

Criminal Liability of Partnerships: Constitutional and Practical Impediments

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

I. INTRODUCTION

Recent changes¹ to the *Criminal Code*² have altered the liability of corporations for crimes requiring proof of mental fault³ in Canada. The author and others have discussed the effect of these changes.⁴ Since arguments regarding the strengths and weaknesses of Bill C-45 with respect to corporations have already been made elsewhere, they need not be repeated here.⁵

However, Bill C-45 goes beyond corporate criminal liability. The new rules also purport to hold other “organizations” liable in the same manner as corporations. “Organizations” include many associations of persons, which

* Associate Professor, Faculty of Law, University of Manitoba. Associate, Marcel A. Desautels Centre for Private Enterprise and the Law. Generous financial support for this project was received from the Legal Research Institute, University of Manitoba. The research assistance of Ryan Johnson, Doug Schweitzer and Daniel Watts is also gratefully acknowledged.

¹ Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, 2nd Sess., 37th Parl., 2003 (Royal Assent, 7 November 2003) [Bill C-45]. The majority of Bill C-45 came into force on 31 March 2004. See Privy Council Minute 2004-90 (16 February 2004). One section of Bill C-45 came into force on assent.

² R.S.C. 1985, c. C-46, as am. by, among others, S.C. 2003, c. 21.

³ “Mental fault” includes both subjective (that is, *mens rea*) and objective (criminal negligence) fault elements. There are offences that do not require the prosecution to prove mental fault of the accused. These are referred to as “strict liability” and “absolute liability” offences. See *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1313-1326, [*Sault Ste. Marie*]. Bill C-45 does not deal with these.

⁴ See e.g., Bruce Welling, *Corporate Law in Canada – The Governing Principles*, 3rd ed. (London, Ontario: Scribblers Publishing, 2006) at 159-178; Todd Archibald, Kenneth Jull & Kent Roach, “The Changed Face of Corporate Criminal Liability” (2005) 48 *Crim. L.Q.* 367; Darcy L. MacPherson, “Extending Corporate Criminal Liability? Some Thoughts on Bill C-45” (2004) 30 *Man. L.J.* 253 [MacPherson, “Extending Corporate Criminal Liability?”].

⁵ The authors listed do not necessarily agree with one another on all of the relative strengths and weaknesses of Bill C-45. There are significant points of divergence. However, an assessment of these is not the task for this paper.

(unlike corporations) do not have separate legal personality from the individuals that comprise them.

How does the legislation purport to do this? There are three possible approaches. The first would hold members of the “organization” liable for wrongdoing committed as part of the organization’s activities. The second approach would imbue the “organization” with the separate legal personality currently reserved for incorporated associations, for all purposes. The third approach would imbue the “organization” with separate legal personality, but for limited purposes only. Bill C-45 is not explicit as to which approach is to be adopted in interpreting its provisions. Therefore each approach will be considered in turn.

I begin by setting out some of the provisions of Bill C-45 and other statutes with respect to organizational liability. Secondly, I argue that, unless an organization has a separate legal personality, the idea of imposing criminal penalties on an “organization” is actually imposing the penalties on its members. Bill C-45 may be attempting to impose the economic component of the criminal sanction on the partners directly, whether or not they were involved in the wrongdoing that led to the imposition of the fine. If this is its intention, the state is punishing people, not for what they personally have done, but rather for their membership in an allegedly criminal association. This violates the presumption of innocence enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms*.⁶ Furthermore, this violates the right to freedom of association guaranteed by s. 2(d) of the *Charter*.⁷

Third, there are division-of-powers issues raised by attempting to imbue provincially-regulated organizations with separate legal personality through federal legislation. Partnerships, (which are designated specifically as “organizations” under Bill C-45), are clearly governed by the law of the province(s) in which the partnership carries on business.⁸

Fourth, these constitutional problems may become less acute if an “organization” is only imbued with separate legal personality for the limited purposes of ascribing criminal wrongdoing to it. However, this leaves certain

⁶ Part I of the *Constitution Act, 1982*, being Schedule “B” to the *Canada Act, 1982*, 1982, c. 11 (U.K.) [*Charter*].

⁷ In *Corporate Law in Canada*, *supra* note 4 at 177, n. 57, Welling questions whether Bill C-45 may raise issues around s. 7 of the *Charter*. Given that: (i) the issue raises concerns in terms of both corporate and non-corporate organizational offenders; (ii) the issue was raised by Welling in the corporate context; (iii) the issue has not been addressed in the corporate context, issues around s. 7 will be left to another day.

⁸ Alison R. Manzer, *A Practical Guide to Canadian Partnership Law*, looseleaf (Aurora, Ontario: Canada Law Book, 1994) at para. 1.10 [Manzer]; J. Anthony VanDuzer, *The Essentials of Canadian Law: The Law of Partnerships and Corporations*, 3rd ed. (Toronto: Irwin Law, 2009) at 29 [VanDuzer].

practical concerns; the division of property between the “organization” and its members may become unclear. This may make it very difficult to punish the “organization” without directly punishing its members. I conclude that the attribution of “organizational” criminal liability for offences requiring proof of mental fault is fraught with difficulty, irrespective of such attribution’s analytical basis.

To be clear, one question is left aside – I am not asking whether the government should introduce organizational criminal liability. This normative issue is a much larger question whose resolution is better left to another day.⁹ As Immanuel Kant once theorized, ‘ought’ implies ‘can’.¹⁰ Herein, we set aside the question of whether the federal government ought to have passed this statute. The remaining analytical question is of sufficient importance and complexity to warrant our full attention here. Therefore, it is this analytical question on which we shall focus.

II. STATUTORY AND CONSTITUTIONAL PROVISIONS

Before turning to the substantive question, it is necessary to set the stage by reviewing the statutory provisions which inform much of the analysis. Let us begin with Bill C-45 itself.

A. Bill C-45

Bill C-45 provides that an organization is liable for an offence if, among other things, a “senior officer” of the “organization” is a party to the offence.¹¹ The definitions of “organization” and “senior officer”, respectively, read as follows:

“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;

“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;¹²

⁹ In “Extending Corporate Criminal Liability”, *supra* note 4 at 256-258, two potential rationales for corporate criminal responsibility are identified. Neither of these rationales is subjected to normative analysis in the earlier article. This will again have to wait for another day.

¹⁰ Immanuel Kant, *Critique of Pure Reason*, ed. and trans. by Paul Guyer & Allen W. Wood (Cambridge: Cambridge University Press, 1998) at 540.

¹¹ Bill C-45, *supra* note 1, s. 2 [now *Criminal Code*, *supra* note 2, para. 22.2(a)].

¹² Bill C-45, *ibid.*, s. 1(2) [now *Criminal Code*, *ibid.*, s. 2] [emphasis added].

The definition of “senior officer” includes a reference to the term “representative”, which is itself defined in Bill C-45 as follows:

“representative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;¹³

For this paper, the major substantive section of Bill C-45 is the section that is now s. 22.2 of the *Criminal Code*:

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.¹⁴

B. The Charter

Certain constitutional provisions are also relevant. Sections 2 and 11 of the *Charter* read in part as follows:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

11. Any person charged with an offence has the right:

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

C. Partnership

In assessing the impact of Bill C-45 on a non-corporate organizational structure, it seems appropriate to focus on one type of structure for consistency and continuity throughout the analysis. Partnership¹⁵ is the logical choice, for four reasons. First, partnerships are specifically named as “organizations” under Bill C-45.¹⁶ Second, the law of partnership is well developed and reasonably uniform across the country with a clear statutory overlay, thereby providing the most source material for this analysis. Third,

¹³ *Ibid.*

¹⁴ *Supra* note 11.

¹⁵ This paper will be restricted to the law of general partnership. It will leave aside issues around the limited partnership and the limited-liability partnership.

¹⁶ Bill C-45, *supra* note 1, s. 1(2) [now *Criminal Code*, *supra* note 2, s. 2].

partnership is one of the most easily recognized forms of non-corporate organization. Fourth, many partnerships are large in size (professional partnerships that cannot be incorporated due to statutory or other restrictions come to mind).

The definition of partnership is:¹⁷

Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit; but the relationship between members of an incorporated company or association is not a partnership within the meaning of this Act.

Bill C-45 itself contains no definition of “partnership”. Consequently, the courts are likely to adopt the definition offered by the provincial *Partnership Acts*.¹⁸

Therefore, a partnership is not a separate person from its partners.¹⁹ Instead it is a relationship that exists between persons. How is it that the federal government intends to hold a *relationship* liable for a criminal offence?

III. A HYPOTHETICAL EXAMPLE

A simple hypothetical will assist. For continuity purposes, reference will be made to this example throughout the paper. One gentleman (“Adam”) works with another gentleman (“Brian”). Each is involved in managing their shared enterprise. Thus, assuming that the business is an “organization”, Adam and Brian are each a “senior officer” of the organization.

Both believe that their relationship is *not* one of partnership. In fact, the contract between the two gentlemen indicates specifically that partnership is

¹⁷ *Partnership Act*, C.C.S.M., c. P30, s. 3 [*Partnership Act* (Manitoba)]. While this is drawn from Manitoba, the other common-law provinces and territories have legislation to a similar effect. Quebec has a partnership regime, which in some ways mirrors that of its common-law sister-provinces. However, there are important differences, which are unique to Quebec. For a discussion of the Quebec partnership regime, see VanDuzer, *supra* note 8 at 29-30. The discussion will be limited to the common-law provinces.

¹⁸ See *Continental Bank Leasing Corp. v. Canada*, [1988] 2 S.C.R. 298 at para. 22, Bastarache J., (dissenting on different grounds); *Spire Freezers Ltd. v. Canada*, [2001] 1 S.C.R. 391 at para. 17; *Backman v. Canada*, [2001] 1 S.C.R. 367. In these cases the Supreme Court of Canada held that in the absence of a statutory definition of “partnership” in the *Income Tax Act*, R.S.C. 1985, (5th Supp.), c. 1, the ingredients of a partnership for tax purposes are those provided under partnership law as codified in the provincial legislation.

¹⁹ See *Re: Thorne and New Brunswick Workmen’s Compensation Board* (1962), 33 D.L.R. (2d) 167 (N.B.C.A.). The position is the same in English law: The Law Commission and The Scottish Law Commission, *Partnership Law – A Report on a Reference under Section 3(1)(e) of the Law Commissions Act, 1965*, Cm 6015 (London and Edinburgh: The Law Commission and The Scottish Law Commission, 2003) at paras. 2.5-2.6 [“The English and Scottish Law Commissions Report”].

not intended. However, notwithstanding the intentions of the parties, the statutory definition of partnership is satisfied, and thus, a partnership exists.²⁰ Adam has been misbehaving. He has been using the business to defraud customers. Adam intended some benefit to the business from his activities, and there was, in fact, some benefit to the enterprise. Notwithstanding this, Brian knew nothing of the scheme to defraud customers. Had Brian known of the scheme, he would have done everything possible to stop it.

Adam is guilty of fraud. Can the same be said of the business? Bill C-45 explicitly intends that there could be criminal liability.²¹ What happens to Brian? He has done nothing criminal. Can the government access Brian's personal assets to pay the fine against the organization?

IV. CONCLUSIONS

Given what follows, the conclusions to be drawn from the analysis are set out below:

Without Imbuing the "Organization" with Separate Legal Personality

Imposing liability on a partnership without providing a separate legal personality presents several difficulties. Partnership property is owned by the partners collectively. While one partner may have legal title to the asset, the partner is subject to a fiduciary obligation in favour of the other partners to only use "partnership property" for the partnership's business purposes. Therefore, payment of the fine levied must come from someone who owns property.

Interpretative Difficulties

Perhaps, the property should only come from the guilty partner. However, this interpretation renders Bill C-45 redundant. Furthermore, such an interpretation does not accord with the purpose of the Act, the scheme of the Act, or the intention of Parliament. Therefore, such an interpretation is to be rejected. The codified rules of criminal sentencing promote, among other things, the responsibility of offenders. Asking a person not associated with the organization to contribute to the payment of the fine would not be in accordance with this principle. This leaves only the property used in the business of the partnership. Therefore, property of both the guilty and the innocent partners may be used to pay the fine levied against the organization;

²⁰ For an example where the courts have held that there is in fact a partnership even where all the parties thereto claim that no such relationship was intended to exist, see *Redfern Farm Services Ltd. v. Wright*, 2006 MBQB 4, 200 Man.R. (2d) 129.

²¹ See Bill C-45, *supra* note 1, ss. 1(2) and 2 [now *Criminal Code*, *supra* note 2, s. 2 and s. 22.2(c)].

