¹³⁰ In fact, the provisions go further and deem that no proceedings have even been commenced with respect to those offences to which a remediation agreement applies.¹³¹ If the performance of a remediation agreement were "punishment", this would defeat the purpose of the remediation agreement. Therefore, to consider this in the context of an argument about the application of section 12 of the *Charter*¹³² seems counterintuitive.¹³³ Furthermore, the legislation introducing the concept of

¹²⁸ *Ibid*, s 715.3(1) *sv* "remediation agreement".

¹²⁹ *Ibid*, s 715.4(2).

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

¹³² *Supra* note 2.

¹³³ Admittedly, section 12 refers to both "punishment" and "treatment". One could make the argument that, even if a remediation agreement is not "punishment", it is nonetheless "treatment" within the meaning of section 12 of the *Charter*. In my view, however, this does not attract section 12 protection as "treatment". The reason for this is simple. A remediation agreement is exactly that: an agreement. The organizational offenders must agree to the terms of the remediation agreement. If the treatment provided for by the remediation agreement is grossly disproportionate to the wrong committed, why would the organizational offender agree to those terms? It is important to remember that constitutional protections are generally driven by the protection the subject of the law (usually referred to as "an individual", but for current purposes, I am willing to concede that it also includes organizations for some purposes) from the coercive power of the state. Where a remediation agreement is negotiated, virtually by definition, the coercive power of the state is minimized, because the subject of the law wishes to negotiate to avoid criminal prosecution. It would seem very difficult to argue that negotiations (at least in most cases) would be genuinely coercive. After all, the defendant need only walk away from the negotiations to force them to end.

Now, a careful reader might suggest that any time that one has the looming specter of the criminal prosecution lying in the background of the negotiation, the possibility of coercion exists. While that is certainly possible, a remediation agreement does avoid

a remediation agreement into the *Criminal Code* is quite clear that a remediation agreement is not even available for all offences under the *Criminal Code*.¹³⁴ The list does not refer to types of offences for which a remediation agreement is possible. It lists specific sections of the *Criminal Code*.¹³⁵ If a remediation agreement is not even permitted for all the offences under its home statute, it strains credulity to suggest that somehow, in interpreting the punishment under a different statute, created by a different legislative body (the National Assembly of Quebec), the remediation agreement provisions are relevant.

the possibility of a criminal conviction for the underlying wrongdoing. For many business enterprises (which would all generally be considered "organizations" pursuant to the provisions of Bill C-45), the avoidance of the stigma of criminal conviction could certainly be worth any reasonable level of pecuniary loss necessary to secure the agreement of the prosecutor. Given this, it seems very unusual to raise the scope of Part XXII.1 of the *Criminal Code* to support an argument under section 12 of the *Charter*.

¹³⁴ In order for a remediation agreement to even be possible, the offence allegedly committed by the organizational offender must be found in a specific schedule to the *Criminal Code*, *supra* note 3. See "Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures", 3rd reading, *House of Commons*, 42-1, No 1 (6 June 2018), s 404, online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-74/> [perma.cc/5LF7-VRH3] [Bill C-74] (adding, among other provisions, subsection 715.3(1) to the *Criminal Code*, *sv* "offence").

