

EXTENDING CORPORATE CRIMINAL LIABILITY?: SOME THOUGHTS ON BILL C-45

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

I. INTRODUCTION

On 7 November 2003, Royal Assent was given to Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*¹. This legislation aims to broaden the criminal liability of corporations and other organizations in two significant ways. First, it expands the basis for corporate criminal liability beyond the existing common law; second, it extends to non-corporate organizations criminal liability previously limited to corporations. Bill C-45 will apply to all fault-based offences occurring on or after 31 March 2004;² it does not apply to offences of either absolute or strict liability.³

The most crucial element of Bill C-45 is the changes it makes with respect to the criminal liability of corporations. In a nutshell, these changes include:

- (a) the replacement of the identification doctrine with a broader regime of criminal liability;

* Assistant Professor, Faculty of Law, University of Manitoba. Generous financial support for this project was received from the Legal Research Institute, Faculty of Law, University of Manitoba. The research support of Matthew Burgoyne and Ryan Brolund is also gratefully acknowledged. Kim Brooks, David Deutscher, Debra Parkes, Barney Sneiderman and Graeme Young were kind enough to provide valuable feedback on earlier drafts of the article. I also wish to thank the anonymous reviewers and the editors of this publication for their time and effort on this paper.

¹ Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, 2d Sess., 37th Parl., 2003 (Royal Assent, 7 November 2003), S.C. 2003, c. 21 [Bill C-45].

² This is fixed as the date on which most of the operative provisions of Bill C-45 came into force. See Privy Council Minute 2004-90 (16 February, 2004). One section of the Bill had come into force on assent.

³ Absolute and strict liability offences were defined in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, at 1325-1326.

(b) the expansion of the principles underlying the attribution of criminal responsibility for fault-based crimes:

(i) for crimes requiring *mens rea*, when a senior officer knows an offence is being or is about to be committed by corporate agents and fails to exercise due diligence to prevent it; and

(ii) for crimes of negligence, the legislation allows for an aggregation of fault of senior officers;

(c) the loosening of the availability of potential defences; and

(d) the inclusion of both increased fines and sentencing guidelines particular to organizations.

This article discusses the likely impact of these changes, among others. It concludes that while the government intends to broaden criminal liability through Bill C-45, and in some ways, is successful in so doing, certain parts may require amendment to achieve this goal within the framework of the *Criminal Code*.⁴

II. THE LAW PRIOR TO BILL C-45

I begin with a statement of the law as it stood prior to the proclamation of Bill C-45. With respect to offences where the prosecution must prove fault, corporate criminal liability has been dependent on what is called the "identification doctrine". Corporations, of course, cannot commit crimes themselves: they have neither the brain to form the requisite fault element⁵ nor the body with which to commit the *actus reus*. Therefore, the law seeks to identify the individual whose actions and mental state should be attributed to the corporation. Any such person is referred to as a "directing mind" of the corporation.⁶

Being a directing mind requires that a person have "governing executive authority" over the activity in question. Governing executive authority has been defined as:

authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.⁷

⁴ *Criminal Code*, R.S.C. 1985, c. C-46, as amended [Code].

⁵ The terms "fault" and "fault element" are meant to encompass the mental elements of both *mens rea* and negligence-based offences, as the case may be.

⁶ *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 at 682 [*Canadian Dredge & Dock Co.*].

⁷ *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497 at 521 [*The Rhône*].

The courts have thus drawn a distinction between those who decide corporate policy and those who, once the policy has been decided by others, are charged with its implementation. The former have “governing executive authority” and are designated as directing minds in those spheres; the latter are not.

This designation of governing executive authority is activity-specific. As Justice Iacobucci indicates in the judgment excerpted above, the concern is whether a person has “decision-making power in a *relevant sphere of corporate activity*.”⁸ In other words, a person could have governing executive authority and be a directing mind for some purposes, but not for others. For example, assume that a fraud is perpetrated against a third party by the vice-president of marketing, using the corporation’s advertizing department to line both the company coffers and his own pockets. The corporation will be liable, provided the vice-president for marketing sets policies for the advertizing department (which he or she presumably would). The company would be criminally liable in addition to the human perpetrators of the fraud. If, however, the vice-president of research and development perpetrated the same fraud using the advertizing department, it is unlikely that the corporation would be liable. The vice-president of research and development generally does not set corporate policy with respect to advertizing. Since the vice-president of research and development is only a directing mind for the areas where he or she has the discretion to set policy, and the fraud related to the advertizing department, the corporation would not be liable for the actions of the vice-president of research and development. However, this does not prevent the individuals responsible for carrying out the fraud from potentially being convicted.

Accordingly, it is only the misconduct of those who are relatively high up in the corporate structure that can cause the corporation to be criminally liable, because generally only executives have the discretion to set corporate policy. Middle managers do not usually set policy; rather, they are the instruments to implement the policy set by others. This means that, at common law, the corporation is generally immune from criminal sanction for the actions of mid- to low-level managers and other employees.

III. BILL C-45

A. “Corporation” v. “Organization”

Although this article focuses on *corporate* criminal liability, one major change made by Bill C-45 is that it applies to more than just corporations. It applies to all “organizations”, which are defined as follows:

⁸ *Ibid.* [emphasis added].

“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.⁹

The government has decided that, regardless of the form chosen to undertake illegal activity (including public bodies and partnerships, among others), prosecution of the “organization” should be allowed.¹⁰ The question remains, though, whether the rationales that justify *corporate* criminal responsibility apply equally to other organizations. The criminal liability of corporations seems to be based on at least two footings. First, corporations have a separate legal personality from the shareholders, directors and officers charged with investment in, and/or oversight of, their operations.¹¹ Because we analogize the corporation to the characteristics of natural persons,¹² and natural persons commit crimes (and, indeed, some crimes occur in the course of representing, and for the benefit of, corporations), the courts have developed a device for holding corporations criminally liable. This is a principled approach to the separate legal personality of the corporation. The argument is essentially this: if you create a corporation, you accept the notion of separate legal personality, with all of its benefits; however, by taking the benefits of separate legal personality, the incorporator must also accept that this other person (the corporation) can do bad things. If it does bad things, society reserves the right to punish the corporation through the criminal law.¹³

The second rationale for holding corporations criminally liable under certain circumstances was explained by Justice Estey in *R. v. Canadian Dredge & Dock Co.*:

⁹ Bill C-45, *supra* note 1, s-s. 1(2).

¹⁰ Canada, Minister of Justice, Press Release, Bill C-45 online: Department of Justice <http://canada.justice.gc.ca/en/news/nr/2003/doc_30922.html> [Date accessed: 29 July 2004] [Bill C-45 Press Release].

¹¹ *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15(1) [CBCA].

¹² J.A. Van Duzer, *Essentials of Canadian Law—The Law of Partnerships and Corporations*, 2nd ed. (Toronto: Irwin Law, 2003) at 168 [Van Duzer], although Van Duzer does say that the analogy does not work particularly well for criminal wrongdoing (at 169).

¹³ In fact, the Supreme Court of Canada has recognized, albeit in the civil (as opposed to the criminal) context, the idea that those who incorporate must accept the less-than-desirable elements of separate legal personality, along with its positive aspects. See *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2, at 10–13.

the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person.¹⁴

The same point was expressed even more forcefully by Justice Schroeder, speaking for the Ontario Court of Appeal, as follows:

This trend [of increasing civil and criminal responsibility of corporations] has a valid basis to support it since corporations are at once more powerful and more materially endowed and equipped than are individuals and, if allowed to roam unchecked in the field of industry and commerce, they are potentially more dangerous and can inflict greater harm upon the public than can their weaker competitors.¹⁵

The same court has recently expanded this rationale to cover non-commercial situations. In *R. v. Church of Scientology*,¹⁶ counsel for the corporate defendant argued that because there were no shareholders and the corporation was not engaged in commerce, the rules of corporate criminal liability should not apply to non-profit corporations.¹⁷ The court dismissed this argument, writing:

The evidence in this case bears out the important role of the non-profit corporation in modern society. The latest figures available at the time of trial indicated that there were over 25,000 corporations without share capital incorporated in Ontario; that there were approximately 65,000 registered charities in Canada, and almost 30,000 of these carry out religious activities; and that Canadian taxpayers donated almost \$3 billion to charities. To leave these organizations outside the purview of the criminal law would be intolerable. Some of the most important activities undertaken in society are performed under the umbrella of the corporate vehicle. I can see no rational basis for adopting a different test for criminal liability, in the case of non-profit corporations solely because they do not have shareholders or because any profits are used to promote the objects of the corporation rather than to enrich the shareholders personally. The need for regulation of the conduct of the corporation through the criminal law is the same.¹⁸

In other words, the corporation is a reality that permeates modern commerce and modern life in general. Therefore, the courts have been unwilling to place corporations outside the reach of the criminal law. This is a pragmatic rationale for corporate criminal liability. So much occurs in the corporate form that society cannot allow this activity (some of it criminal) to remain untouchable by the criminal law.