Section 11(d) of the Charter

Section 11 of the *Charter* – including the presumption of innocence contained in s. 11(d) – applies to any case where the prosecution is “criminal by nature” or causes “true penal consequences”. Since the prosecution will occur under the *Criminal Code*, the prosecution is “criminal by nature”. Even if this does not render the prosecution “criminal by nature”, each of the unlimited power to fine, and the fine’s purpose in protecting public order is sufficient to attract s. 11 protections. Parliament cannot avoid the application of s. 11 by “charging” one entity (the partnership) when a person who has not been charged (the innocent partner) will be required to make good on the fine levied. In addition, the innocent partner will suffer “true penal consequences” if the innocent partner’s property can be used to pay the fine against the organization. A criminal fine is fundamentally different than other civil liabilities that can (according to the law of partnership) be placed upon one partner by another without the consent of the first partner. A criminal fine for an offence of mental fault carries with it an assignment of moral blame, unlike other civil liabilities. Therefore, constitutional protections should apply to the payment of a criminal fine.

Section 2(d) of the Charter

Freedom of association protects a person’s right to perform in association with others activities which the person has the legal right to perform individually. A person has the legal right to do nothing about the criminal behaviour of any other person, and not be liable for it. Bill C-45 does not change this outcome for the innocent partner; however, once the guilty partner commits a crime which is intended to benefit the partnership, the innocent partner can be forced to pay part of the partnership’s resulting fine. Therefore, the right of the innocent partner to do nothing in the face of the knowledge of his or her co-partner’s criminal behaviour is removed, simply because the innocent partner is associated as a partner of the guilty individual. As such, Bill C-45 violates s. 2(d).

In the alternative, Bill C-45 drives at the “qualitative distinctions” between the individual partner and the partnership. According to recent Supreme Court of Canada jurisprudence, this is sufficient to attract s. 2(d) protection. Bill C-45 draws such a “qualitative distinction” in at least five ways. First, the definition of “organization” focuses on “associations of persons” rather than the individuals that comprise them. Second, not all partners are designated as “senior officers” of the partnership, drawing a distinction between the partnership and the individual partners. Third, the fact that there can be “organizational” liability without any senior officer (who is the conduit to “organizational” liability) being liable for any crime, including the one for which the organization is charged, further accentuates this distinction. Fourth, one section in Bill C-45 imposes a duty to ensure occupational health and

safety for workers on “every one”. This applies equally to individuals as well as organizations. Parliament specifically equates the two for the purpose of this section, and does not do so for “organizational” liability sections of Bill C-45. Parliament is clearly drawing a distinction between the group (the partnership) and its individual counterpart (the partner). Finally, the Supreme Court of Canada has given specific examples of the “qualitative distinctions” meant to be caught by the test enunciated by the Court. There are significant similarities between one of those examples and the distinctions drawn by Bill C-45.

Under s. 2(d) jurisprudence, the section will be engaged if: (i) the state seeks to either prevent or provide a specific disincentive to the pursuit of the common goals, or the actions of the state have the effect of substantially interfering with the pursuit of the common goals, and (ii) but for the prohibition or disincentive at issue, the common goals are legally allowed; and (iii) the disincentive at issue is driven at the associational nature of the goals sought to be pursued. Bill C-45 creates a specific disincentive against the pursuit of collective goals, even though the collective goals may be legal in and of themselves. The common goals of the partnership are legally allowed, because the criminal goals of one senior officer are *not* necessarily *common* goals of the partners. The disincentive is driven at the fact that the goals being carried out in the associational context of partnership. This is precisely the type of state action with which s. 2(d) is concerned. Also, values which underlie *Charter*, including the rule of law, could be enhanced by s. 2(d) protection in these circumstances. This militates in favour of s. 2(d) protection for the innocent partner.

Section 1

Through a comparison of the impact of Bill C-45 to the s. 1 analysis undertaken by the Supreme Court of Canada on the facts of *R. v. Oakes*,²² it is contended that there is, at the very least, a strong argument to suggest that Bill C-45 may not pass constitutional muster if the organization is not imbued with separate legal personality.

Imbuing the “Organization” with Separate Legal Personality for All Purposes

Imbuing the partnership with a separate legal personality for all purposes – similar to that for corporations – will alleviate concerns around both ss. 11(d) and 2(d) of the *Charter*. However, division of powers issues arise when the federal government applies separate legal personality to the partnership for all purposes. Provincial legislatures have jurisdiction over

²² *Infra* note 125.

“Property and Civil Rights in the Province”, including general regulatory jurisdiction over businesses. If an otherwise valid federal law could change the ownership of property by a provincially-regulated business, this effectively strips the provincial legislatures of the power to regulate businesses. To give effect to both the federal power over criminal law and the provincial regulation of business, the federal power only applies when the criminal law applies to the business.

The position of the partnership is then analogous to the constitutional position of the corporation. Provincial law cannot interfere with the status of a federally-incorporated corporation. Although there is no case-law on this point, the province should be able to determine the status of provincially-incorporated corporation. The case-law on the status of federal corporations includes the ability to carry on business as part of that status. The separate legal personality of a corporation is as important as its ability to carry on business. If the federal government does not have the power to remove the separate legal personality of a provincially-incorporated corporation, the federal government should also not have the ability to impose a separate legal personality on a provincially-regulated partnership.

The purpose of separate legal personality in this context is to ensure that a partnership has the ability to possess property. Yet, it is clear that the provinces have the legislative competence to determine who may own property in the province in the civil context. Furthermore, it is clear that the provinces have spoken on this issue in the civil context.

However, once the criminal law applies (because a crime has been committed), the doctrine of federal paramountcy applies because: (i) a fine is the predominate way to sentence organizations under the provisions of Bill C-45; (ii) if the partnership could not own property, a valid federal purpose would be frustrated, because the partnership would have no ability to pay any fine so levied; and (iii) since a valid federal purpose would be frustrated, the provincial *Partnership Acts* must give way to that federal purpose. However, paramountcy only applies to the extent of the inconsistency. Therefore, the separate legal personality of the partnership must be only for the purposes of the criminal law.

Imbuing the “Organization” with Separate Legal Personality for Limited Purposes – Practical Considerations

This approach is most consistent with the intention of Parliament, in that it treats corporate and non-corporate entities in the same way. Case-law supports the idea that separate legal personality need not necessarily be given for all purposes and is instead determined by the intention of Parliament. Nonetheless, there are certain practical concerns with this approach. The issues to be considered in this section are not meant to be an exhaustive list.

While Bill C-45 attempts to treat corporate and non-corporate entities alike, there are differences between the corporation and the partnership that make a simple analogy difficult. These differences include:

Differences in organizational formation

A corporation must be created on purpose; a partnership can be created by accident, even against the express wishes of the partners. This means that the “common fund” of the partnership may not even be known to the partners, making it difficult for the state to prove which assets constitute the fund. For larger partnerships (such as large legal or accounting practices), there is more likely to be a clear common fund for the partnership, because the parties will clearly have intended to create a partnership. This means that issues of property ownership are more easily resolved for larger partnerships than for smaller ones.

Avoidance of liability as a going concern

In larger partnerships, partners can take steps to reduce the asset pool that is potentially at risk to pay partnership civil liabilities. While this may be acceptable in civil law, there is a serious question as to whether it should be acceptable in criminal law. The criminal law is designed to reflect basic morality. Should basic morality be thwarted by a well-informed partner?

Corporate law has certain provisions that ensure that there is at least a minimal level of assets available to pay creditors. Partnership law does not have similar provisions, because the assets of the partners are fully exigible to pay the civil debts of the partnership. Therefore, partnership law provides more expansive opportunities for the manipulation of the size of the common fund than does corporate law, and therefore, may make it easier for the partners to avoid criminal liability against the organization.

When does separate legal personality attach to the partnership?

1. At the time of the offence

If the common fund becomes depleted in the ordinary course of business, then: (i) the court cannot trace the assets because the government had no legal interest in the assets at the time that they were disposed of; (ii) the partners at the time of the offence cannot be called upon to make good on the loss, nor can the partners of the partnership at the time of sentencing.

2. At the time of sentencing

This creates a further incentive for the partner to remove assets from the common fund at regular intervals. This could raise issues when there has been a change in the composition of the partnership between the time of the offence and the time of sentencing. Has the original partnership ceased to exist, and

been replaced by a new and separate partnership, composed of new partners? The new partnership did not exist at the time of the offence. If the partnership does not automatically cease to exist on a change of membership, the partners could write such a provision into the partnership agreement indicating that a new partnership is being created to end the existing one. The status of the partnership at the time of the offence would then be unclear. If there has been a complete turnover in the membership, does Bill C-45 foist the fine on a business now owned by different people? Corporations again are different, because those that choose to invest in them generally do so with knowledge of the separate legal personality of the corporation (and the continuity of existence that comes with it), whereas the *Partnership Act* would lead a partner to believe that the partnership does not have the same continuity of existence. Thus, incoming partners will likely take steps to protect their interests, including perhaps dissolving the earlier partnership and creating a new one. Regardless of when the separate legal personality attaches to the partnership, serious practical issues remain.

V. WITHOUT IMBUING THE “ORGANIZATION” WITH SEPARATE LEGAL PERSONALITY

Is government constitutionally permitted to assign liability to, for example, a partnership, *without* assigning or imbuing it with separate legal personality? In my view, this question must be answered in the negative.

A partnership cannot own property *per se*. The provincial *Partnership Acts* are explicit as to ownership of property used in the business of the partnership. In this regard, s. 23(1) of the *Partnership Act* (Manitoba) is representative:²³

All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act “partnership property”, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.

Thus, although property may be committed to the purposes of the business, the partners continue to own that property. However, it is important to remember that once property is committed to the partnership’s business, the partner contributing that property loses the ability to withdraw it from the business on a whim. His or her fellow partners have the equitable right to

²³ Manzer, *supra* note 8 at para. 3.1610; VanDuzer, *supra* note 8 at 11; see also *Partnership Act* (Manitoba), *supra* note 17, s. 23(1).

prevent this.²⁴ The equitable ownership of the property becomes collective – in the partners as a group – rather than individual, in the hands of the contributing partner.²⁵ This conclusion is further strengthened by s. 23(2) of the same *Act*, which provides as follows:²⁶

The legal estate or interest in any land, that belongs to the partnership, shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but *in trust* so far as necessary, for the *persons beneficially interested* in the land under this section.

Therefore, the *Act* indicates that there is a trust relationship created with respect to interests in land.

Nonetheless, for immediate purposes, it is sufficient to say the “partnership” never has ownership of the property that is used to advance the interests for which it was formed. In general partnership law, as far as third-party creditors are concerned, there is no distinction between the property used in the business, on the one hand, and the personal assets of the individual partners, on the other. All assets of all partners are available to pay the debts of the business.²⁷

So, to return to the hypothetical example set out in the previous section, Brian has an equitable interest in the property contributed to the business by both Adam and him. Assuming that Brian contributed some of his personal assets to the business, legal title to those assets may remain in his name.

Thus, it is probable that if the organization has no separate legal personality, some of the property used to pay a fine assessed against the organization would be property in which an innocent partner²⁸ has an interest.

²⁴ R.C. l’Anson Banks, *Lindley & Banks on Partnership*, 18th ed. (London: Sweet & Maxwell, 2002) at paras. 18-07 & 19-03-19-04; Manzer, *ibid.*; VanDuzer, *ibid.* at 54.

²⁵ VanDuzer, *ibid.* at 53-54.

²⁶ *Partnership Act* (Manitoba), *supra* note 17 [emphasis added].

²⁷ *Ibid.*, s. 12.

²⁸ The characterization of an “innocent partner” may seem counterintuitive of some people. Some might argue that Brian’s voluntary choice to create a partnership with a person such as Adam is a choice that was (or should have been) undertaken with an appreciation of the consequences of such a decision. These consequences include the impact of Bill C-45. In essence, the argument runs, one has taken the benefits of entering into the partnership. One must also be willing to accept the burdens that come along with those benefits. For a similar argument accepted by the Supreme Court in the context of corporate law see *Kosmopoulos v. Continental Insurance Co. of Canada*, [1987] 1 S.C.R. 2, Wilson J. [*Kosmopoulos*] on this point.

There are several answers to this argument. The first is that the criminal law does not impose guilt through the principles of vicarious liability. Second, the law has not recognized liability for an offence of bad choices of associates, whether of partners or otherwise. The impact of Bill C-45 is *not* to alter this. Bill C-45 does not create personal liability on Brian. Rather, the primary focus of Bill C-45 is on the *organization* and *not* the individuals that make up the organization. Third, this would violate s. 2(d) of the *Charter*. See Part V(c), below.