¹³⁵ The listed offences are: "An offence under any of the following provisions of this Act: (a) section 119 or 120 (bribery of officers); (b) section 121 (frauds on the government); (c) section 123 (municipal corruption); (d) section 124 (selling or purchasing office); (e) section 125 (influencing or negotiating appointments or dealing in offices); (f) subsection 139(3) (obstructing justice); (g) section 322 (theft); (h) section 330 (theft by person required to account); (i) section 332 (misappropriation of money held under direction); (j) section 340 (destroying documents of title); (k) section 341 (fraudulent concealment); (l) section 354 (property obtained by crime); (m) section 362 (false pretence or false statement); (n) section 363 (obtaining execution of valuable security by fraud); (o) section 366 (forgery); (p) section 368 (use, trafficking or possession of forged document); (q) section 375 (obtaining by instrument based on forged document); (r) section 378 (offences in relation to registers); (s) section 380 (fraud); (t) section 382 (fraudulent manipulation of stock exchange transactions); (u) section 382.1 (prohibited insider trading); (v) section 383 (gaming in stocks or merchandise); (w) section 389 (fraudulent disposal of goods on which money advanced); (x) section 390 (fraudulent receipts under [the] *Bank Act*); (y) section 392 (disposal of property to defraud creditors); (z) section 397 (books and documents); (z.1) section 400 (false prospectus); (z.2) section 418 (selling defective stores to Her Majesty); and (z.3) section 426 (secret commissions)." See Bill C-74, *supra* note 134, Schedule 6, s 1. Inchoate and other offences (conspiracy or attempt to commit, accessory after the fact, and counselling) related to these offences are also included. See Bill C-74, *supra* note 134, Schedule 6, s 3.

Put another way, in my view, there is not even any plausible argument that a remediation agreement could ever apply to any provincial statute. Yet, the respondent in a case before the Supreme Court of Canada is nonetheless relying upon these provisions as part of its analysis of the punishments imposed by a provincial statute. To me, this can only lead to a lack of clarity as to what rules should apply when dealing with offences outside of the *Criminal Code*, whether those be the substantive attribution rules (whether sections 22.1 and 22.2 of the *Criminal Code*, on the one hand, or the common-law rules exemplified by the *DeJong* case,¹³⁶ on the other). It is this lack of clarity that will be remedied by a strong statement by the Supreme Court of Canada that the *Criminal Code* has no application to provincial offences.

III. CONCLUSION

In the end, the object of this paper is to make an argument about the scope of Bill C-45.¹³⁷ Essentially, multiple factors suggest that the courts ought to confine the application of the statutory attribution and sentencing rules regarding organizational criminal liability contained in the *Criminal Code*¹³⁸ to only those offences charged under the *Criminal Code*. With respect to quasi-criminal offences provided under provincial statutes, such as the one at issue in 9147,¹³⁹ the first of these are constitutional issues arising largely out of the division of legislative power under the *Constitution Act, 1867*.¹⁴⁰ Notably, where an offence is under valid provincial legislative jurisdiction, it would seem incongruous in the extreme to suggest that the rules of a federal statute (the *Criminal Code*) should govern the elements of the otherwise-valid exercise of provincial power. Of course, a provincial statute may incorporate the language of a federal statute by reference. There was a degree of incorporation of certain elements of the federal *Criminal Code* in the provincial *Code of Penal Procedure*.¹⁴¹ But where that incorporation is limited (as it is in the *Quebec Code of Penal Procedure*), we ought not read more of the incorporated federal statute into the provincial

¹³⁶ *Supra* note 81.

¹³⁷ *Supra* note 17.

¹³⁸ *Supra* note 3.

¹³⁹ *Supra* note 1.

¹⁴⁰ *Supra* note 48.

¹⁴¹ *Supra* note 67.

enactment than that provided for in the wording chosen by the provincial legislature. Finally, recent jurisprudence from the Supreme Court of Canada itself¹⁴² suggests that if the federal rules are easier to apply (in that they would create attribution in more cases than would their common-law counterparts), the common law rules should not be relaxed. In other words, on this view of the case law, harmonization between the *Criminal Code* provisions, on the one hand, and the judicially-created rules, on the other, should be accomplished by relaxing the latter. Obviously, judges cannot overrule Parliament with respect to the *Criminal Code* provisions. Thus, unless the *Criminal Code* provisions apply directly, it follows that we must apply the common-law rules with respect to all statutes other than the *Criminal Code*. Hopefully, the Supreme Court of Canada, when it decides the appeal of the decision of the Quebec Court of Appeal in 9147, will provide clarity on this issue for all Canadian courts going forward.

¹⁴² DeJong, *supra* note 81.