¹⁴ *Canadian Dredge & Dock Co.*, *supra* note 6 at 692.

¹⁵ *R. v. St. Lawrence Corp. Ltd. et al.*, [1969] 2 O.R. 305 at 320 (C.A.), [St. Lawrence].

¹⁶ (1997), 33 O.R. (3d) 65 (Ont. C.A.), leave to appeal to S.C.C. refused, (1998), 227 N.R. 291n (S.C.C.).

¹⁷ *Ibid.* at 130.

¹⁸ *Ibid.* at 131–132.

If these are in fact two of the rationales (one principled, the other pragmatic) underlying corporate criminal responsibility, then I question whether these same justifications hold true for other "organizations", as defined in Bill C-45. Clearly, partnerships, among others, do not have separate legal personality from the individuals who are charged with their operation.¹⁹ Similarly, separate legal personality is not a requirement for any organization caught under paragraph (b) of the definition. Therefore, the principled rationale does not apply as easily to other forms of organization as it does to corporations. With respect to the pragmatic rationale, although "organizations" (other than corporations) are a recognized part of our social fabric, I question whether the activity carried out by such unincorporated "organizations" is as prevalent as corporate activity. If not, the applicability of the pragmatic rationale is proportionally more tenuous as well.

My object here is *not* to resolve whether it is appropriate to apply the identification doctrine to these other forms of "organization". Rather, it is simply to point out that Bill C-45 offers no insight into *why* these other "organizations" should be treated similarly to corporations.²⁰ As I have argued above, two of the rationales supporting *corporate* criminal liability are not as readily applicable to the other forms of "organization" to be caught by Bill C-45.

B. Expanding Liability: "Directing Mind" v. "Senior Officer"

I turn now to my main area of interest flowing from the legislation: how does Bill C-45 change corporate criminal liability?²¹ First, it eliminates the prosecution's duty to prove that a person is a directing mind of the corporation. Instead, a "senior officer" must be implicated in the criminal activity. "Senior officer" is defined in the Bill as follows:

¹⁹ Van Duzer, *supra* note 12 at 13.

²⁰ There may be other rationales that might justify holding other "organizations" criminally liable. For example, assume that a trade union began a concerted effort to disrupt non-union employers through a campaign of damage to property, criminal harassment of employees and other nuisances. The actions of individual trade union members may be relatively minor; collectively, however, the economic and other impacts of the joint actions of members may be substantial. In such a case, one might have other compelling justifications for imposing criminal liability on the organization. The defence of any other rationale must be left to another day, as such a normative defence would expand the undertaking here far beyond its intended scope.

²¹ To be clear, I am leaving aside the liability of individuals. Bill C-45 places certain duties on individuals related to the corporation: for example, section 3 of the Bill provides, "Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task." While this is another legal duty imposed on persons, including corporations, it does not affect the basic criteria for the liability of corporations generally. Therefore, I will not comment on it further here.

“senior officer” means a representative who plays an important role in the establishment of the 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

The term “representative” is, in turn, defined to include any director, partner, employee, member, agent or contractor of a corporation.²³ The first part of the definition of “senior officer” (“plays an important role in the establishment of the organization’s policies”) appears largely to codify the common law; “directing minds” under the common law would fit this definition. The second portion, however, clearly extends the attribution of criminal corporate liability to the actions of mid-level managers. Anyone who “is responsible for managing an important aspect of the organization’s activities” can render the corporation liable. This is a much lower standard than under the common law. “Senior officers” would include those managers who implement and operationalize corporate policies set by executives and/or directors. Bill C-45 essentially eradicates the distinction between those who create or set corporate policy and those charged with managing its implementation. In this sense, Bill C-45 extends corporate criminal liability.

C. Expanding Liability—Section 22.2

For a corporation to be liable for fault-based offences where the Crown has to prove a mental state other than negligence (intention, recklessness or wilful blindness) under Bill C-45, a “senior officer” must satisfy one of three tests. These are where the senior officer:

- (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.²⁴

Let me consider each of these in turn.

1. Paragraph 22.2(a)

The first of these seems to replicate the common law, in that if a person in a position of authority is a party to the offence, and is acting within the scope of

²² Bill C-45, *supra* note 1, s-s. 1(2).

²³ *Ibid.*

²⁴ *Ibid.*, s. 2.

his or her authority, the corporation may be held liable. As Justice Estey explains in *Canadian Dredge & Dock Co.*:

The principle of attribution of criminal actions of agents to the employing corporate principal in order to find criminal liability in the corporation only operates where the directing mind is acting within the scope of his authority ... in the sense of acting in the course of the [corporation's] business ... Generally the directing mind is also guilty of the criminal offence in question.²⁵

In my view (subject to my earlier discussion regarding the difference between directing minds and senior officers), paragraph 22.2(a) simply takes these comments from Justice Estey and puts them into statutory form. Therefore, this paragraph does not expand corporate criminal liability.

2. Paragraph 22.2(b)

Paragraph 22.2(b) appears to cover something that is already dealt with by a combination of paragraph 22.2(a), discussed above, and the common law. Ordinarily, an offender must have committed the *actus reus* with the requisite fault element at the time of the offence in order to be convicted. Under paragraph 22.2(b) of the Bill, a corporation may be liable if:

- (i) there are two representatives of the corporation, at least one of whom is a senior officer;
- (ii) the actions of the senior officer are within the scope of his or her authority;
- (iii) the senior officer has the requisite level of mental fault to commit the offence; and
- (iv) pursuant to a direction of the senior officer, the other representative commits the *actus reus* of the offence charged.

Subsection 21(1) of the *Criminal Code* reads in part as follows:

Everyone is a party to an offence who

- (a) actually commits it;

...

- (c) abets any person in committing it.²⁶

“Abets”, in this context, means to encourage someone else to commit a criminal offence.²⁷ Clearly, if a senior officer directs another person to commit a criminal

²⁵ *Canadian Dredge & Dock Co.*, *supra* note 6 at 684–685 [footnotes omitted].

²⁶ *Code*, *supra* note 4, s-s. 21(1)

offence and the other person commits that offence, then the senior officer would be abetting the offence. Paragraph 22.2(a) (discussed above) covers not only those senior officers who *commit* an offence, but also those *who are party to an offence*²⁸ (including those who abet the person committing the offence).

Therefore, assume that the other representative (who was directed by the senior officer) committed the offence, meaning that the other representative committed the *actus reus* with the necessary fault element. In such a case, the senior officer (by directing the other representative) would be abetting the representative in committing the offence. The senior officer would be a party to the offence pursuant to paragraph 21(1)(c) of the *Code*. In turn, the corporation would fall within paragraph 22.2(a). Hence paragraph (b) would be redundant.

But what if the representative who commits the *actus reus* does not have the requisite fault element to commit the offence? Clearly, paragraph 22.2(b) pertains to the fault element of the senior officer, as opposed to that of the other representative. Therefore, the statute unites the *actus reus* (of the other representative) with the fault element (of the senior officer) to hold the corporation liable.

At first blush, this might appear to be a change; however, the common law has already covered this. It has established that if one person (the senior officer) gets a second person (the other representative) to commit the *actus reus* of an offence without the knowledge of that other person, that other person is known as the “innocent agent” of the person with the guilty mind. The person with the guilty mind is then considered to be the person who “commits the offence”.²⁹ Put another way, in cases of “innocent agency”, the innocent agent appears to be considered simply an instrument of the person who demonstrates the requisite fault element. Therefore, the “innocent agent” is ignored and the person with the requisite fault element can be convicted, not because he or she aided or abetted anyone else, but rather, because he or she, using an instrument, committed the *actus reus* with the requisite fault element. Therefore, on this view, accomplice liability is irrelevant.

In the end, I believe that paragraph 22.2(b) is redundant. If the senior officer directs another representative to commit the *actus reus*, and the other representative does so with the requisite fault element, then the other representative commits the offence and the senior officer abets the other representative. Both are parties to the offence and are thus liable. As long as the senior officer acts

²⁷ *R. v. Curran* (1977), 38 C.C.C. (2d) 151 at 156 (Alta. S.C. App. Div.), leave to appeal to S.C.C. dismissed, (1978), 20 N.R. 180n.