In 1976, the Law Reform Commission of Canada issued its Working Paper entitled *Criminal Responsibility for Group Action*.²⁹ In this document, the Commission held the view, somewhat tentatively,³⁰ that non-corporate groups should be amenable to the criminal law.³¹ In so concluding, the Commission attempted to respond to some of the rationales typically given as to why groups without separate legal personality should *not* be held criminally liable. According to the Commission, one such argument is that the group or organization could not hold property in its own name. With respect to this argument, the Commission wrote:³²

In our view this [the capacity of the corporation to own property in its own name] is another tenuous basis for differentiation [between corporate and non-corporate groups]. Imposing group responsibility does not require that the group hold property in its name. While the capacity of corporations to hold property is obviously helpful in sanctioning a corporation, since a fine or restitution can be paid out of property “owned” by it, the fact that the property is held by the corporation is not, in our view, essential. Groups, though not incorporated, may have a common fund. Pecuniary sanctions can be related to the state of the fund so that the financial position of the group, not that of its members, can be taken as the basis for sanctioning. The technical question, who “owns” funds in a strict legal sense, is not of principal concern in criminal sanctioning, especially if there is a residual authority to deal with the members individually where the sanction is not complied with.

Three points are worthy of note. First, the Commission was unconcerned with technical rules on the ownership of property. Second, the expectation is that the “common fund” of the organization would be used to pay fines levied against it. By “common fund”, I take the Commission to mean those assets that are used by the organization in carrying out its operations. Third, if the money in the common fund is insufficient to cover the full amount of the sanction, there is “residual authority” to recover the unpaid amount from the individual members.

With all due respect to the Law Reform Commission of Canada, the legal landscape has changed significantly since 1976. The most important of these changes is the advent of the *Charter*, which leads to two potential problems. The first problem revolves around s. 11(d) of the *Charter*, with respect to the presumption of innocence; the second concerns the freedom of association, as guaranteed by s. 2(d) of the *Charter*. Before turning to these substantive issues, however, it is necessary to interpret what Bill C-45 is meant to accomplish in

²⁹ Law Reform Commission of Canada, Working Paper 16, *Criminal Responsibility for Group Action* (Ottawa: Information Canada, 1976) at 53-56 [*Criminal Responsibility for Group Action*].

³⁰ *Ibid.* at 56.

³¹ *Ibid.* at 53-54.

³² *Ibid.* at 55.

seeking to recover the fine. In other words, the question in the next section is: Who is being asked to pay the fine associated with the offence?³³

A. Interpretative Difficulties

Since I assume that the organization does not have a separate legal personality from those who manage its operations, and thus has no property of its own, the logical place to look for payment of a fine is the guilty partner. If this is all that is intended by Bill C-45, there are several problems of statutory interpretation. As Elmer A. Driedger explained in his seminal work, *The Construction of Statutes*:³⁴

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In the case of Bill C-45, the scheme of the Act clearly contemplates the guilt of the “organization”, rather than individuals who are guilty for their own criminal acts. The definition of “organization” makes no reference to individuals³⁵ other than on an aggregate basis.³⁶ Therefore, the position that Bill C-45 is driven to convict the guilty partner but leave others untouched is simply unreasonable.

If such an interpretation were accepted, Bill C-45 would be superfluous in most cases. To return to our example, if Adam is party to the offence, then Bill C-45 is not needed to convict Adam of the offence. After all, Adam is responsible for his actions, regardless of whether those actions are in a context that furthers business or personal interests.³⁷ Therefore, if the provisions of

³³ For two examples where a statutory regime was interpreted prior to analyzing the provision’s constitutionality, see *R. v. Butler*, [1992] 1 S.C.R. 452; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

³⁴ (Toronto: Butterworths, 1974) at 67, quoted with approval in Ruth Sullivan, *Sullivan on Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada Inc., 2008) at 1 [Sullivan].

³⁵ Although the majority of Bill C-45 is directed to organizational liability, there is one section of the statute that is also directed to individuals. Bill C-45, *supra* note 1, s. 3 [now *Criminal Code*, *supra* note 2, s. 217.1]. For the full text of the section, see *infra* note 84 and related text.

³⁶ See *supra* note 12 and related text.

³⁷ The personal liability of directors for torts of the corporation is uncertain. See *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.) at 107-109 [ADGA]; *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (sub nom. ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.)* (1995), 26 O.R. (3d) 481 (C.A.) at 490-491 [ScotiaMcLeod]; and *Pryce v. Vuckovich* (2000), 144 O.A.C. 256; [2000] O.J. No. 3390 (C.A.)

In the area of corporate *criminal* activity on the other hand, the jurisprudence on the personal responsibility of those undertaking such activity is actually much clearer. *Canadian Dredge & Dock Co. Ltd. v. The Queen*, [1985] 1 S.C.R. 662 [Canadian Dredge] is the seminal decision which discusses the parameters of common-law corporate criminal liability in Canada. There, Estey J., speaking for the Court, was very plain that the liability of the

Bill C-45 were intended only to allow the Crown to hold a guilty partner personally liable for his or her criminal acts, the law prior to Bill C-45 is sufficient, whether those actions are undertaken to benefit the business, rather than for personal motivations. Therefore, this interpretation renders Bill C-45 redundant.

The second problem is that such an interpretation – that Bill C-45 allows only the conviction of the guilty partner – is inconsistent with the overall scheme of the Act. Above, I reproduced what is now paragraph 22.2(c) of the *Criminal Code*:³⁸

The paragraph does not require that a senior officer (in our example, Adam) be guilty of the underlying offence in order to convict the organization.³⁹ To illustrate this, I need to slightly alter the facts of my example. Assume that a third person (“Charlie”) is an employee of the organization. Charlie is undertaking the same scheme to defraud customers as was earlier ascribed to Adam. In these altered facts, Adam is not undertaking any criminal activity. However, Adam becomes aware that Charlie intends to defraud customers, with a minor benefit to the partnership and a large benefit to Charlie. Adam does not try to stop Charlie’s scheme. At common law, Adam is not necessarily guilty of any crime due to his advance knowledge of Charlie’s wrongdoing.⁴⁰ Bill C-45 does not change Adam’s culpability. Here, Charlie is a “representative” of the partnership. Adam is a “senior officer”. Charlie is guilty of fraud; Adam is guilty of nothing. However, the partnership can be held liable for Charlie’s acts, pursuant to paragraph 22.2(c). Therefore, Bill C-45 clearly allows the “organization” to be held liable, even without liability on Adam. On these altered facts, no partner is guilty. Therefore, the scheme of the Act is not restricted to the guilty partner, because no partner of the partnership need be found personally guilty of any offence.

corporation was *in addition to*, and *not in substitution for*, the criminal liability of the human person undertaking the criminal activity. He wrote as follows: “Generally the directing mind is also guilty of the criminal offence in question. Glanville Williams states in *Textbook of Criminal Law* (London: Stevens, 1978) at 947: ‘...the director or other controlling officer will almost always be a co-perpetrator of or accessory in the offence...’”. Since the separation between director and corporation is much clearer than the separation between partner and partnership, it seems that the partners are personally liable for their crimes, even absent Bill C-45.

³⁸ Bill C-45, *supra* note 1, s. 2 [now *Criminal code*, *supra* note 2, para. 22(a)].

³⁹ For a more detailed discussion of paragraph 22.2(c), see MacPherson, “Extending Corporate Criminal Liability?”, *supra* note 4 at 262-266.

⁴⁰ One person’s simple knowledge of, and even presence at, the commission of the crime by another person does not make the first person a party to the offence committed by the second. See *R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881 at 898, Dickson J. (as then he was).

The intent of Parliament is *not* served by such a restrictive interpretation of Bill C-45. Bill C-45 is not a codification of the previously existing law. The addition of non-corporate entities within its ambit is proof of this, since the common law did not apply to them. As well, the government has made clear that Bill C-45 was meant to “clarify and expand”⁴¹ the law on the criminal liability of corporations. Therefore, it is clear both that: (i) the common law would allow the guilty partner to be convicted; and (ii) Bill C-45 was not a codification of the common law. Consequently, this restrictive interpretation of Bill C-45 is consonant with neither the object nor the scheme of the Act, nor with the stated intention of Parliament.

B. Section 11(d) of the Charter

The ambit of s. 11 was discussed by the Supreme Court of Canada in *R. v. Wigglesworth*.⁴² In that case, Justice Wilson, speaking for the Court, wrote as follows:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity ... *But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.*

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. *Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.* In “Annotation to *R. v. Wigglesworth*” (1984), 38 C.R. (3d) 388, at p. 389, Professor Stuart states:

... other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).

⁴¹ Department of Justice Canada, Minister of Justice, Press Release, “Parliament Passes Bill C-45: Stronger Laws Affecting the Criminal Liability of Organizations” (31 October 2003). [Press Release, Bill C-45].

⁴² [1987] 2 S.C.R. 541.

I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline: *Royal Canadian Mounted Police Act*, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the “by nature” test but passing what I have called the “true penal consequence” test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the *Charter* only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the “by nature” test can be failed but the “true penal consequence” test passed. Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the “by nature” test must give way to the “true penal consequence” test.⁴³

Several points are worthy of notice. First, although *Wigglesworth* was immediately concerned with s. 11(h),⁴⁴ the reasoning seems equally applicable to s. 11(d). Second, Justice Wilson clearly sets up a disjunctive two-part test, of which either component will be sufficient to engage s. 11 protection: (a) the “by nature” test; and (b) the “true penal consequences” test. Third, in the event that the two tests come to conflicting answers (assuming that this is possible), the “true penal consequences” test will likely prevail. Fourth, a fine qualifies as “true penal consequences” for these purposes, provided the fine is “designed to redress the harm done to society at large.”

Returning to the original facts of our example, if (i) the point of Bill C-45 is to expand criminal liability and (ii) the organization does not have a separate legal personality from those who control its operations, this leaves only innocent partner(s) as targets of the legislation. On the facts of our example, the partner uninvolved in the acts referred to (Brian) has done nothing criminal. Where is Brian’s presumption of innocence?

Some may answer that the “organization” is charged; therefore, Brian cannot assert s. 11 rights. However, the non-corporate organization does not have a separate legal personality from those who are involved in its operations. This means that the organization cannot own the property used in the business. From where, then, is the property intended to come? The

⁴³ *Ibid.* at 560-562 [emphasis added].

⁴⁴ See the quote from Stuart provided by Wilson J., *ibid.* at 561.

partners' property must then be intended to be available to pay the fine levied against the organization.⁴⁵ One of the goals of criminal liability for organizations is that of deterrence. It must be recalled that the provisions of Bill C-45 are part of the *Criminal Code*. Section 718 sets out the "fundamental purpose" of sentencing under the *Criminal Code*. The section reads in part as follows:

718. 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:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- ...
- (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 and to the community.⁴⁶

Since the avowed purpose of Bill C-45 is to make an organization an "offender" for *Criminal Code* purposes, society can only deter the organization if it imposes hard treatment⁴⁷ (in the case of an organization, a fine) on the organization in such a way that the imposition of the fine removes something that is important to the organization. Put another way, would it "promote a sense of responsibility" in the organization if the organization were able to externalize⁴⁸ the fine? Of course not. Therefore, paragraph 718(f) makes it clear that the penalty should be paid by the organization. Since it is clear that the payment of the fine is not restricted to the guilty partner, the closest remaining proxy available for the organization is the property of the partners used in the business.

Since Brian has rights in the property,⁴⁹ and the law demands that the fine be paid out of that property, the question becomes two-pronged. First, is the fine "by nature criminal", so as to engage s. 11? Second, is Brian suffering the "true penal consequences" of the wrongdoing? If either question is answered

⁴⁵ One part of the scheme of Bill C-45 is to encourage the management of organizations to communicate with one another to prevent wrongdoing of people associated with the organization (employees and others). See *Criminal Code*, s. 22.2(c), *supra* note 38 and accompanying text.

⁴⁶ *Criminal Code*, *supra* note 2, s. 718.

⁴⁷ See e.g., Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Boston: Northeastern University Press, 1986) at 40-44; Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon, 1993) at 94-95.

⁴⁸ The process of externalization (and its negative impacts on society) is described in more detail in Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2005).

⁴⁹ See the discussion of partnership property, *supra* at note 23 and accompanying text.

in the affirmative, then, according to *Wigglesworth*, the presumption of innocence and the other protections of s. 11 are engaged. Let us examine each of these questions in turn.

1. “Criminal By Nature”

The nature of the prosecution is clearly criminal in this case, as it is carried out under the *Criminal Code*. *Wigglesworth* makes it clear that “all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.”⁵⁰ However, we need not stop there.