²⁸ For another case example where the distinction between these two potential choices of language (“commits the offence”, on the one hand, and “is a party to the offence”, on the other) proved important, see *R. v. Paquette*, [1977] 2 S.C.R. 189 at 194.

²⁹ *R. v. Berryman* (1990), 57 C.C.C. (3d) 375 (B.C. C.A.).

within the scope of his or her authority, paragraph 22.2(a) is satisfied and there is no need to resort to paragraph 22.2(b). If, on the other hand, the senior officer directs another representative to commit the *actus reus* and the other representative does so *without* the requisite fault element, then the other representative is an “innocent agent”. The innocent agent is ignored for the purposes of the *actus reus*, and the senior officer would commit the offence. In either case, subsection 21(1) of the *Code* would make the senior officer a party to the offence (by virtue of paragraph 21(1)(c) in the former case, or by virtue of paragraph 21(1)(a) in the latter). In my view, paragraph 22.2(b) does not expand the conditions for corporate criminal liability.

Such a redundancy is to be avoided, if reasonably possible, given the wording of the statute. As Ruth Sullivan puts it: “It is presumed that the legislature avoids superfluous or meaningless words, that *it does not pointlessly repeat itself or speak in vain.*”³⁰ Ultimately, however, I cannot find any other reasonable interpretation of the section. When the section is clear and unambiguous, the courts must give effect to the ordinary meaning of the words of the section unless it can be proven that there is a reason to depart from this general rule.³¹ Therefore, even though I argue that the section is redundant, in my view, the courts will have little choice but to interpret the section in the manner described above.

3. Paragraph 22.2(c)

Paragraph 22.2(c) of Bill C-45 makes a substantial change to the law. Under this paragraph, if any senior officer becomes aware that any representative is or is about to be a party to an offence, then the corporation would be criminally liable, subject to a “due diligence” defence. This extends corporate liability markedly, in at least four ways. First, the section requires no active participation in the offence by anyone acting in any sort of managerial capacity or control position. An administrative assistant or member of the janitorial staff could conceivably render the corporation liable, as long as a senior officer is aware of the wrongdoing.

Second, the section does not require the senior officer who becomes aware of the misconduct to have any power in the area of the corporation’s business and affairs where the crime is being or will be committed. Bill C-45 not only changes the concept of “directing mind” to the defined term of “senior officer”, it also alleviates the activity-specific nature of the designation. Once a person is a senior officer, paragraph 22.2(c) can be invoked without the senior officer having the control necessary to prevent the crime. To return to my earlier ex-

³⁰ R. Sullivan, *Sullivan and Drediger on the Construction of Statutes*, 4th ed. (Markham, Ontario: Butterworths, 2002) [Sullivan and Drediger] at 158 [emphasis added] [Sullivan].

³¹ *Sullivan and Drediger*, *ibid.* at 19–21, 36.

ample, if the vice-president of research and development of a large corporation were to become aware of a crime being committed by the advertizing department, the fact that he or she has no managerial role with respect to the advertizing department is irrelevant to the liability of the corporation. This broadens corporate criminal liability significantly.

Third, it appears that legislative drafters have decided that the Crown should be able to prosecute the corporation, even though the senior officer cannot be convicted of the underlying offence. Under *Canadian Dredge and Dock Co.*, the directing mind would generally be liable for the offence for which the corporation is convicted.³² The introduction of paragraph 22.2(c) changes this. Knowledge of the criminal activity of another is generally not sufficient to convict someone of being a party to a crime.³³ Therefore, a senior officer cannot be convicted simply because he fails to stop another representative from committing an offence. But the corporation is in a different situation: a person's position as a senior officer, combined with knowledge of a crime being committed by someone connected to the corporation, is sufficient to convict the corporation of the underlying offence. Put another way, the path to corporate liability (under Bill C-45) runs through the senior officer, but the facts necessary to convict the corporation are not necessarily enough to convict the senior officer as an individual (although they would be enough to convict the representative who is a party to the offence).

Fourth, the paragraph also means that all senior officers are expected, *at a minimum*, to communicate with another in order to protect the interests of the corporation. This is a reasonable expectation. The law gives the corporation its own legal personality,³⁴ but prior to Bill C-45 society held the corporation criminally liable for only a limited subset of activities undertaken on behalf of the corporation. In other words, under the common-law approach to corporate criminal liability, if a directing mind becomes aware of criminal conduct committed by someone in the corporation (who is not a directing mind) that could potentially benefit the corporation, the directing mind is *not* required by the criminal law to stop it. Furthermore, the corporation would not be liable even if the directing mind knows that the criminal conduct is occurring.

Those who have responsibility for the well-being of the corporation are expected to work together to protect the corporation's interests. Paragraph 22.2(c) seems to demand co-ordination and communication between all members of the management team, whether at the upper or middle levels of the corporation. In fact, the words "all reasonable measures" may actually require more than simple communication from the senior officer with knowledge to the sen-

³² *Canadian Dredge & Dock Co.*, *supra* note 6 at 682.

³³ *R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881 at 898.

³⁴ See, for example, *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.); CBCA, *supra* note 11.

ior officer with the power to stop the criminal conduct. In principle, I support this concept. After all, a corporation should not be permitted to defend itself on criminal charges simply by arguing that the senior officer who knew of the wrongdoing says that the misconduct was “not my department”. Whether or not a senior officer has the authority to actually discipline the offending representative, he or she should at least be expected to inform those with authority over the representative so that they can put a stop to the criminal misconduct.

Notwithstanding my support in principle, however, there remains a practical problem. The section may demand that the senior officer report the conduct of the offending representative to any authority that could conceivably put a stop to the offence, including authorities external to the corporation (such as the police). This could put certain groups of senior officers in a difficult position. For example, the internal auditors of many large corporations are charged with risk assessment and risk management duties. An internal auditor could very well be said to be “responsible for managing an important aspect of the organization’s activities”, and thus be a “senior officer” of the corporation under Bill C-45. If so, internal auditors may quickly find themselves in an uncomfortable position. The very nature of an auditor’s role means that the auditor will likely discover problems in the corporation. There is a distinct possibility that an auditor may discover criminal wrongdoing by representatives who are not “senior officers”. In fact, the standards of professional practice for internal auditing make it clear that internal auditors, as a matter of competence, must be able to identify the indicia of fraud.³⁵ When the internal auditor does so, what is he or she to do?

The internal auditor is trusted by the corporation to find and report indications of risk that the business is facing. Then, the internal hierarchy of the corporation will decide what to do with the risks reported by the auditor. The head of internal audit generally reports to the board of directors, or, more typically in large corporations, the audit committee of the board.³⁶ In other words, an internal auditor’s role generally begins and ends within the governance structure of the corporation that the auditor serves. Dissemination of internal audit materials outside the organization is controlled by the policies of the organization.³⁷ If Bill C-45 requires any senior officer to report to external authorities, suddenly the internal auditor is caught in a dilemma. The auditor’s professional responsibility to the organization is to disseminate information to external sources only

³⁵ The Institute of Internal Auditors, *The Professional Practices Framework* (Altamonte Springs, Florida: The Institute of Internal Auditors, 2002) [PPF], Practice Advisory 1210.A2-2, at 85–86.

³⁶ PPF, *ibid.*, Standards for the Professional Practice of Internal Auditing [Standards], Standard 2060, at 14 and Practice Advisory 2060-1, at 135–136.

³⁷ PPF, *ibid.*, Standards, *ibid.*, Standard 2440, at 21 and Practice Advisory 2440-2, at 241–243.

if the organization's policies so allow. In order to protect the organization from criminal liability, paragraph 22.2(c) may require that internal auditors who qualify as senior officers report to external authorities even when specifically not permitted by such policy. In summary, if the internal auditor does not report his or her findings to external authorities, this may be sufficient to hold the corporation criminally liable. On the other hand, if the internal auditor *does* report his or her findings to external authorities, this could violate the standards of conduct for their profession.

In order to rectify this untenable situation, I would suggest that the obligations for all senior officers to stop criminal activity of which they become aware should be qualified. All senior officers should be required to take all reasonable measures *within the corporation* to stop the criminal activity. This would mean that all senior officers would have to report any information either "up the chain" or to other senior officers at the same level of the corporation with the ability to stop the offending representative. The information would make its way to the upper levels of the corporation. Ultimately, the chief executive officer, the president, and/or the board of directors would have the power to remove the offending representative and to involve external authorities. After all, the board of directors has the ability to hire and fire management, as part their supervision of corporate affairs.³⁸ If the board chooses to risk criminal conviction for the corporation rather than removing the offending representative, then clearly, "all reasonable measures" will not have been taken. Ultimately, there are no constraints on the board of directors if they choose to involve external authority to prevent the offence.

Paragraph 22.2(c) thus requires communication and positive action by senior officers to prevent crime by representatives of the corporation. One could argue that directors and officers of the corporation owe a duty to protect the corporation in any event.³⁹ In other words, fiduciary duty should require all officers and directors of a corporation to communicate among themselves to prevent potential losses to the corporation through criminal fines. Therefore, one might think that the fiduciary duty imposed on officers and directors makes the language of proposed paragraph 22.2(c) redundant.

In my view, this is not the case. Corporate law differs from Bill C-45 in several respects. First, the definition of "senior officer" seems more expansive than "officers" under corporate law.⁴⁰ Officers, in the corporate law sense, are designated by the directors of the corporation, at their discretion. Senior officers are determined by the application of the statutory definition, and not by the directors. Officers in the corporate law sense are generally appointed by the directors

³⁸ CBCA, *supra* note 11, s. 102.

³⁹ *Ibid.*, s-s. 122(1).

⁴⁰ *Ibid.*, s. 121.

in advance, often in the constituting documents of the corporation or by resolution. The designation of "senior officers" on the other hand, will likely also be determined after the fact. Put another way, it is unlikely that people within the corporation will spend time to determine who fits the definition of "senior officer" until an event occurs to make the designation relevant. Many employees of a corporation will not qualify as "officers", but may easily be "senior officers". This should be obvious from the earlier discussion of internal auditors. The head of internal audit may or may not be designated as an "officer" in the corporate law sense. Non-executive or outside directors are by definition *not* officers of the corporation, yet they clearly fall within the definition of "senior officer". As a third and final example, in a medium-sized, family-run business, officer positions may be restricted to family members. Nonetheless, many employees of the corporation could be "responsible for managing an important aspect of the organization's activities". Therefore, it is not only possible but in fact probable that individuals who are not "officers" in the corporate-law sense will nonetheless be "senior officers" for the purposes of Bill C-45. Therefore, the reach of the new legislation extends further than that of fiduciary duty.

Second, a breach of fiduciary duty by an officer or director is not sufficient to hold the corporation criminally liable. Breach of fiduciary duty is generally dealt with in the civil courts, even if the conduct may also qualify as criminal in nature (such as fraud by a director or officer). In fact, under corporate law, the corporation is the person who must sue the director for any breach of fiduciary duty. For that reason, fiduciary duty does not provide for criminal sanction against the corporation for its breach. Therefore, even though fiduciary duty may require some degree of communication between directors and officers, Bill C-45 adds something significant to the law by introducing criminal penalties for failure of employees to communicate relevant information to others in the corporation.

To recap, although paragraphs 22.2(a) and (b) codify the common law and other parts of the *Criminal Code*, the definition of "senior officer" extends corporate criminal liability to lower levels of management of a corporation than the common law. Paragraph 22.2(c) also adds significantly to the law in that it: (i) requires no active participation by any high-ranking corporate official; (ii) gets rid of the activity-specific nature of the former "directing mind" designation; (iii) enables the Crown to convict the corporation without convicting the human being whose failures are at issue; and (iv) demands communication between all management team members.

4. Narrowing Liability—Safeguards

Despite these extensions of corporate criminal liability, Bill C-45 also puts in place certain safeguards that make it harder for the government to prosecute under section 22.2. Two are particularly relevant. Let me again deal with each of these in turn.

The corporation can only be convicted under paragraph 22.2(c) if the senior officer “knows” that the other representative is or is about to be a party to an offence. I believe that this choice of wording would necessarily mean that the mental state of recklessness on the part of the senior officer would not be sufficient to hold the corporation liable. “Recklessness” refers to consciously running an unjustified risk of the occurrence of the offence.⁴¹ But “consciously running an unjustified risk” is a lesser state of culpability than actual knowledge of the commission of an offence. Since the drafters specifically chose the word “knowledge”, and since the courts tend to construe criminal statutes strictly,⁴² in my view, the courts have a basis in decided judicial authority upon which to read the paragraph in this way.

Nonetheless, I must acknowledge that there is also judicial authority to support the contrary position. In *Beaver v. The Queen*,⁴³ the majority of the Supreme Court of Canada held that the term “has in his possession any drug”⁴⁴ required knowledge of the drug alleged by the Crown to be “possessed” by the defendant.⁴⁵ However, in *R. v. Blondin*,⁴⁶ the British Columbia Court of Appeal, while purporting to apply *Beaver*,⁴⁷ held that recklessness as to the character of the substance would be sufficient to ground a conviction.⁴⁸ This was later affirmed by a unanimous Supreme Court of Canada in a short oral judgment.⁴⁹

In my view, Parliament should consider clarifying its language so as to explicitly include or exclude recklessness from the knowledge component of paragraph 22.2(c). Otherwise, the courts will undoubtedly have to wrestle with this issue. Personally, I favour a restrictive view of “knowledge” so as to exclude recklessness. If Parliament intends otherwise, it should say so. Considering how much the paragraph will expand liability regardless of this issue (that is, actual knowledge as opposed to recklessness), it seems to me that the courts should not further expand the section by judicial fiat.

⁴¹ See e.g. *R. v. Sansregret*, [1985] 1 S.C.R. 570 at 582. See also *Model Penal Code: Official Draft and Revised Commentaries* (Philadelphia: American Law Institute, 1985), §2.02.

⁴² *Sullivan and Dreidger*, *supra* note 30 at 385–386.

⁴³ [1957] S.C.R. 531, (1957), 118 C.C.C. 129 [*Beaver* cited to C.C.C.].

⁴⁴ Under the former *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, para. 4(1)(d).

⁴⁵ *Beaver*, *supra* note 43 at 140.

⁴⁶ (1970), 2 C.C.C. (2d) 118 (B.C. C.A.).

⁴⁷ *Ibid.* at 123 (McFarlane J.A.) and at 129–130 (Robertson J.A.).

⁴⁸ *Ibid.* at 120 (Davey C.J.B.C.), at 123 (McFarlane J.A.) and at 131 (Robertson J.A.).

⁴⁹ *R. v. Blondin* (1971), 4 C.C.C. (2d) 566 (S.C.C.).

In any event, the exclusion of recklessness under one paragraph of section 22.2 is a relatively minor safeguard. The major safeguard is contained in the opening words of the section, which read as follows:

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 ... [emphasis added].

Therefore, under Bill C-45, the prosecution must prove not only that one of the tests in paragraphs 22.2(a), (b) or (c) is satisfied, but also that the senior officer *intends to benefit the organization*.

This is a substantial change to the law. *Canadian Dredge & Dock Co.* provides that the identification doctrine is exceeded where the crime was not “by design or result partly for the benefit of the company”.⁵⁰ Justice Estey further explains the limits of the identification doctrine as follows:

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. The same reasoning and terminology can be applied to the concept of benefits.⁵¹

The judgment thus describes the limits of the identification doctrine in two ways: (i) where the actions of the directing mind are “directed to the destruction of the undertaking of the corporation”; and (ii) where the scheme was not “by design or result partly for the benefit of the company”. I now turn to consider each of these descriptions, as against the language of Bill C-45.

On the first test, the common law requires that a senior officer’s actions be “directed to the destruction of the undertaking of the corporation” before the corporation will *not* be held liable. In other words, to avoid liability, *Canadian Dredge & Dock* requires proof that the directing mind was intending to harm the corporation. From my reading of Bill C-45, however, this is no longer the case. In its place, there is a requirement to raise only a reasonable doubt as to whether the directing mind was trying to confer some benefit on the corporation. Put another way, it is easier for the corporation to use the defence in Bill C-45 (arguing that the senior officer did not “intend to benefit the organization”) than it is to use the common law defence (“the destruction of the undertaking of the corporation”).⁵²

⁵⁰ *Canadian Dredge & Dock Co.*, *supra* note 6 at 714.

⁵¹ *Ibid.* at 713.

⁵² Even though I refer to these as defences, the term is simply a matter of convenience. In order to convict the corporate accused at common law, the Crown must prove that the

As to the second test, to a certain extent the common law and Bill C-45 overlap. After all, if a directing mind *designs* a scheme at least partly to benefit the corporation (under the common law), this person would also have the “intent” to benefit the corporation as required under the new legislation. Therefore, I believe that Bill C-45 replicates this aspect of the common law test.

The common law test, however, does not end with design. The common law defence only applies if no benefit is conferred *either* by design *or* result. In *Canadian Dredge & Dock Co.*, Justice Estey sets up the test as a clearly disjunctive one: either one will disallow the defence to the corporation. In other words, even if there were no intent by the directing mind to benefit the corporation, as long as the activities of the directing mind delivered something positive to the corporation, the corporation would still be held liable. Bill C-45 does not inquire into the result of the activities of the senior officer at all. In this respect, the new legislation makes it harder for the prosecution to convict corporations than did the common law.