Wigglesworth discusses the “prosecution” being “criminal by nature”. Here, we are discussing the requirement that the innocent partner contribute property in which he has an interest to pay the fine levied against the organization. Therefore, we must assess whether such a contribution constitutes part of an “offence” for the purposes of s. 11.

Justice Wilson draws a distinction between prosecutions to “promote public order within a public sphere”, and those intended to “regulate conduct within a limited private sphere of activity”. Therefore, if one were to ask whether Brian is being asked to contribute to a fine in a “limited sphere of activity”, or to promote public welfare, the latter answer is far more likely.

The scheme of sentencing under the *Criminal Code* reinforces this conclusion, in at least two different ways. First, the level of the fine is relevant. Section 735(1) of the *Criminal Code* is set out immediately below:

An organization that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,

- (a) that is in the discretion of the court, where the offence is an indictable offence; or
- (b) not exceeding one hundred thousand dollars, where the offence is a summary conviction offence.⁵¹

Therefore, there is now an unlimited power to fine provided in the *Criminal Code* under paragraph (a). As described by Justice Wilson, this is the first of two indicators that the prosecution is “criminal by nature”. The second indicator is that the fine is “redressing the wrong done to society at large”. A sentence for a criminal offence is supposed to “provide reparations for harm done to victims or *to the community*”, among other things.⁵² It is clear that the general sentencing provisions of the *Code* also apply both to human beings and

⁵⁰ *Supra* note 42 at 560.

⁵¹ *Criminal Code*, *supra* note 2, s. 735(1), as amended by Bill C-45, *supra* note 1, ss. 20(1) and (2).

⁵² *Supra* note 46, s. 718(f) and accompanying text [emphasis added].

organizations. Section 718.21 of the *Code* provides in part as follows: “A court that imposes a sentence on an organization shall *also* take into consideration the following factors: ...”⁵³ [emphasis added]. The use of the word “also” implies that both (i) the factors applicable to other offenders,⁵⁴ and (ii) the “fundamental principle” which underlies the inclusion of the factors applicable in the sentencing of individuals⁵⁵ are both also to be considered in an organizational offender’s sentence.

Thus, a criminal sentence imposed on an organizational offender is at least partly to repair the harm done to society. Therefore, a criminal sentence is designed to “promote public order and welfare within a public sphere of activity”. This is sufficient to attract the protection of s. 11 of the *Charter*. It should make no difference that the “offender” is technically the “organization” rather than the individual. The very fact that the fine is being levied to protect the public engages s. 11 rights, including the presumption of innocence for whoever must pay the fine.

This conclusion is strengthened when one remembers that the fine is imposed with the knowledge that the “offender” has no assets of its own with which to pay the fine, and the property of someone else would have to be used to pay the fine. Should the government be allowed to avoid the application of s. 11 simply because the law has charged one “offender”, despite the knowledge that an innocent individual will be required to pay the resulting fine? Surely, s. 11 protection should not be so easily avoided.⁵⁶

2. “True Penal Consequences”

The previous paragraph applies equally to discussion of the “true penal consequences” test in *Wigglesworth*. Parliament must be presumed to know the law of partnership,⁵⁷ and thus, that the partnership does not own the property used in carrying out the partnership’s business operations. Once it is established that (i) there are partners who have an interest in the property to

⁵³ Bill C-45, *supra* note 1, s. 14 [now *Criminal Code*, *supra* note 2, s. 718.21] [emphasis added].

⁵⁴ *Criminal Code*, *ibid.*, s. 718.2.

⁵⁵ *Ibid.*, s. 718.

⁵⁶ This also answers the potential use of the decision in *R. v. Church of Scientology of Toronto*, (1997), 33 O.R. (3d) 65 (C.A.) in these circumstances. The individual partners are being charged directly (for the purposes of the discussion in this Part) with the crime. Therefore, the Court’s analysis of the potential applicability of s. 7 of the *Charter* (with which I disagree, but this is not the forum for that argument) is inapplicable in this scenario.

⁵⁷ See *Sullivan*, *supra* note 34 at 205. This is so even though the constitutional power to regulate partnerships generally lies with the provinces in which the partnership carries on business. See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]. We will discuss the division of powers in more detail in Part VI, below.

be used to pay the criminal fine, (ii) these partners have done nothing criminal, then (iii) it necessarily follows that the innocent partners are suffering “true penal consequences” within the meaning of that term as described by Justice Wilson. Even if the reader were not to accept my conclusion with respect to the “criminal by nature” test, the payment of a fine for public purposes qualifies as “true penal consequences”. This is sufficient, in and of itself, to engage the protections of s. 11 of the *Charter*.

It has been suggested to me that a partner’s obligation to pay a criminal fine levied on a partnership is no different from other business-related liabilities. In the ordinary course of business, partners are often saddled with responsibilities to which they did not themselves assent. For example, one partner may be liable to pay a creditor owing under a contract entered into by his or her fellow partner, based on the law of agency. This is so *even if* the first partner specifically told the second that such a contract was not an acceptable commitment of partnership resources. Each partner is deemed to be both the agent of, and the principal to, his or her fellow partners.⁵⁸ Under agency law, a person with whom an agent purports to make a contract may be able to enforce that contract against the principal even if the agent was specifically told by the principal not to make the contract in question.⁵⁹ Thus, it is argued, a criminal fine is simply another undesired liability for the unwilling partner, and should attract no different treatment than any other liability incurred in the course of the partnership business.

My response to this point is that criminal sanctions are unlike civil liabilities. Certainly, in both cases, the party liable can be deprived of financial resources. However, sanctions for crimes involving mental fault are an assignment of moral blameworthiness against those required to pay them.⁶⁰ Civil liabilities, on the other hand, are often less a matter of moral blame,⁶¹ although the civil law may have some grounding the moral realm. Rather, civil law is more often thought of as an assertion of policy goals, such as wealth re-

⁵⁸ *Partnership Act* (Manitoba), *supra* note 17, s. 8.

⁵⁹ Cameron Harvey and Darcy L. MacPherson, *Agency Law Primer*, 4th ed. (Toronto: Carswell, 2009) at 67.

⁶⁰ Adekemi Odujirin, *The Normative Basis of Fault in Criminal Law* (Toronto: University of Toronto Press, 1998) at 69.

⁶¹ In this context, there is a distinction to be made between *blame simpliciter*, on the one hand, and *moral blame*, on the other. For a more detailed discussion of what is referred to here as *blame simpliciter* in a different context, see Darcy L. MacPherson, “Damage Quantification in Tort and Pre-Existing Conditions: Arguments for a Reconceptualization” in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2005) 248 at 258-260.

distribution (in the case of torts)⁶² or the importance of commercial certainty and respect for the allocation of risk made by the parties (in the case of contracts).⁶³ The attribution of criminal wrongdoing to an organization pursuant to Bill C-45 is an assignment of moral blame to the organization.⁶⁴ Further, if (i) there is no separate legal personality in the organization, and (ii) the organization cannot hold legal title to property, and (iii) Parliament demands payment from another source, then (iv) this is equally an assignment of moral blame to the innocent partner. This is why the provisions of Bill C-45 should trigger constitutional imperatives of s. 11, while other liabilities imposed by civil law do not.⁶⁵

C. Section 2(d)

If the argument with respect to the applicability of s. 11(d) of the *Charter* is well-founded, this sufficiently dismisses the government's ability to apply the criminal law to a partnership without imbuing the partnership with separate legal personality. In such circumstances, no further analysis would be required on this point. However, for the remainder of this section, I will assume that some readers remain unconvinced by the s. 11(d) analysis offered above. Therefore, it is necessary to consider whether other *Charter* guarantees might potentially be engaged in a prosecution under Bill C-45.

⁶² Anthony M. Dugdale *et al.*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at para. 1-12.

⁶³ S. M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at para. 4. As I write this (April 2010), the next edition of this book is scheduled to be published in June 2010.

⁶⁴ On this point, Welling asserts the stigma is of major importance in corporate criminal liability, and that the sentence itself (that is, the fine) can be relatively insignificant. See Welling, *supra* note 4 at 171, n. 43. I disagree with his assertion that the economic impact can be "relatively insignificant", but we do agree that the imposition of a criminal sanction is designed to express society's judgment of moral blameworthiness.

⁶⁵ My thanks to a colleague, who shall remain unnamed, whose passionate argument convinced me to deal explicitly with this issue herein.

This analysis with respect to the difference between the criminal and civil law is also implicitly supported by the fact that it is clear, in both Canada and the U.K., the attribution of intent to an organization for the purposes of the criminal law is governed by the identification doctrine (or its statutory derivative, pursuant to Bill C-45). On this point, see *Tesco*, *infra* note 81 (U.K.), and *Canadian Dredge*, *supra* note 37 (Canada, prior to Bill C-45).

However, in the civil context, the division between the identification doctrine, on the one hand, and principles of vicarious liability in the law of tort is sometimes unclear. In some cases where the identification doctrine might be thought to be applicable, the courts have held that principles of vicarious liability are actually in issue. This paper is focused on the criminal (and not the civil) application of the identification doctrine. Thus, it is not necessary to resolve in this forum issues around the exact relationship between the identification doctrine, on the one hand, and vicarious liability, on the other.

At first blush, it may seem unusual to consider freedom of association, as guaranteed by s. 2(d) of the *Charter*, in this context. After all, the federal government is not attempting to limit the ability of persons to enter into partnership. Rather, the government is assigning a consequence to criminal behaviour within the associational context so created. With all due respect to those who might hold a contrary view, I believe that a significantly more sophisticated analysis is necessary.

This analysis has three major thrusts. First, s. 2(d) is engaged because Bill C-45 removes the right of the innocent partner to do nothing if the innocent knows of the actions of the guilty partner. Second, there are “qualitative differences” between the individual partner and the partnership. These “qualitative differences” are engaged in five separate ways by the provisions of Bill C-45. *Dunmore v. Ontario (Attorney General)*⁶⁶ and subsequent case-law points out that a nuanced and contextualized appreciation of the scope of s. 2(d) is necessary. Third, Bill C-45 discourages the collective pursuit of common goals simply because those goals are pursued in a manner that is associational in nature. According to *Dunmore*, this is a violation of s. 2(d). A relatively minor fourth point is that the scope of s. 2(d) should be determined in light of *Charter* values.

1. Protection of that which is legal if done by an individual

The scope of s. 2(d) of the *Charter* was explained by Justice Bastarache, speaking for the majority of the Supreme Court of Canada in *Dunmore*:

On the basis of this principle, McIntyre J. confined s. 2(d) to three elements: (1) the freedom to join with others in lawful, common pursuits and to establish and maintain organizations and associations (with which all six justices agreed), (2) the freedom to engage collectively in those activities which are constitutionally protected for each individual (with which three of six justices agreed) and (3) the freedom to pursue with others whatever action an individual can lawfully pursue as an individual (with which three of six justices agreed). These three elements of freedom of association are summarized, along with a crucial fourth principle, in the oft-quoted words of Sopinka J. in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (“*PIPSC*”), at pp. 401-2:

Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional

⁶⁶ 2001 SCC 94, [2001] 3 S.C.R. 1016 [*Dunmore*].

rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.⁶⁷

For our purposes, it is sufficient to restrict the analysis to the fourth proposition offered by Justice Sopinka in *PIPSC*, namely, “that s. 2(d) protects the exercise in association of the lawful rights of individuals.”⁶⁸ It is important to recall our hypothetical example. Brian has done nothing that the criminal law currently recognizes as wrong. Hence, if Brian is punished for doing in a partnership what he is legally entitled to do alone, s. 2(d) is engaged.

At common law, if Brian knew of the wrongdoing of either Adam (in our original facts) or Charlie (in our altered facts), it is clear that it is entirely lawful for Brian to do nothing.⁶⁹ As mentioned earlier,⁷⁰ Bill C-45 does nothing to change this. Yet, the combination of: (i) exercising his legal right to not prevent the crime; and (ii) his membership as a partner of the organization; then creates (iii) the requirement that his property be made available to pay the fine levied. Therefore, a substantive s. 2(d) claim is possible on these facts. According to both the *Alberta Reference*⁷¹ and *PIPSC*,⁷² this is sufficient to establish the *prima facie* s. 2(d) violation.⁷³ Given that (i) *Dunmore* is one of the most recent pronouncements by the Supreme Court of Canada on the scope of s. 2(d) of the *Charter*; and (ii) the majority of the Court specifically approved the *Alberta Reference* and *PIPSC*, it would seem the argument made herein might be sufficient to prove a *prima facie* violation of s. 2(d) if one adopts this interpretation of Bill C-45.

2. “Qualitative differences”

However, since *Dunmore* is significantly more recent than either the *Alberta Reference* or *PIPSC*, we will consider the language of *Dunmore* with

⁶⁷ *Ibid.* at para. 14 [emphasis added by Bastarache J. in *Dunmore*].