Did Parliament mean to do this? Probably not. The government press release explains the rationale behind Bill C-45 as follows:

The proposed amendments were first outlined in the Government's November 2002 response to the 15th Report of the House of Commons Standing Committee on Justice and Human Rights on workplace safety and corporate liability, a review prompted by the Westray mine disaster in Nova Scotia.⁵³

In the Westray disaster, 26 coal miners died when an explosion caused the Westray mine near Stellarton, Nova Scotia to collapse.⁵⁴ Despite public inquiry findings of misconduct by mine managers,⁵⁵ neither the corporate parent of the

criminal act of the directing mind: (a) was within the field of operation assigned to him or her; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company. See *ibid.* at 714. These are referred to as “defences” for two reasons. First, in a number of places, Justice Estey refers to them as such (see *ibid.* at *inter alia*, 670, 673, 694, 695 and 698). Secondly, they only become relevant to the discussion *after* the Crown has proven both (i) the underlying facts of the offence committed by the individual; and (ii) that the individual has some policy-setting authority in the corporate hierarchy, and is thus a directing mind.

⁵³ Bill C-45 Press Release, *supra* note 10. Similar sentiments were expressed on the introduction of a Private Members Bill (Bill C-284, An Act to Amend the Criminal Code (offences by corporations, directors and officers)) in November, 2001. See House of Commons Debates, 37th Parliament, 1st Session, 2001–2002, Volume 9, 8 November 2001 at 7186.

⁵⁴ Kevin Cox, “Curragh aims to reopen Westray mine”, *The Globe and Mail* (16 May 1992) at A8.

⁵⁵ CBC News Online Staff, “Charges dropped in Westray explosion”, CBC News, (30 June 1998), online: CBC News Online:

<<http://cbc.ca/cgi-bin/templates/view.cgi?category=&story=/news/1998/06/30/westray980620a>> [Date accessed: 29 July 2004]. See also Justice K. Peter Richard, Commissioner, *The Westray Story*:

mine nor any individual mine managers were ever convicted of a crime in connection with the tragedy.⁵⁶ The intention of Bill C-45 was clearly to rectify the deficiencies highlighted by the Crown's inability to convict the Westray defendants under the common law. This is confirmed by another part of the press release accompanying the introduction of Bill C-45, where the government says, "The proposed legislation ... clarifies and *expands* the conditions for liability of organizations..."⁵⁷

It is unlikely that the government would intend to expand the conditions for liability, on the one hand, while making it easier for corporations to avoid liability by loosening constraints on the use of defences, on the other. Loosening defences is antithetical to the avowed legislative purpose of *expanding* corporate criminal liability. This assumes, of course, that the government's avowed purpose is in fact not compromised by other, more overtly political, considerations. To be clear, I do not believe that the loosening of defences necessarily eradicates all of the expansion of corporate criminal liability otherwise found in Bill C-45; but if expansion of liability is the goal, the loosened defences do not serve this purpose. Since this is the case, I would suggest that the legislative drafters might seek to rectify this by adding the concept of result-based benefits to the opening language of section 22.2. In order to do this, the language might read something like the following:

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 *either* the intent, *and/or* result of, at least in part, *benefiting* the organization, one of its senior officers ... [changes italicized].

This change to the statutory language would leave what the Supreme Court of Canada refers to as the "outer limit of the delegation [identification] doctrine"⁵⁸ intact. I am not suggesting that Parliament needs to *narrow* the defence to achieve its aims; rather, my point is that loosening the defence is antithetical to Parliament's purpose. The suggested language would at least be neutral to the purpose. The use of the defence would not be loosened, but Bill C-45 would also not make it more difficult for corporate wrongdoers to defend themselves.

A Predictable Path to Disaster—Report of the Westray Mine Public Inquiry, Vol. 1 (Halifax, Nova Scotia: The Province of Nova Scotia, 1997), at *inter alia* 140–141.

⁵⁶ Susan LeBlanc and Eva Hoare, "Westray charges Stayed—Mine bosses, Curragh unlikely to face trial" *The Chronicle-Herald*, (1 July 1998), online: *The Herald* <<http://www.halifaxherald.com/cgi-bin/home/displaypackstory?1998/07/01+200.raw+Westray3+2>> [Date accessed: 29 July 2004].

⁵⁷ Bill C-45 Press Release, *supra* note 10 [emphasis added].

⁵⁸ *Canadian Dredge & Dock Co.*, *supra* note 6 at 712.

While the change would not *in itself* serve the goal of *expanding* corporate criminal liability, it at least would not detract from the avowed goal of the legislation.

If Parliament were committed to expanding corporate criminal liability through the *narrowing* (as opposed to the loosening) of the defences, it could easily do so. For example, it could provide no defences at all. Alternatively, the legislation could provide that the defence only applies to the corporation where it is the sole victim of the crime. After all, it seems incongruous to say that the criminal is also the victim of his or her own crime. In *Canadian Dredge & Dock Co.*, Justice Estey has already covered the circumstance where the directing mind is trying to steal from the corporation. Where the crime is a “fraud on the corporation” the identification theory does not apply.⁵⁹

But should the corporation need to be the *sole* victim? This would simply make it more difficult for the corporation to use the defence. It is conceivable that the corporation may lose some money due to the fact that the individual perpetrator has not dedicated him- or herself fully to making money for the corporation. In that sense, the corporation is always a victim in corporate criminal activity. Therefore, the “sole victim” requirement would reflect the fact that simply saying that the corporation had to be a “victim” may not be a difficult standard to meet. The “sole victim” standard would clearly narrow the availability of the defence and meet Bill C-45’s avowed goal of expanding corporate criminal liability. This is not to suggest that this would be a positive change to the law. My point is *not* to show the proper course of action. This would require far more analysis of the potential options than space allows here. My point is only to demonstrate that, if Parliament wishes to narrow the use of the common-law defence referred to by Justice Estey in *Canadian Dredge & Dock*, there are ways to accomplish this.

D. Expanding Liability—Section 22.1

Section 22.2 deals with fault-based offences that require states of culpability *other than* negligence. Negligence-based offences are dealt with in section 22.1. It is to these offences that I now turn my attention. There are two elements to the test set out in the section, both of which must be present to convict the corporation. First, a representative (and two or more representatives will be treated as a single representative for the purposes of this section) must be party to the offence. Second, the section requires the following:

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.

The operative element of the first part of the test (a representative of the corporation being a “party to the offence”) was already discussed earlier in the section

⁵⁹ *Ibid.*, at 713.

on paragraph 22.2(a). The second element of the first part of the test is more interesting. This is the only part of Bill C-45 that refers to treating two or more representatives as one for the sake of establishing liability (which I will refer to as the “joint-liability language”). In particular, there is no mention of this joint-liability issue in section 22.2 with respect to other fault-based offences. On the second part of the test (paragraph 22.1(b), excerpted above), the “marked departure” standard is largely a codification of the common law.⁶⁰ The words between the dashes (“or the senior officers, collectively, depart”), however, create a degree of collective responsibility among the senior officers. Even if the senior officer in charge of the area of corporate affairs where the offence occurred did not “depart markedly” from the standard of care that could have prevented the offence, if the other senior officers (judged collectively) “depart markedly” from that standard, this is sufficient to fulfill paragraph 22.1(b).

Section 22.1 thus treats both multiple representatives committing the offence, and multiple senior officers failing to stop it, each as one for the purposes of negligence-based offences.⁶¹ I believe that this focus on collective action is designed to prevent what I will refer to as “avoidance of accountability by fragmentation”. In other words, the standard of a “marked departure” makes the addition of the joint-liability language important. An example may assist here. Assume that two senior officers were negligent by failing to prevent the offence of causing death by criminal negligence by a corporate representative. Each of the senior officers acknowledges that he or she committed negligence, but argues that his or her act (or omission) alone does not constitute a “marked departure” from the requisite standard of care. With the fragmentation of responsibility in modern corporations, this could easily occur. Each senior officer may have such a small area of responsibility that relatively few decisions would, *in and of themselves*, constitute a “marked departure” from the standard of care. Without the section’s joint-liability language, as long as responsibility for the “marked departure” could not be laid at the feet of a *single* senior officer, the corporation avoids responsibility. In other words, without the joint-liability language, by *fragmenting* decision-making authority, the corporation could avoid accountability because no one senior officer would *individually* make a decision that meets the “marked departure” standard. With the joint-liability language, however, the court can look at all the decisions made by senior officers that *collectively* resulted in the commission of the offence.

In my view, this change to the law is desirable. It recognizes that in many modern corporations, particularly large ones, it is sometimes difficult to point to one or more decisions made by a single person that constitute a “marked depart-

⁶⁰ *R. v. Sharp* (1984), 12 C.C.C. (2d) 428 at 436 (Ont. C.A.).

⁶¹ I wish particularly to thank Professor David Deutscher for helping to direct and refine my thinking on this issue.

ture” from the standard of care. In other words, the joint-liability language actually treats the corporation’s decision-making as a cohesive whole, rather than viewing corporate decisions in an individualized way. The focus of the common law on identifying the person who is the “ego”⁶² or directing mind of the corporation means that once one finds that “mind”, it becomes the “mind of the corporation”. While a corporation can have more than one directing mind,⁶³ it appears that, under the common law, the conduct of each directing mind is judged separately from that of any other directing mind. This can be implied from *Canadian Dredge & Dock Ltd*, where Justice Estey held that, when the identification doctrine applies, “The corporation and its directing mind became one...”.⁶⁴ There is no suggestion, under the common law, that a court could examine the totality of decision-making of many directing minds of the corporation and combine all the decisions made by them so as to judge the actions of corporate managers on a collective basis.

The corporation is a separate legal person from those who control its destiny (that is, directors and officers). Those individuals need to operate in a collective framework to achieve positive results for the corporation. Therefore, it seems to me only natural to acknowledge that the corporation takes on a “personality” that reflects the *collective effects* of the decisions of all the individual group members.

To be clear, I am *not* suggesting that a corporation should be held criminally liable for every action taken in its name. Nonetheless, I say that, with negligence-based offences, the global view of corporate decision-making is preferable to the individualistic nature of the “identification doctrine”, under Canadian law prior to Bill C-45. If a number of people (whom Bill C-45 designates as “senior officers”) are involved in decisions that lead to a course of action, then it seems only correct to view all of those decision-makers *collectively*, because the *collectivity* of decisions (and decision-makers) was necessary to bring about the course of action. Therefore, by including the joint-liability language, I believe the theory of corporate criminal liability comes closer to the reality of current corporate practice. In my view, this is a positive aspect of Bill C-45.

I mentioned earlier that the joint-liability language only applies to negligence-based offences. Why not apply the same logic to other fault-based offences? In my view, the reason is the inherent difference in the fault standards to be applied to the offences. As discussed above, one could have multiple people who are negligent, but only the collectivity may show the necessary “marked

⁶² *Lennox's Carrying Company, Limited v. Asiatic Petroleum Company, Limited*, [1915] A.C. 705 at 713 (H.L.); *St. Lawrence*, *supra* note 15 at 317, 320; *Canadian Dredge & Dock Co.*, *supra* note 6 at 682.

⁶³ *Canadian Dredge & Dock Co.*, *ibid.* at 693; *St. Lawrence*, *ibid.* at 320.

⁶⁴ *Canadian Dredge & Dock Co.*, *ibid.* at 699.

departure”, without any individual meeting the standard. The joint-liability language therefore has a place with respect to negligence-based offences. It is more difficult to see how one could find the mental state of, for example, “intention” in a collection of senior officers without finding an individual who also meets the standard. In other words, with the mental state of “intention”, there is no reason to include joint-liability language: any time that the language would apply, there would also be an individual senior officer who would have the necessary mental state. If a senior officer has the requisite mental state, then the corporation is liable and resort to the joint-liability language is unnecessary. Thus it makes sense *not* to apply the joint-liability language to offences requiring fault other than negligence.

E. Sentencing

Bill C-45 changes the conditions of liability for corporate criminals. However, it does not stop there. It also alters the sentencing regime for corporate offenders in two major ways.⁶⁵ First, it increases the maximum fines for corporate criminal wrongdoing. Second, it sets out guidelines for judicial sentencing decisions.

1. Increased Fines

Turning to the first of these, subsection 735(1) of the *Code* gives a court the right to impose fines on corporations found guilty of criminal offences. This section is somewhat altered by Bill C-45, at least in terms of summary conviction offences. For this lower grade of offences (as compared to the more serious indictable offences), the maximum allowable fine is increased from \$25 000⁶⁶ to \$100 000.⁶⁷ Just as important is the change introduced by the 2004 federal Budget disallowing deductibility of fines and penalties imposed by law.⁶⁸ Previously, under the common law, fines were deductible unless they were either specifically disallowed by legislation⁶⁹ or so egregious that their deductibility

⁶⁵ To be clear, I am not attempting to address all the potential issues raised by the sentencing provisions of Bill C-45. For example, section 18 of Bill C-45 (subsections 732.1(1) and 732.1(3.1) of the *Code*) adds “optional conditions” to the probationary options available on the conviction of an organization. Some of these “optional conditions” clearly raise serious constitutional issues. These issues are sufficiently important and complex to warrant analysis, but this article is not the appropriate forum for this analysis. This challenge will be taken up at another time.

⁶⁶ *Ibid.*, s. 735(1)(b), as it read prior to proclamation of Bill C-45.

⁶⁷ Bill C-45, *supra* note 1, s-s. 20(2).

⁶⁸ See Budget Plan, Annex 9 (Budget 2004) online: <<http://www.fin.gc.ca/budget04/bp/bpa9ae.htm>> under “Fines and Penalties” [Budget Plan] [Date accessed: 29 July 2004].

⁶⁹ See *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), as amended, s. 67.5.

would offend public policy.⁷⁰ The federal government provides reasons based in tax law and policy for this change.⁷¹

In my view, there is another reason why the deductibility of criminal fines is problematic. This argument is based, not in tax law and policy, but rather in the criminal law. The *Code* clearly sets out the purposes of sentencing:⁷² a sentence is meant, among other things, “to denounce unlawful conduct”,⁷³ “to deter the offender and other persons from committing offences”,⁷⁴ “to provide reparations from harm to victims or to the community”⁷⁵ and “to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community”.⁷⁶ Since these are some of the purposes of sentencing, the deductibility of fines (the predominant way that we punish corporate criminal wrongdoers) does not further any of these avowed statutory ends.

Paragraph 718(f) (that is, “to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community”) is particularly telling. After all, the *Code* goes even further and provides that it is a *fundamental principle* that a sentence must be proportionate to both the “the gravity of the offence and the responsibility of the offender”.⁷⁷ Therefore, when a fine is imposed, it becomes an assignment of responsibility to the corporation. The monetary loss suffered by the corporate offender is supposed to be a public statement of the degree of that responsibility. By allowing the deduction of the expense, the tax system had previously diminished that degree of responsibility. But what was perhaps even more distressing was that, in diminishing the responsibility of the corporation, the tax system foisted this burden onto people who had done nothing wrong. The tax base (that is, the general population) was in no way responsible for the criminal actions of the corporations. It seems unfair, from a criminal law perspective, to place even part of the economic consequences (that is, the fine) of criminal wrongdoing on someone with no connection to the wrongdoer. To me, this provides an additional compelling ra-

⁷⁰ 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 at 842–843 (Iacobucci J., writing for the majority of the Court).

⁷¹ Budget Plan, *supra* note 68.

⁷² *Code*, *supra* note 4, s. 718.

⁷³ *Ibid.*, para. 718(a).

⁷⁴ *Ibid.*, para. 718(b).

⁷⁵ *Ibid.*, para. 718(e).

⁷⁶ *Ibid.*, para. 718(f).

⁷⁷ *Ibid.*, s. 718.1 [emphasis added].

tionale, in the criminal law, for the decision of the federal government to disallow the deductibility of fines for criminal conduct.

2. Sentencing Guidelines

In 1995, Parliament amended the *Criminal Code* to insert guidelines with respect to the sentencing of offenders.⁷⁸ In Bill C-45, the government supplements these guidelines with considerations particular to "organizations".⁷⁹ Let me make two points. First, it is clear that these new factors are *additional to*, and not in substitution for, the factors for offenders generally. The section provides that a sentencing court "shall *also* take into consideration the following factors".⁸⁰ The new section immediately follows the provision of the *Code* with respect to the sentencing guidelines for offenders generally. In fact, the marginal note for the relevant clause in Bill C-45 says simply "Additional factors".⁸¹ The existing guidelines applied to all offenders are thus relevant to "organizations".

Second, it is clear that the list detailed below is non-exhaustive. While the sentencing court is to "take into consideration" the factors listed, section 718 provides the following general statement in arriving at an appropriate sentence:

The fundamental purpose of sentencing is 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 ...⁸².