⁶⁸ *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 403 [*PIPSC*] cited with approval in *Dunmore*, *ibid.*

⁶⁹ See *supra* note 40.

⁷⁰ *Ibid.* and accompanying text.

⁷¹ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 365-367 [*Alberta Reference*]. Some of the substantive holdings of the *Alberta Reference* were later overruled by the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391. However, it is important to note that the holdings in the *Health Services and Support* case were *designed to extend* s. 2(d) protection to certain aspects of the collective bargaining process. Such an approach, in my view, was *not* to diminish the scope of the protections of s. 2(d) *recognized* by the majority in the *Alberta Reference*. Rather it was to add to them. Therefore, despite the subsequent case law, the *Alberta Reference* remains relevant as s. 2(d) still protects activities carried out by a collective which an individual can lawfully undertake alone.

⁷² *Supra* note 68 at 381-384.

⁷³ The potential impact of s. 1 of the *Charter* is dealt with in sub-Part (d) below.

respect to the s. 2(d) claim. A claim under s. 2(d) is even stronger, given that the prohibition of the exercise of one's legal right (in this case, Brian's legal right to do nothing to prevent a crime) is specifically aimed at activity that can only be undertaken on a collective basis. As Justice Bastarache wrote:

As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members....[B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level.⁷⁴

Is Bill C-45 driven at the "qualitative differences between individuals and collectivities", in the sense described by Justice Bastarache? I believe that it is. There are at least five reasons for this. The first is based on the statutory definition of "organization".⁷⁵ The catch-all part of the definition is specifically driven at "associations of persons" which hold themselves out to the public as such.⁷⁶ Therefore, Bill C-45 is specifically driven at activity carried out in association with others.

Second, the treatment of partners under Bill C-45 reinforces this conclusion. Partners are individually designated as "representatives" of the organization,⁷⁷ but not necessarily included as "senior officers" of the partnership. It is important to recall that the wrongdoing of a representative is not sufficient to hold the partnership liable for a crime.⁷⁸ A senior officer must be involved in some way.⁷⁹ If Parliament were not attempting to draw a meaningful difference between a partner (the individual) and the partnership (the collectivity), why not at least designate all partners as senior officers?⁸⁰ In

⁷⁴ *Supra* note 66 at para. 17. This paragraph of the reasons of Bastarache J. were cited with approval and parts of it were specifically emphasized in the judgment of McLachlin C.J.C. and LeBel J., for the majority in *Health Services and Support*, *supra* note 71 at para. 28.

⁷⁵ *Supra* note 12 and accompanying text.

⁷⁶ *Ibid.*, para. (b).

⁷⁷ Bill C-45, *supra* note 1, s. 1(2) [now *Criminal Code*, *supra* note 1, s. 2]; reproduced above, see *supra* note 3 and accompanying text.

⁷⁸ MacPherson, "Extending Corporate Criminal Liability?", *supra* note 4 at 258-259.

⁷⁹ *Ibid.* at 258.

⁸⁰ It is not that partners can *never* be senior officers of the partnership. Senior officers of a partnership will likely be partners. However, the definitions show that only those partners who "play an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities" are senior officers of the partnership.

my view, by designating all partners as “representatives” but not as “senior officers”, Parliament shows that it does not see each partner as the equivalent – or the “alter ego”⁸¹ – of the partnership. If some partners are not the equivalent of the partnership, it seems difficult to argue that Parliament is not trying to separate the individual partner from the collectivity of the partnership of which he or she is a member.

Third, in passing Bill C-45, it is clear that Parliament was aware that there could be “organizational” (collective) liability in the absence of independent liability on each of the principals (individual partners) of the organization. Our hypothetical example shows that at least one partner (the individual) may not be criminally liable, even when the organization is liable.

As mentioned earlier,⁸² the converse is also true. Bill C-45 also does not affect the pre-existing position of the criminal law that the guilt of the organization does not affect the liability of a guilty partner. The liability of the organization in no way negates the personal liability of guilty senior officers. The Crown need not choose between prosecuting either the individual senior officer or the organization. Both can be pursued. The conviction of one does not affect the other. Therefore, the collectivity is targeted by most sections of Bill C-45, while the individual is a target to a much lesser extent.⁸³ Therefore, Parliament saw a distinction between the individual and the collective.

Fourth, on a related point, Bill C-45 includes a new s. 217.1 of the *Criminal Code* that reads as follows:

217.1 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.⁸⁴

Therefore, even though the Act is titled “*An Act to Amend the Criminal Code [criminal liability of organizations]*”,⁸⁵ Parliament clearly added a duty for individuals as well as organizations. Note that s. 217.1 is not restricted to either individuals or organizations, as both are equally covered. This is confirmed by the definition of “every one” in the *Criminal Code*, as amended by Bill C-45:

⁸¹ The “alter ego” language was used to bring together an individual with the enterprise in *Tesco Supermarkets v. Natrass*, [1972] A.C. 153 (H.L.) at 192-193. But this is not directly applicable to Bill C-45, although it was previously influential in Canada. See *Canadian Dredge & Dock*, *supra* note 37 at 684-685.

⁸² See *supra* note 37 and related text.

⁸³ Subject to the one notable exception to be discussed immediately below, the liability of the individual is in general, not determined by Bill C-45. Instead, for individuals the remainder of the *Criminal Code* remains unchanged.

⁸⁴ Bill C-45, *supra* note 1, s. 3 [now *Criminal Code*, *supra* note 2, s. 217.1].

⁸⁵ Bill C-45, *supra* note 1 [emphasis added].

“every one”, “person” and “owner”, and similar expressions, include Her Majesty and an organization;⁸⁶

This is a non-exhaustive definition that specifically encompasses organizations.⁸⁷ The addition of s. 217.1 in Bill C-45 demonstrates two things. First, that Bill C-45 was not drafted solely to deal with group activity, in that the statute contains obligations for individuals as well as for organizations.⁸⁸ Second, it reinforces the point that Parliament did not create “organizational” liability in a vacuum, without considering individual liability as well, albeit in the context of criminal liability of individuals for lapses in occupational health and safety standards resulting in death or serious injury to workers. By having a number of sections restricted to organizations, and one section that applies to individuals as well as organizations, the distinction between an organization and the individuals that comprise it is clearly made out.

Fifth, one of the examples of the “qualitative differences” between the individual and the association used by Justice Bastarache in *Dunmore* –

⁸⁶ Bill C-45, *supra* note 1, s. 1(1) [now *Criminal Code*, *supra* note 2, s. 2]. Interestingly, in *United Nurses of Alberta v. Alberta (Attorney-General)*, [1992] 1 S.C.R. 901, McLachlin J. (as she then was) [*United Nurses*], the majority held that (i) the union was an “unincorporated association” (at 928); (ii) the union was not incorporated under the *Societies Act* of Alberta, (now R.S.A. 2000, c. S-14) (at 929); (iii) the union *may* qualify (McLachlin J.’s words) as a “society” under the then-existing definition of “every one” in the *Criminal Code* (at para. 929). Cory J., with Lamer C.J.C. concurring (dissenting in the result), agreed that unions are subject to the criminal contempt jurisdiction of the courts, because they are given the right to sue. If they are given the right to sue, as litigants, they must necessarily be subject to the jurisdiction of the court to impose criminal contempt (at para. 910). McLachlin J. also held that, notwithstanding the fact that the union was not incorporated, it is a legal entity (at para. 41), citing *International Longshoremen’s Association, Locals 273, 1039, 1764 v. Maritime Employers’ Association et al.*, [1979] 1 S.C.R. 120, at 137 [*International Longshoremen’s*]. Therefore, notwithstanding the non-incorporation of the union, it is still a separate legal entity. Although the Court is not explicit about this issue, presumably, the union is separate from those who are its members and those who manage its operations. If this is so, then *United Nurses* does not resolve the issue confronted herein. McLachlin J. avoids the issue of the amenability to the criminal law of an unincorporated association that has no separate legal personality from that of its members by finding that a union is a separate legal entity. Cory J., on the other hand, restricts his comments on the status of the union to issues of criminal contempt. Sopinka J. (dissenting in the result) finds it unnecessary to deal with this issue given his result in the case (at 951). We are dealing with partnerships herein. A partnership is an unincorporated association without separate legal personality from its members. Thus, *United Nurses* is not directly on point. For further discussion of whether separate legal personality might apply to partnerships, see *infra* notes 155 and 156 and accompanying text.

⁸⁷ On the fact that the use of the term “includes” in general refers to a non-exhaustive definition, see *Sullivan*, *supra* note 34 at 238-239.

⁸⁸ Bill C-45, *supra* note 1, s. 3 [now *Criminal Code*, *supra* note 2, s. 217.1], unlike many other sections of the *Criminal Code*, does not actually create a new offence. Rather it simply places supervisors under a legal duty to protect subordinates from injury, so that where there is a lapse in workplace safety measures and someone suffers injury or death as a result, liability for criminal negligence may apply (under *Criminal Code*, *supra* note 2, ss. 219-221).

namely, the formulation of a political platform by a trade union – is analogous to the situation under Bill C-45. The political platform formulated by a trade union is unlikely to correspond to the political beliefs of each individual member of the union. Therefore, as Justice Bastarache points out, the union's priorities are independent of those of its members.⁸⁹

The same is true under Bill C-45. The decision of one senior officer to use the organization as a means to commit a crime may be contrary to the fundamental moral fibre of every other senior officer and representative of the organization. There may even be specific instructions from the highest levels of the organization indicating that such behaviour will not be tolerated. Nonetheless, even at common law, an order to obey the law will not protect the organization from the criminal liability that would otherwise attach. The perpetrator's contravention of instructions is irrelevant for assessing criminal liability for fault-based offences. *Canadian Dredge & Dock Co. Ltd. v. The Queen* was the seminal case from the Supreme Court of Canada on the common-law principles of corporate criminal liability prior to the passage of Bill C-45. In that case, Justice Estey, speaking for the Court, dismissed this argument as follows:

If the law recognized such a defence [that is, that contravention of orders from above would eliminate the organization's liability], a corporation might absolve itself from criminal consequence by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law. That is not to say that such an element is without relevance when considering corporate liability with reference to offences of strict liability, *supra*. Where, however, the court is concerned with those *mens rea* offences which can in law be committed by a corporation, the presence of general or specific instructions prohibiting the conduct in question is irrelevant. The corporation and its directing mind became one and the prohibition directed by the corporation to others is of no effect in law on the determination of criminal liability of either the directing mind or the corporation itself by reason of the actions of the directing mind. This accords with the result reached in other courts.⁹⁰

In other words, at common law, even if the management team as a whole was fundamentally opposed to criminal behaviour, this is insufficient to protect the corporation from criminal sanction. There is nothing in the language of Bill C-45 to suggest that this common-law principle has been altered statutorily. Given that Bill C-45 was meant to “clarify and expand” the criminal liability of organizations,⁹¹ a statutory reversal of the common-law position on this point seems unlikely. The innocent partners may make their position on criminal conduct within the organization clear through an instruction to avoid even the appearance of criminality. However, the personal

⁸⁹ *Dunmore*, *supra* note 66 at para. 17, and see *supra* note 74.

⁹⁰ *Canadian Dredge*, *supra* note 37 at 699.

⁹¹ Press Release, Bill C-45, *supra* note 41 [emphasis added].

desires of the innocent partners may be different from the mental state ascribed to the partnership under Bill C-45. Thus, just as a political platform of an organization may be different from the political views of most of its members, the criminality of the organization may not accord with the views of many of the senior officers of the organization.

Furthermore, organizational liability draws upon the position of the representative who commits the *actus reus*. Therefore, just as a political platform put forward by a single worker will not have the same impact as one with the force of “organized labour” behind it, Adam (on the original facts) or Charlie (on the altered facts) would not have had the power to set the criminal scheme in motion without utilizing their position within the organization to do so. Their positions within the associational framework of the partnership give Adam or Charlie the power needed to accomplish the desired criminal ends. Just as the associational nature of a trade union gives power to bring forward a political platform that will be taken seriously, the association of the partnership gives Adam or Charlie power to conduct their criminal scheme.

From Justice Bastarache’s *obiter* statement in *Dunmore*, it is clear that the trade union’s ability to adopt a political platform is likely protected by s. 2(d). As shown above, there are significant similarities between the adoption of a political platform by a trade union, and the impacts of Bill C-45.

These five elements suggest that Parliament, in passing Bill C-45, was attempting to draw a distinction between the individual (the partner) and the collectivity (the partnership). Therefore, if the constitutionality of Bill C-45 were challenged, it would be difficult for the Crown to argue that the language of Bill C-45 does not appreciate this qualitative difference. This distinction is obviously essential to the very concept of “organizational” liability. Therefore, it seems as though Bill C-45 is aimed at the “qualitative differences” referred to by Justice Bastarache, because distinctions based on those differences animate the very core of Bill C-45.

One minor point remains to be made about this approach to “qualitative differences” as set out in *Dunmore*. A knowledgeable reader might suggest that if Bill C-45 sets up a “qualitative difference” between the individual partner and the partnership, this must mean that Bill C-45 creates a separate legal personality for the organization as a means to recognize that difference. The best answer to this assertion is that separate legal personality would make this distinction clear, and would perhaps be effective.⁹² However, it is important to recognize that this is only one possibility. The law has often drawn meaningful qualitative differences between the individual and the collective, without assigning separate legal personality to the collective. In fact, we have already

⁹² The effectiveness of attributing a separate legal personality to the partnership as a means to accomplish the ends of Bill C-45 are discussed in Parts VI and VII below.

seen this with respect to partnership property. Section 23 of the *Partnership Act* (Manitoba)⁹³ makes clear that there is a distinction between property for the private use of the individual and property for the use of the partnership. However, it is clear that this distinction alone does not allow the partnership to develop a separate legal personality. Therefore, the distinction *may* be sufficiently “qualitative” to engage s. 2(d) consideration, without necessarily granting a separate personality to the organization.

3. Discouragement of the collective pursuit of common goals because the manner in which those goals are pursued is “associational” in nature

The third element with respect to s. 2(d) is captured in the following quotation from *Dunmore*:

... the purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra*, such activities may be collective in nature, in that they cannot be performed by individuals acting alone.⁹⁴

Several points are worthy of note. First, the four-part test from *PIPSC* still applies, despite different formulations of the test for resolving s. 2(d) claims. Second, the four-part test from *PIPSC* is not exhaustive, meaning that more activity may be covered, even if it does not meet the *PIPSC* test.⁹⁵ Third, some activities that are protected by s. 2(d) will not be the collective equivalent of individual action. Fourth, the inquiry focuses on state discouragement of associational activity because of its associational nature.

The first point further validates the earlier assertion (in sub-Part 1. above) that *Dunmore* does not limit the protection offered by the analyses in the *Alberta Reference* or *PIPSC*. Rather, it extends them. The second point confirms the need to analyze *Dunmore* separately from earlier jurisprudence (done in sub-Part 2. above).⁹⁶

The third point from this quotation avoids difficult analogies between the partnership, and its individual equivalent, that is, the sole proprietorship.

⁹³ *Partnership Act* (Manitoba), *supra* note 17, s. 23. See also *supra* notes 23 and 26.

⁹⁴ *Supra* note 66 at para. 16 [emphasis in original].

⁹⁵ This is reinforced in *Health Services and Support*, *supra* note 71 at para. 22.

⁹⁶ See *ibid*.

Interestingly, a business run as a sole proprietorship, unlike both a partnership and a corporation, is not specifically listed as an “organization” under Bill C-45. There are three major forms of business organization in Canada today.⁹⁷ The fact that only two of these are specifically listed in the definitional section of the statute is a strong indication that the third may not be an “organization”. This conclusion is further reinforced by the catchall portion of the definition, which requires a group that holds itself out to the public as an “association of persons”. The sole proprietorship is, by definition, not an association of persons; the business is owned by a single individual, who is responsible for all obligations and liabilities of the business.⁹⁸ Therefore, it seems unlikely that a sole proprietorship would qualify as an “organization”. Because of this definitional matrix, an organization cannot be the functional equivalent of the actions of an individual. This conclusion furthers buttresses the argument made above with respect to the “qualitative differences” between the individual (the partner) and the collective (the partnership).

The fourth point from this quotation is perhaps the most difficult issue to confront. In the case of Bill C-45, the state is not attempting to “preclude the activity because of its associational nature”. The state is not attempting to control the entering into partnerships, or any other associational context, for that matter.

Nonetheless, it is important to remember *Dunmore’s* factual background. In *Dunmore*, there was a specific statutory scheme (the “first statute”) designed to govern, amongst other things, the certification of a trade union as a collective bargaining agent.⁹⁹ Workers involved in agriculture were specifically excluded from the ability to bargain collectively.¹⁰⁰ In 1994, Ontario passed a second statute¹⁰¹ providing organizing rights to agricultural workers.¹⁰² A third statute¹⁰³ repealed the second, and removed organizational rights from workers who had such rights under the second statute, but not the first. Workers then applied for a declaration that their *Charter* rights had been violated. Therefore, the Court in *Dunmore* was dealing with the complete preclusion of a group of people from undertaking the formation of an

⁹⁷ See VanDuzer *supra* note 8 at 7-19. VanDuzer does discuss other forms of business organization, such as the franchise (at 21), the distributorship (at 22), the strategic alliance (at 20) and the joint venture (at 20), among others. However, it is clear that the corporation, the partnership and the sole proprietorship are by far the three most common.

⁹⁸ See VanDuzer, *ibid.* at 7.

⁹⁹ *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A [LRA].

¹⁰⁰ *Ibid.*

¹⁰¹ *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6.

¹⁰² *Dunmore*, *supra* note 66 at para. 3.

¹⁰³ *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1.

association. This element of the facts in *Dunmore* explains why the “single enquiry” commanded by s. 2(d) is framed as follows: “Has the state precluded activity because of its associational nature?” However, the framing of the question in these terms is, in my view, a result of the facts of the case that the Supreme Court was being called upon to decide, rather than an attempt by Justice Bastarache to limit s. 2(d) to laws that specifically preclude association by certain groups. It is also important to recall that the question asked by Justice Bastarache is framed in the following terms: “Has the state precluded activity because of its associational nature, *thereby discouraging the collective pursuit of common goals?*”¹⁰⁴

The *Health Services and Support* case refined and extended this concept. Chief Justice McLachlin and Justice LeBel write as follows:

Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals.¹⁰⁵

The lesson to be learned from the combination of *Dunmore* and *Health Services and Support* is that the protection of s. 2(d) is engaged, if all of the following statements are true:

- (i) the state seeks to either prevent or provide a specific disincentive to the pursuit of the common goals, or the actions of the state have the effect of substantially interfering with the pursuit of the common goals, and
- (ii) but for the prohibition or disincentive at issue, the common goals are legally allowed; and
- (iii) the disincentive at issue is driven at the associational nature of the goals sought to be pursued.

Is there a disincentive created by Bill C-45? In my view, the unquestionable answer is “yes”. Would a person be more or less inclined to join a partnership if the person knew that his or her assets could be used to satisfy a criminal fine? The fact that many people might decide to join a partnership notwithstanding this disincentive does not negate the disincentive’s existence.¹⁰⁶ Therefore, the first step in the analysis is satisfied.

¹⁰⁴ *Dunmore*, *supra* note 66 at para. 16 [emphasis added].

¹⁰⁵ *Health Services and Support*, *supra* note 71 at para. 90.

¹⁰⁶ The power of the disincentive to alter the behaviour of individuals may be relevant at the s. 1 stage of the constitutional inquiry. For example, if it could be shown on a balance of probabilities that Bill C-45 had no negative impact on the willingness of people to join partnerships, this could be a valid consideration when weighing the salutary effects against its deleterious effects, at the third stage of the *Oakes* proportionality analysis. For a

The second step recognizes a basic point made by Justice McIntyre in the *Alberta Reference*: s. 2(d) does not permit persons to carry on any activity, simply because it is done collectively.¹⁰⁷ For example, a criminal conspiracy does not become legal simply because it is carried on by persons acting in concert. One might argue that the goal of the guilty partner is illegal, and thus, the second step of the test set out is not satisfied.

It is important to remember that the “discouragement of the collective pursuit of *common goals*” [emphasis added] (borrowing from *Dunmore and Health Services and Support*) is the concern here. This raises the question: what are the *common goals* of the association? Assuming that not all partners are involved in criminal activity,¹⁰⁸ the individual innocent partner does not share in the goal. The common goal of any partnership is to “carry on business with a view to profit”. To turn to our example, Adam and Brian do not share a common goal to commit a criminal offence. Brian would be opposed to any such action if he were aware of it. How, then, can this be a common goal of the partnership?¹⁰⁹

comparison of the *Oakes* decision to the possible impacts of Bill C-45, see sub-Part V(d), below.

¹⁰⁷ *Supra* note 71 at 398-399.

¹⁰⁸ If the common goal of all those involved (in this case, all the partners of the partnership) is to commit a crime, then the potential liability of the partnership is largely academic. If all of partners share a common criminal purpose, then there is a criminal conspiracy. If you can convict all the members of the organization and take all the property that they own (including assets used in the business) to pay the resulting fine, organizational liability of the partnership becomes less of a concern. The government can impact the business simply by making the fine against the individuals involved sufficiently large to require payment out of the sale of assets used in the business.

¹⁰⁹ Paradoxically, under the application of Bill C-45, the intention of the guilty senior officer (in our example, Adam) becomes the intention of the partnership. Therefore, it could be argued that once it is the intention of the partnership to commit a crime, this is a goal of the partnership-any goal of the partnership is necessarily a common one. If it is a common goal of the partnership to commit a crime, the common goal is illegal, and therefore unprotected by s. 2(d).

The problem with this is that the reasoning is circular. In order to prove that Bill C-45 is constitutional, the provisions of Bill C-45 must be applied. In other words, for the argument to succeed, Adam’s criminal intent must also be the criminal intent of the partnership. If not, Adam’s criminal goal is once again not a common one. However, the only way to impute Adam’s criminal intention to the partnership is by the application of Bill C-45. Yet, the constitutionality of Bill C-45 cannot be justified on the assumption that if one applies the provisions, this in itself will resolve the constitutional infirmities of the legislation.

For a similarly circular argument in the application of the common-law identification doctrine in the civil context, see *Hart Building Supplies Ltd. v. Deloitte & Touche*, 2004 BCSC 55, 41 C.C.L.T. (3d) 240 at para. 63, Baker J. For commentary on this decision see Darcy L. MacPherson, “Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v.*

There can be no doubt that Bill C-45 is aimed at the associational nature of the crime, and not at the crime itself. After all, Bill C-45 does not make membership in an organization a crime.¹¹⁰ It simply makes one partner liable to pay the criminal fine resulting from the wrongdoing of a fellow partner within the business of the partnership, even if the first partner has done nothing wrong. In other words, Parliament is using the criminal law to create negative consequences for partners, *specifically because they are associated with another person in a lawful association*. Despite Parliament's statement that the "partnership" committed the offence, the effect on the innocent partner (in our example, Brian) is both tangible and intended.

To return to our hypothetical example, if Brian were *not* Adam's partner, and Adam were to commit criminal wrongdoing, then Brian has no liability for Adam's wrongdoing unless he is also a party to the same offence. On the other hand, under Bill C-45, as soon as the following statements are true, different consequences result:

- (i) Adam and Brian become partners; and
- (ii) Adam manages an important aspect of the business; and
- (iii) Adam commits criminal wrongdoing designed at least in part to benefit the partnership.

In such a case, Brian is liable to pay the fine resulting from Adam's wrongdoing, because of Brian's associational ties to Adam. Therefore, Bill C-45 is concerned with Brian only because he is acting in a lawful association with Adam. This is the very type of state action that is the concern of s. 2(d). Thus, a criminal fine levied against the partnership without imbuing the partnership with separate legal personality would breach s. 2(d) of the *Charter*.

4. *The protection of other Charter values*

Where protection of a s. 2(d) right is consistent with other values in the *Charter*, this militates in favour of s. 2(d) recognition.¹¹¹ In *Health Services and Support*, Chief Justice McLachlin and Justice LeBel point out that "Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*".¹¹² The judges then reason that since collective bargaining would enhance human

Deloitte & Touche" (2005) 41 C.B.L.J. 471, in particular at 485, and Darcy L. MacPherson, "Hart Building Supplies Ltd. v. Deloitte & Touche – Annotation" (2005), 41 C.C.L.T. (3d) 240.

¹¹⁰ Certain sections of the *Criminal Code* do make it illegal to belong to certain groups, such as recognized terrorist organizations. See *Criminal Code*, *supra* note 2, ss. 468.1 - 468.14. While it is clear that there is a possible s. 2(d) challenge to these sections, this is not the forum for a discussion of this possibility.

¹¹¹ See *Health Services and Support*, *supra* note 71, at para. 80.

¹¹² *Ibid.* at para. 81

dignity, equality, liberty, autonomy, and democracy,¹¹³ protection of the collective bargaining process under s. 2(d) is important to the internal consistency of the *Charter*.¹¹⁴ It is important to note that neither human dignity nor autonomy is a specifically enumerated right under the *Charter*.¹¹⁵ Thus, it is clearly not necessary that every *Charter* value have a specific *Charter* right attached to it.