The ultimate goal is a just sentence. In other words, despite the enumeration of specific factors, the court should still take other relevant circumstances into consideration. Similarly, the listed factors should not affect the sentence if they are inapplicable to the fact-scenario with which the court is confronted.

Bill C-45 refers to the following considerations for sentencing "organizations":

- (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;

⁷⁸ *Code*, *supra* note 4, ss. 718-718.2.

⁷⁹ Bill C-45, *supra* note 1, s. 14.

⁸⁰ *Ibid.* [emphasis added].

⁸¹ *Ibid.*

⁸² *Code*, *supra* note 4, s. 718. Some of purposes of sentencing are listed at notes 73-77, and related text [emphasis added].

- (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.⁸³

Let me consider each of these in turn. Paragraph (a), for most corporations, would entail an examination of the *economic* advantage procured through the criminal conduct. This seems to me to be a factor directly related to the *gravity of the offence*. As mentioned earlier, the “fundamental principle” of sentencing is proportionality of the sentence to the gravity of the offence and the responsibility of the offender.⁸⁴ Therefore, this seems to be a logical factor to take into account. Likewise, paragraph (b) seems to be directed toward the responsibility of the offender. If an offence is planned, deliberate, long-term, and carried out through a complex series of steps or transactions, it becomes very difficult to argue the offence was the result of a momentary lapse in judgment. This is recognized both statutorily, with respect to offences such as murder,⁸⁵ and more generally by judicial sentencing pronouncements.⁸⁶ Clearly, planning and deliberation aggravates the responsibility of an offender. Therefore, in my view, this is again a proper consideration in sentencing. Paragraph (c) appears to be redundant: if the people running the corporation attempt to hide assets and render the corporation essentially judgment-proof, this, in essence, is a continuation of the offence. It renders the offence more complex and increases the level of planning necessary to execute it. Therefore, this is already covered by paragraph (b).

Paragraph (d) seems to recognize the relative importance of corporations to economic development and employment in North America. In other words,

⁸³ Bill C-45, *supra* note 1, s. 14.

⁸⁴ *Code*, *supra* note 4, s. 718.1.

⁸⁵ *Ibid.* s-s. 231(2).

⁸⁶ See Allan Manson, *Essentials of Canadian Law—The Law of Sentencing* (Toronto: Irwin Law, 2001) at 156; Clayton C. Ruby, *Sentencing*, 5th ed. (Markham, Ontario: Butterworths Canada Ltd., 1999) at 167 [Ruby], and the cases cited by each of the authors.

Parliament has decided that while the courts should punish each corporate criminal, the punishment should not be so severe as to affect the economic viability of the corporation as a whole. The expectation is that the economic consequence of criminal wrongdoing will be borne by the shareholders of the corporation (who invest their money with the hope of profit, while knowing that there is a risk of loss associated with the investment). Shareholders elect the directors. Directors appoint the officers, who in turn hire the other employees. The employees should not generally bear the risk of criminal misconduct, as they do not select or oversee the senior officers. Therefore, if the fine imposed were so large as to threaten the ability of the corporation to continue as a going concern, this would foist the cost of the wrongdoing onto the employees, who could lose their respective livelihoods if the corporation ceases operations. The employees may have done nothing wrong, nor have they as a group been in any position to stop the occurrence of the offence; yet, if the fine were large enough, the employees will lose their means of supporting themselves. This paragraph attempts to ensure that the sentence is borne by those with the power to prevent it, placing responsibility on the offender and not on others who are innocent. The court should be cognizant of this when imposing sentences on corporations.

Paragraph (e) is, in my view, one of the more problematic factors put forward in this section. On the one hand, a guilty plea by the corporation early on will save the authorities a significant expense. This is properly considered to be a mitigating factor in sentencing.⁸⁷ The failure to plead guilty and the desire to stand on the constitutional right to a trial should not be considered as an aggravating factor.⁸⁸ Clearly, the costs of a prosecution are increased by a full trial as opposed to a guilty plea. We do not sentence individuals based on the expense to which the state has been put to investigate their wrongdoing. It is true that planning and deliberation of the offender in carrying out the offence may add to the costs of the prosecution's attempt to discover what may be well-concealed by the corporate offender; however, the concern with regard to planning and deliberation has already been covered under paragraph (c), discussed above. Furthermore, the fact that a crime is costly to investigate *in and of itself* has no relevance to either the gravity of the offence or the responsibility of the offender. Therefore, I view the costs of the investigation as an inappropriate factor in sentencing for corporations.

As in the case of individuals, this factor should be a one-way street. The guilty plea may be used to mitigate the sentence if the court believes that this is warranted; however, the requirement of a trial should not aggravate a corporation's sentence. The proper use of a guilty plea as an exclusively mitigating fac-

⁸⁷ *R. v. Johnston and Tremayne*, [1970] 2 O.R. 780 (C.A.).

⁸⁸ *Ruby*, *supra* note 86 at §§5.176–5.177.

tor could be clarified by listing which of the factors are considered to aggravate the sentence and which of them are considered to mitigate. The *Code* already does this with respect to individual, non-corporate offenders.⁸⁹ In my view, Bill C-45 should do the same for organizations.

Paragraph (f) subsumes two considerations: (i) regulatory penalties imposed on the corporation for the conduct constituting the offence; and (ii) regulatory penalties imposed on the *representatives of the corporation* for the same conduct. These raise different issues. With respect to the first of these, when the corporation suffers a regulatory penalty, and is convicted criminally for the same conduct, this can be seen as two sides of the same coin. In terms of the business of the corporation, it could be seen as paying twice for the single incident. Therefore, the section seems to apply what is referred to as “the totality principle” to the combination of criminal and regulatory offences. The totality principle means that when consecutive sentences are imposed, the *total* of the sentences for the offence should not be disproportionate to the gravity of the offence and the culpability of the offender.⁹⁰ Given the layers of regulatory complexity that modern businesses can face, this recognition of the totality principle in relation to regulatory as well as criminal offences seems warranted.

With respect to the second issue, however, different considerations apply. There are two alternatives. First, it is possible that Parliament is saying that the harsher the regulatory sentence imposed on the representative, the lower the sentence of the corporation should be. This seems to be premised on the idea of avoiding double punishment. After all, it is the action of the representative that led to liability for both the representative and the corporation. There is a certain logic to this. If the representative had never engaged in the prohibited conduct in the first place, the corporation would never have been found liable. I return to this first alternative below. The second alternative is that Parliament intends that a harsh sentence for the representative should necessarily mean a proportionately harsher sentence for the corporation (to reflect the fact that the corporation was meant to benefit from this wrongdoing). This, too, has a certain common sense appeal. Both the representative and the corporation are being convicted of the same offence, as a result of the same action. Therefore, one could argue that since the gravity of the offence is the same, there should be proportionality between the respective sentences for the representative and for the corporation.⁹¹

⁸⁹ *Code*, *supra* note 4, s. 718.2.

⁹⁰ Ruby, *supra* note 86, §2.76; see also *Code*, *ibid.*, para. 718.2(c).

⁹¹ For a detailed discussion of proportionality in criminal sentencing, see Darcy L. MacPherson, “The Relevance of Prior Record in the Criminal Law: A Response to the Theory of Professor von Hirsch” (2002), 28 *Queens L.J.* 177 at 189–192 [MacPherson, “The Relevance of Prior Record”], as well as the authorities cited therein.

In my view, the second alternative is closer to the mark than the first, as the second one clearly considers the gravity of the offence. Therefore, if the second alternative is what is intended, this should be clarified. However, both of these alternatives are, in my view, unacceptable. They ignore two basic facts. First, the corporation is a separate legal person from the representative who actually committed the underlying offence.⁹² If we are truly committed to the separate legal personality of the corporation, why is the punishment of one person (that is, the corporation) dependent on the sentence received by another (the representative)? This runs counter to the “fundamental principle” of sentencing: the sentence must be proportional to both the gravity of the offence and the responsibility of the offender.⁹³ This principle is not dependent on the actions of others. In this respect, the first alternative is particularly problematic. It seems to say that the justice system will get its ‘pound of flesh’ from either the representative or the corporation. The justice system must determine the appropriate sentence for *each offender*. All the offenders found liable for the offence should not be treated as a group. The statute simply does not provide for sentencing offenders as a group.