While this paper is not the place for a full discussion of *Charter* values at play in the criminal law, a short point should be made here. The rule of law is a *Charter* value to be upheld.¹¹⁶ In fact, the preamble to the *Charter* reads as follows: “Whereas Canada is founded upon principles that recognize the supremacy of God and *the rule of law*”¹¹⁷. The rule of law as a constitutional value is explained in part by Hogg and Zwibel as follows:¹¹⁸

The *Manitoba Language Reference* supports our suggestion that one ingredient of the rule of law is a body of laws that are publicly available, generally obeyed, and generally enforced. A law that is vague, or incomprehensible for some other reason, would not be publicly available in any real sense and could not easily be obeyed or enforced. Of course, for the reasons already given, the rule of law does not operate as a direct restraint on legislative action, and therefore the rule of law alone cannot invalidate a law that is vague or incomprehensible. However, the rule of law can play a role in influencing the interpretation of constitutional provisions that do operate as direct restraints on legislative action.

From this quotation, the following conclusions can be drawn. First, avoiding excessive vagueness in the drafting of laws is a part of the rule of law.¹¹⁹ Second, the law must be “publicly available” because the rule of law

¹¹³ *Ibid.* at paras. 82-85.

¹¹⁴ *Ibid.* at para. 86.

¹¹⁵ Autonomy is not a right recognized anywhere in the *Charter*. “Human dignity” is an important component of the analysis of the constitutional protection of equality under s. 15 of the *Charter*. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51, Iacobucci J. [Law]. However, human dignity is a *not* free-standing *Charter* right. “Liberty” is constitutionally protected by s. 7 of the *Charter*, but only where the deprivation of it is not in accordance with the principles of fundamental justice. Equality is also a specifically-recognized *Charter* right, but it is limited to certain specific enumerated grounds, or grounds analogous thereto. *Law* at para. 84. Subsequent to *Law*, however, the precise relevance of human dignity was changed in *R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 22, McLachlin C.J.C. and Abella J. Clearly, it is no longer necessary to prove an affront to human dignity in order to succeed in a section 15 challenge. Beyond this assertion that it is not an essential part of the s. 15 test, *Kapp* leaves open the issue of what *other* role (if any) dignity might play in future constitutional cases.

¹¹⁶ See Peter W. Hogg & Cara F. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55 U.T.L.J. 715 at 718.

¹¹⁷ *Supra* note 6.

¹¹⁸ Hogg & Zwibel, *supra* note 116 at 722-723.

¹¹⁹ The jurisprudence under s. 7 of the *Charter* sets out a test for vagueness which is relevant here. As Lamer J. (as he then was) wrote in *Reference re ss. 193 and 195.1(1)(c) of the Criminal*

demands that a person *be able to know in advance* what the law requires of him or her,¹²⁰ and when he or she is in danger of breaching one of its prohibitions, particularly in the criminal law.¹²¹ Third, the rule of law cannot and should not be used to invalidate legislation.¹²² Pursuant to Bill C-45, there is no way for a

Code, [1990] 1 S.C.R. 1123 at para. 38, vagueness applies where “a law ...does not give fair notice to a person of the conduct that is contemplated as criminal”. He also held (at para. 34): “It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards (see Professor L. Tribe *American Constitutional Law* (2nd ed. 1988), at p. 1033). This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law.” [emphasis added].

In same case, Dickson C.J.C., writing for himself and LaForest and Sopinka JJ., held at para. 17: “Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not.” [emphasis added]. Note that both statements make specific reference to the liberty interest at stake in most criminal prosecutions. Organizational liability under Bill C-45 does not carry with it the potential for incarceration, and therefore, does not engage the liberty interest under s. 7. However, whether this *alone* would be sufficient to alter the applicability of the above Supreme Court *dicta* is an open question.

Section 7 of the *Charter* is not directly applicable to Bill C-45 for a number of reasons. This is not the forum to do a detailed analysis of the interrelationship between s. 7 and the provisions of Bill C-45. However, it does seem unlikely that any of “life, liberty or security of the person” is engaged by Bill C-45. Thus, according to the Supreme Court's s. 7 jurisprudence – see e.g. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at paras. 82-83 and *R. v. Heywood*, [1994] 3 S.C.R. 761 at paras. 54-55 – a direct attack on s. 7 grounds would likely prove fruitless. However, as will be explained in more detail below, the point here is *not* to establish the violation of a constitutional right separate from s. 2(d). Rather, the purpose of this analysis is to inform the content of s. 2(d), by taking account of other values that underlie the *Charter*. In such an analysis, proof of a s. 7 violation is unnecessary.

¹²⁰ This is not to be confused with needing to know that what one is doing breaches the law. Ignorance of the law is no excuse. This is codified in our criminal law. See *Criminal Code*, *supra* note 2, s. 19.

¹²¹ The *Charter*, *supra* note 6 at s. 11(g) reads as follows: “Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations”. The Canadian Constitution thus upholds the value that the criminal law should *not* be imposed on those who have no opportunity to know in advance what will constitute a breach of the criminal law.

¹²² In *British Columbia v. Imperial Tobacco*, [2005] 2 S.C.R. 473 at para. 59 [*Imperial Tobacco*], the Court, speaking through Major J., held that, on the facts of the case, “it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content”. The Court, at para. 58, limited the “rule of law” to requiring that: (i) the law applies to government as well as the individuals within the state; (ii) there must be a set of laws; (iii) the law must be used to regulate the relationship between the individual and the state. However, in the *Imperial Tobacco* case, it is important to point out that the appellants’

partner to know in advance whether his or her actions will trigger the need to pay a fine, because the actions of the guilty partner are sufficient to trigger liability. No action on the part of the innocent partner is necessary. Some might suggest that it is the decision of the innocent partner to enter into partnership with the guilty partner that triggers the liability. However, two comments can be made. First, such a response only enhances the strength of the contention that Bill C-45 is focused on behaviour specifically because it is carried on in association with others. In other words, the argument that could be made in opposition to the consideration of *Charter* values in a Bill C-45 actually enhances the contention that s. 2(d) is engaged. Second, even pursuant to Bill C-45, being in partnership with someone who later proves to be a criminal is *not* a crime. Therefore, to make entering into partnership the behaviour of the innocent partners that triggers criminal liability seems incongruous, to put it mildly.

To be clear, my argument is *not* to say that Bill C-45 necessarily contravenes the rule of law. Nor is my argument that the rule of law as a constitutional principle can be used to invalidate legislation that does not infringe any other specifically enumerated *Charter* guarantee. Nor am I advocating that the rule of law can or should be used to create broader constitutional protection than those rights specifically enumerated in the *Charter*. Rather, the focus here is to suggest that protection under s. 2(d) is justified in these circumstances, because to find that s. 2(d) applies will enhance the rule of law. Thus, just as a desire to uphold the values of human dignity and autonomy informed the content of s. 2(d) in the *Health Services and Support* case, a desire to uphold and enhance the rule of law as a *Charter* value could impact the analysis of s. 2(d) in a case involving Bill C-45.

D. Section 1

As most readers will be aware, s. 1 of the *Charter* applies to any *prima facie* violations of *Charter* rights. The section provides as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹²³

Once again, this is not the proper forum for a comprehensive discussion of s. 1 justifications with respect to Bill C-45. After all, the burden of such justification lies on the party seeking to invoke s. 1.¹²⁴ For example, only the government would be able to present long-term sociological studies tending to

arguments were driven at having the Court declare legislation to be invalid based on its alleged incongruity with the rule of law (at para. 63).

¹²³ *Supra* note 6.

¹²⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

show the need to deter criminal conduct in the business setting. This is neither to suggest that such studies necessarily exist, nor conversely, that they do not. Having not done the sociological research necessary to draw any such conclusion, it is not the goal here to make a full-blown s. 1 analysis. However, it would be both misleading and irresponsible to not deal with s. 1 in some way.

In *R. v. Oakes*,¹²⁵ the constitutionality of what was then s. 8 of the *Narcotic Control Act*¹²⁶ was tested and found wanting. Section 8 created a rebuttable presumption that a person found in possession of a narcotic was in possession of the drug for the purposes of trafficking.¹²⁷ The challenge was upheld, as s. 8 violated s. 11(d) of the *Charter*.¹²⁸ The government could not successfully invoke s. 1 of the *Charter* in *Oakes*, because the fact proven (that is, the simple possession of a narcotic) was not “rationally connected” to the presumption.

Notice that in *Oakes*, the person whom the Crown sought to have convicted of the offence (possession for the purposes of trafficking) was already convicted of the lesser offence (the simple possession of a narcotic). In other words, the presumption further punished the criminal behaviour of the accused. The greater offence is certainly related to the lesser offence (in the sense that they both involve possession of a narcotic). Nonetheless, the Supreme Court held that the rational connection between the two offences was not sufficiently established for the rebuttable presumption created by s. 8 of the *Narcotic Control Act* to be saved under s. 1.

In the context of Bill C-45, there is no underlying offence committed by the innocent partner. There is no express rationale given for creating what appears to be the equivalent of an irrebuttable presumption that:

- (i) a senior officer of the partnership commits an offence with the intention of benefiting the partnership; and
- (ii) any other person is a partner of the partnership, then
- (iii) the partner (who is innocent of any crime) should suffer the consequence of a finding of guilt vis-à-vis the partner’s assets.

With all due respect to Parliament, *Oakes* establishes that the rebuttable presumption that a person who is criminally convicted of possession of a drug intends to traffic in that drug does not have a sufficiently rational connection for the purposes of s. 1. Bill C-45 creates a situation where a person who has done nothing criminal will be irrebuttably presumed to be connected with a crime committed by someone else, so as to make him liable to make good the

¹²⁵ *Ibid.*

¹²⁶ *Narcotic Control Act*, R.S.C. 1970, c. N-1.

¹²⁷ *Oakes*, *supra* note 124 at 116.

¹²⁸ *Ibid.* at 134-135.

economic consequences of that crime. If this is so, then it seems inconceivable that Bill C-45 will be found to have a sufficiently rational connection to pass this branch of the *Oakes* test.

VI. IMBUING THE “ORGANIZATION” WITH SEPARATE LEGAL PERSONALITY FOR ALL PURPOSES

The preceding discussion establishes that there are significant issues that result from using Bill C-45 to go after assets in which the innocent partner has an interest without imbuing the partnership with separate legal personality. But this is not the end of the matter. The next question becomes: what if Bill C-45 was intended to give separate legal personality to a partnership for all purposes?

Clearly, if the non-corporate organization were given a legal personality separate from those who own and control it, this would resolve the constitutional issues around the presumption of innocence and freedom of association, in that the partnership (the person to whom the mental state is attributed according to the new rules) is being held liable. The innocent partner (to whom the mental state is *not* attributed) is not asked to put his property forward to pay the fine. Rather, it would be the property belonging to the partnership that would be at stake. Therefore, there is no true penal consequence imposed on the innocent partner. Thus, s. 11 of the *Charter* would not be engaged.

Second, the partnership would be a person. Therefore, the fact that a group of individuals stands behind the “person” of the partnership would be irrelevant, in much the same way that the group of individuals standing behind the corporate person was irrelevant when the common-law rules of criminal liability were previously applied to corporate “persons”. Therefore, the constitutional problems of freedom of association tied to compelling the individual partners to pay the fine (because they are partners of the firm) are also no longer at issue if the partnership (the guilty party) is actually paying the fine out of its own property. Therefore, s. 2(d) of the *Charter* is not problematic.