It could be argued that since the senior officer is the corporation for these purposes, the responsibility of the two offenders (the senior officer who commits the *actus reus* with the requisite fault element and the corporation) is the same. I view this as too simplistic. An example might assist here: imagine that the head of a corporation set up a variety of internal checks and balances to ensure that criminal and other types of undesirable behaviour did not occur. The system was generally successful, but one rather ingenious senior officer finds a way to circumvent the system. The corporation benefits from the actions of the senior officer. Both are brought to trial and convicted. Clearly, the level of responsibility for the offence lies more with the guilty senior officer than with the corporation. After all, the senior officers who installed and operated the internal checks and balances are just as much the corporation as the ingenious guilty one. In a situation such as this, the fact that all senior officers but one are trying to protect the corporation from crime would, in my view, be relevant to the sentence imposed. Therefore, different considerations may justify different sentences for the corporation, as compared to the senior officer.

The second issue is a related concern. Assume that the justice system is dealing with two individuals, each of whom has been convicted of the same offence. Assume that one is convicted of actually committing the offence; the second is convicted of abetting the first. One would expect that the principal offender would receive more punishment than the abettor. This is quite proper. But assume that for some reason, the Crown cannot prosecute the representa-

⁹² CBCA, *supra* note 11, s-s. 15(1).

⁹³ Code, *supra* note 4, s. 718.1 [emphasis added].

tive (the principal offender) for some reason (the loss of crucial evidence due to violation of a *Charter* right would be one example). Does this mean that the corporation should be treated more harshly than would otherwise be the case? If the first alternative discussed above were correct, then the answer to this question would be “yes”. Under Bill C-45, the inability to convict the representative leads to a harsher punishment for the corporation. In my view, this is unacceptable.

Paragraph (g) discusses the corporation’s prior record. This raises the same concern with respect to connecting the sentence of the corporation with that of the representative as discussed under paragraph (f) above. However, there is an additional concern: not all regulatory offences provide the same degree of procedural protection to defendants as does the criminal process. For example, many regulatory offences do not require the prosecution to prove actual fault; instead, regulatory offences are often “strict” or “absolute” liability offences.⁹⁴ Similarly, many administrative tribunals use procedural standards which may be less stringent than those observed in the criminal process.⁹⁵ Therefore, if the criminal courts wish to use regulatory offences as a relevant consideration in criminal sentencing, this should at least be done with care, if at all, given the number of potential differences between the criminal and regulatory contexts.⁹⁶

I find paragraph (h) puzzling. I can only assume that this is a mitigating factor in sentencing. If it were not, then the corporation would be disinclined to discipline its representatives who commit crimes. To me, this seems counter-productive. Even as a mitigating factor, it remains an enigma. This would encourage the corporation to attempt to offload its responsibility by “pointing the finger”, as it were, at one of its representatives. While a genuine show of remorse is an accepted mitigating factor,⁹⁷ this usually does not involve blaming and penalizing someone else. I suspect that the legislative drafter added this to give organizations an incentive to maintain internal discipline. As will be dis-

⁹⁴ See *R. v. Sault Ste. Marie (City)*, *supra* note 3.

⁹⁵ David J. Mullan, *Evans, Janisch, Mullan & Risk—Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond-Montgomery Publications Limited, 2003) at 285.

⁹⁶ In an earlier essay on sentencing, I held the view that there was a difference between criminal offences and non-criminal bad acts. This difference, I said, justified the conclusion that only prior criminal record (and not other bad acts) should be considered in determining the appropriate sentence for the current offence. See, MacPherson *supra* note 91 at 203–205. My earlier essay dealt with sentencing generally, and *did not* examine regulatory offences or corporate wrongdoing in particular. It may be that, in certain circumstances, past regulatory offences should be considered in sentencing a corporation for current criminal misconduct. Space does not allow me to do a full analysis of the relationship between regulatory offences and criminal sentencing here. Until that analysis is complete, I sound only a note of caution, as definitive answers will have to wait for another day.

⁹⁷ Ruby, *supra* note 86, §5.72.

cussed below, Parliament has already provided such an incentive in paragraph (j); in my view, paragraph (h) is simply an *ex post facto* way for corporation to shield itself from its full responsibility. If I were drafting an amendment to the legislation, I would delete this factor; however, if I were an adviser consulted by a corporate client after criminality of a representative is discovered, I would tell my client to penalize the representative very seriously so that the client might avail itself of the paragraph.

Paragraph (i) appears to use both voluntary and court-ordered restitution as mitigating factors on sentencing. Voluntary restitution shows that the offender is remorseful and is taking responsibility for his, her or, in this case, its actions.⁹⁸ There is no issue with respect to this, as the proposed paragraph simply codifies the common law⁹⁹ and applies it to corporations and other organizations. With respect to court- or tribunal-ordered restitution, however, in my view, the paragraph goes too far. A restitution order is part of a sentence. The totality principle tells us that the entire sentence (and not simply each of its constituent elements) must be proportionate to the offence. The elements of the sentence must be viewed in their collective context. I have no issue with this contextual approach. But if the paragraph is intended to be a mitigating factor *in addition to* providing the proper context, it is overly generous to the offender. In other words, the restitution order should be taken into account in determining an appropriate sentence, but to make an additional mitigating factor would be inappropriate. If the paragraph is meant only to ensure proper context, it is redundant, as the totality principle already covers this. Thus, in my view, paragraph (i) is unnecessary.

I view paragraph (j) as a specific example of the common-law principle of considering (as a mitigating factor) the offender's positive behaviour after the offence to show remorse and ensure that the same offence will not occur again.¹⁰⁰ This paragraph provides an incentive for corporations to take decisive action to protect against further occurrences of employee criminal misconduct, thereby maintaining internal discipline. Unlike paragraph (h), discussed above, this proposed paragraph is focused, not on the corporation's decision to penalize its *employee* for *past* conduct, but on the fact that the corporation is ensuring *future* compliance, thereby taking responsibility for its actions. This is properly considered in determining a proportionate sentence.

As should be evident from the foregoing discussion, I would argue that some of the new sentencing factors in Bill C-45 are inappropriate. These provisions should thus be amended to bring them into line with the fundamental principle of sentencing. Nonetheless, it is also important to remember that this list is

⁹⁸ *Ibid.*, §19.12.

⁹⁹ *Ibid.*, §5.74.

¹⁰⁰ *Ibid.*, §§5.75–5.77.

non-exhaustive, and that the factors need only be applied when relevant to a given fact-scenario. The judiciary need not use all of these factors in every case.

IV. CONCLUSION

There can be little doubt that, in some ways, Bill C-45 changes the law significantly. It extends corporate criminal liability principles to unincorporated organizations. It also lowers the level of responsibility needed to implicate the corporation by replacing the common law concept of a “directing mind” with the statutory definition of a “senior officer”. Further, Bill C-45 extends criminal liability for corporations in that it forces all senior officers to actively prevent misconduct by everyone associated with the corporation. If the senior officers do not take “all reasonable measures” to prevent misconduct of which they become aware, the corporation can be held criminally liable.

Bill C-45 allows the court, in negligence-based offences, to view corporate decision-making on a collective, rather than an individual, basis. Because of the fragmentation of decision-making in modern corporations, it can be hard to point to a single individual and say that his or her decisions show a marked departure from the standard of care. It may be that collectively the actions of *all those managing* the corporation show such a departure. For my part, I believe that this improves the common law.

Some of the sentencing provisions of Bill C-45 also consider factors which are different from the common law or the statutory guidelines applicable to individuals. While some of these provisions, in my view, further the purposes and principles of sentencing set out in the *Criminal Code*, others do not seem to promote these principles and may in fact run counter to general principles of sentencing. Thankfully, this section is by its terms non-exhaustive, and hopefully the judiciary will be very careful in applying the paragraphs that do not promote the fundamental principle of sentencing. We will have to wait for the application of the sentencing provisions in order to discover whether this hope will become reality.

In some respects, the new legislation codifies the common law. For example, under Bill C-45, if a person who is acting as the brain of the corporation is a party to an offence, then the corporation is liable. The same is true under the common law, although the nomenclature (“directing mind” as opposed to “senior officer”) is different. In other respects, Bill C-45 makes it harder to convict a corporate accused, since the corporation could now successfully argue that it was not intended to benefit from the criminal wrongdoing of its representatives, and thus could not be held criminally liable.

There is thus a bit of everything in this new legislation. It undoubtedly alters the law relating to the criminal liability of corporations. While the overall effects of Bill C-45 will be positive, some reworking of the legislation remains to be done to ensure three things. First, changes are needed so that the legislation

achieves its avowed goals (by, for example, *not* expanding defences). Second, Bill C-45 must guard against placing certain senior officers, such as internal auditors, in intractable situations. Third, the statute should be changed to remove those sentencing provisions that are not in line with the concepts of sentencing already in the *Criminal Code*. As this paper has tried to show, I believe that all of this can be accomplished with a few simple changes. When these changes are made, this will be an even more positive step forward in the law.