However, even though the *Charter* issues are reduced in importance if Bill C-45 is interpreted to have granted to a partnership the status of a legal personality separate from those who control its operations or have an ownership stake in the business, other constitutional issues arise. In particular, the division of powers is engaged. Section 92(13) gives the provinces legislative jurisdiction over “Property and Civil Rights in the Province”.¹²⁹ This

¹²⁹ *Constitution Act, 1867*, *supra* note 57.

section provides the provinces with legislative jurisdiction over the regulation of businesses carried on in the province, subject to notable exceptions.¹³⁰

There can be little doubt that an amendment to the *Criminal Code* is a valid exercise of the federal government's legislative competence over criminal law.¹³¹ While the criminal law can be used to regulate businesses, even business that would otherwise be the subject of provincial legislative jurisdiction, this power is circumscribed. As Hogg explains:

But the gaps in federal power are very important and extensive. The trade and commerce power will authorize a federal prohibition of the importation of margarine, but not a prohibition of its manufacture or sale. The criminal law power may be used to prohibit undesirable commercial practices, but if the law departs from the conventional criminal format the criminal law power will not sustain it. The criminal law power may also be used to enforce closing hours on businesses for religious reasons, but not for secular reasons. ...[This] is not intended to be an exhaustive list of the gaps in the federal power to regulate business. It is simply a recitation of the better-known arenas of controversy.¹³²

Thus, it is clear that Bill C-45 is a proper use of the criminal-law power by the federal government. However, the federal government does not have the jurisdiction to regulate business in general. The federal government has jurisdiction over the criminal law. The federal government cannot do anything (in this case, regulating business in general) through the back door (in this case, through the criminal-law power) that it is not constitutionally allowed through the front door. In order to give effect to this principle, it seems as though it is necessary to limit the imposition of a separate legal personality on a non-corporate organization to situations where the criminal-law power is validly invoked. Let us assume that the federal government were to try to use Bill C-45 to take legislative jurisdiction over businesses in general, where the business's conduct was not criminal (that is, the imposition of separate legal personality on the partnership went beyond applying separate legal personality when it was incidental to a criminal prosecution). This would be a massive intrusion into the provincial jurisdiction over Property and Civil Rights in the Province; thus, it would constitutionally impermissible.

Beyond this, an analogy to the constitutional jurisdiction over corporations is also instructive. Both the federal government (under the residual power granted pursuant to the "peace, order and good government" clause of s. 91 of the *Constitution Act, 1867*) and the provincial governments (pursuant to s. 92(11)) have the legislative jurisdiction to pass incorporation

¹³⁰ For a discussion of these exceptions, see Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 2007) vol. 1, s. 21.6 at 21-8-21-9.

¹³¹ *Constitution Act, 1867*, supra note 57, s. 91(27). See also Hogg, *ibid.*, c. 19.

¹³² Hogg, supra note 130, s. 21.6 at 21-9.

statutes.¹³³ The Privy Council has decided that the apparent limit on the provincial power in this area ('corporations with provincial objects') is not a territorial limit on the ability of provincially incorporated companies to carry on business in other jurisdictions, if the laws of the other jurisdiction so allow.¹³⁴ Thus, as in the case of Bill C-45, both the provincial and federal governments are involved in this legislative area, and they must co-exist. In *John Deere Plow Co. v. Wharton*,¹³⁵ and *Great West Saddlery Co. v. Saskatchewan*,¹³⁶ the Privy Council decided that the essential characteristics (referred to in the cases simply as "status") of a federally-incorporated corporation could not be impaired by provincial licensing legislation. In the *Great West Saddlery* case, Viscount Haldane explains as follows:

If therefore in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the Provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion Government with powers to trade in any Province, it may not the less, consistently with the general scheme, be subject to Provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licenses for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such Provincial laws might be enforced could validly be so directed by the Provincial Legislatures as indirectly to sterilise or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred.¹³⁷

From this excerpt, it is clear that the provincial government cannot use its legislative powers to interfere with the essential characteristics of a federally-incorporated corporation. The remaining question is whether the converse is also true. Can a federal law determine the essential characteristics of a provincial corporation? Although there is no case-law directly on this point, in my view, just as clearly as Viscount Haldane laid out the answer to the question before the Judicial Committee in *Great West Saddlery*, the answer to the question above must be answered 'No'. This means that a federal law cannot be used to strip a provincially-incorporated corporation of the powers conferred by provincial legislation. If the right to carry on business anywhere in Canada is fundamental to the federally-incorporated corporation (as held in

¹³³ *Ibid.*, s. 23.1 at 23-1.

¹³⁴ *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566 at 578-579 (J.C.P.C.).

¹³⁵ *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (J.C.P.C.).

¹³⁶ *Great West Saddlery Co. v. Saskatchewan*, [1921] 2 A.C. 91 (J.C.P.C.) [*Great West Saddlery*].

¹³⁷ *Ibid.* at 100.

Great West Saddlery),¹³⁸ then it seems obvious that the separate legal personality of a corporation is at least equally important to a corporation as the ability to carry on business. Furthermore, the separate legal personality is a power specifically provided by the statute. Section 15 of the Manitoba statute is representative for our purposes here:

15(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

15(2) A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Manitoba to the extent that the laws of that jurisdiction permit.¹³⁹

Both subsections of s. 15 are reproduced for a simple reason: *Great West Saddlery* clearly indicates the ability to carry on business is part of the “status” of a corporation, granted by its enabling legislation. The other level of government cannot interfere with the elements of this status. By the structure of s. 15, the Manitoba legislation draws a link between the separate legal personality of the corporation (s. 15(1)), on the one hand, and the ability of the corporation to carry on business, on the other (s. 15(2)).¹⁴⁰ *Great West Saddlery* is quite specific that the latter is constitutionally protected from interference by laws passed by the other level of government. Thus, the former should receive the same level of protection.

Careful readers will undoubtedly point out that the entire paper thus far has drawn a distinction between the corporation, and the non-corporate organization. Yet, here, I am specifically drawing on the constitutional jurisprudence on the law of corporations to make a point. Therefore, it is legitimate to ask: “Is this not inconsistent?”

I do not believe that the corporate-law constitutional jurisprudence is necessarily dispositive here. However, stripping a provincially-incorporated corporation of its separate legal personality would be impermissible for the federal government, as an incursion into the legislative competence of the provinces under s. 92(11).

Provided that this argument is sound, the relevant question is: “How does this argument affect partnerships?” An argument could be framed as follows: The federal government does not have the constitutional authority to strip a corporation incorporated under provincial law of either:

- (i) its right to carry on business within its home province (or any other province(s) or jurisdictions that choose to allow the corporation carry on business, for that matter);

¹³⁸ *Ibid.* at 114-115.

¹³⁹ *The Corporations Act*, C.C.S.M. c. C225, s. 15.

¹⁴⁰ See *Sullivan*, *supra* note 34 at 360-361.

- (ii) the separate legal personality of the corporation assigned to it by its enabling statute.

Since the federal government does not have the constitutional authority to strip a corporation of its separate legal personality, it equally does not have the ability to impose a separate legal personality on a business over which it does not have regulatory jurisdiction. Put another way, the legislative branches of the provincial and territorial governments have made the decision not to grant a separate legal personality to a partnership. If, on the one hand, the *Partnership Act* of a given province was passed *prior* to the incorporation statute in the relevant province, then the legislature could have amended the *Partnership Act* to mirror the newly passed incorporation statute. If the legislature had intended to confer “the capacity ... rights, powers and privileges of a natural person” on a partnership, the passage of the incorporation statute would have provided the perfect opportunity to make this clear, through a concurrent amendment to the *Partnership Act*.

If, on the other hand, the *Partnership Act* of a given province was passed *after* the incorporation statute in the relevant province, then the legislature clearly made a choice not to adopt the statutory model of the corporation (that is, including a separate legal personality for the organization). If this argument is valid, the federal government should not have the legislative power to interfere with the specific legislative choice not to confer such status on provincially-regulated, non-corporate enterprises, such as partnerships. Thus, in my view, the federal government should not be constitutionally allowed to utilize its criminal-law power to confer separate legal personality on enterprises over which it does not have specific legislative jurisdiction.¹⁴¹

This conclusion is strengthened by the fact that the point of granting separate legal personality to a partnership is designed to ensure that the “partnership property” can be legally owned by the partnership, so that the federal government can avoid the constitutional impediments that would exist if they were to seek to force individual partners to pay the fine levied against the partnership.¹⁴² In other words, if Bill C-45 were to imbue a partnership with separate legal personality for all purposes, the federal government would specifically be trying to affect the ownership of property in the province where the property is situated. This is particularly problematic given that the head of legislative power that entitles the provinces to regulate business in general is called “*Property and Civil Rights in the Province*”. It seems obvious that the

¹⁴¹ For a list of some of the areas where the federal government could unilaterally impose a separate legal personality, because it does have specific legislative jurisdiction, see Hogg, *supra* note 130, s. 21.6 at 21-9-21-10.

¹⁴² See Part V, above, for more on this topic.

determination of who owns property situated in a given province is within the competence of the legislature of that province. As Hogg puts it:

The creation of property rights, their transfer and their general characteristics are within property and civil rights in the province. Thus, the law of real and personal property and all its various derivatives, such as landlord and tenant, trusts and wills, succession on intestacy, conveyancing, and land use planning, are within provincial power.¹⁴³

The conclusion that the general application of property law to partnerships is a matter of provincial legislative competence is further reinforced by the fact that the provinces have passed a provision, contained in the *Partnership Act*, which deals with the ownership of property. Although discussed above, the relevant section with respect to property ownership is reproduced here for ease of reference:

All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act "partnership property", and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.¹⁴⁴

The section continues as follows:

The legal estate or interest in any land, that belongs to the partnership, shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but *in trust* so far as necessary, for the *persons beneficially interested* in the land under this section.¹⁴⁵

These provisions make it clear that the provincial government has exercised its legislative competence to determine the property interests of partners with respect to both real and personal property. Therefore, in the civil context, the federal government cannot dictate the ownership of property.

In the criminal context, however, this is a different story. Clearly, Bill C-45 contemplates an organization having property of its own (separate from that of its partners) with which to pay the fine assessed. Yet, the provincial statute dealing with the ownership of property in these circumstances could, if strictly applied, effectively strip Bill C-45 of its desired impact. One might think about it this way: The law of partnership (governed provincially) says that the "partnership" (as a legal entity separate from the partners) does not own property. Therefore, if the *Partnership Act* were followed, no association without separate legal personality would have assets with which to pay any fine levied against it.

¹⁴³ Hogg, *supra* note 130, s. 21.11(a) at 21-25.

¹⁴⁴ See *supra* note 17, s. 23(1).

¹⁴⁵ *Ibid.*, s. 23(2) [emphasis added].

As mentioned earlier, the federal government has legislative competence over criminal law. A provincial statute cannot “trump” a valid federal objective. In such a case – where the valid provincial statute would, if applied expansively, create a conflict with the purpose of a federal one – the doctrine of federal paramountcy applies. Federal paramountcy means that to the extent that there is an inconsistency between a federal law and a provincial statute, the federal law will prevail.

There are a number of ways in which inconsistency (for paramountcy purposes) can manifest itself. The first of these is often referred to as “express contradiction”. This arises where there is an impossibility of compliance with both statutes. One statute expressly contradicts the other, and compliance with one requires the breach of the other. The second is where the provincial law (if applied) would have the effect of blunting the purpose of the federal statute. Hogg explains:

Canadian courts also accept a second case of inconsistency, namely, where a provincial law would frustrate the purpose of a federal law. Where there are overlapping federal and provincial laws, and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law, that is also a case of inconsistency. This is often regarded as a subset of express contradiction, although it is much less “express” than the impossibility of dual compliance. The courts have to interpret the federal law to determine what the federal purpose is, and then they have to decide whether the provincial law would have the effect of frustrating the federal purpose.¹⁴⁶

Therefore, the provincial *Partnership Act* cannot dictate the frustration of a federal purpose. In this case, the federal purpose is to ensure that the offender (that is, the organization) is amenable to the criminal law. The government, in passing Bill C-45, makes its intention in this regard clear.¹⁴⁷ The criminal law is generally driven at punishment of the guilty. It is equally clear that fines are the principal means of punishing a corporation under Bill C-45.¹⁴⁸ If the organization has no property that can be removed from it as a form of punishment, this clearly frustrates the federal purpose of punishment. Thus, in my view, the provincial law on the ownership of property must yield to the federal statute with respect to criminal law.

However, it is also clear that paramountcy only applies to the extent of the inconsistency.¹⁴⁹ In the case of Bill C-45, the inconsistency only exists to the

¹⁴⁶ Hogg, *supra* note 130, s. 16.3(b) at 16-6.1. With respect to “express contradiction”, see Hogg, s. 16.3(a), at 16-4-16.6.1. With respect to the frustration of a federal purpose, see Hogg, s. 16.3(b), at 16-6.1-16.8.

¹⁴⁷ *Supra* note 21.

¹⁴⁸ See Bill C-45, *supra* note 1, s. 20 [now *Criminal Code*, *supra* note 2, s. 735]. Bill C-45 also introduces the concept that an organization may be put on probation. See Bill C-45, s. 18(2) [now *Criminal Code*, s. 732.1].

¹⁴⁹ Hogg, *supra* note 130, s. 16.6 at 16-19-16-20.

extent that Bill C-45 applies, that is, in the criminal sphere. In other words, in the civil context, the Bill C-45 is not meant to apply, and so there is no inconsistency. Thus, the ownership of partnership property (and the obligations attached to ownership, such as fiduciary and trust obligations) would continue to be determined by the *Partnership Act* of the given province. Once we step into a *Criminal Code* offence, the property used by the organization in carrying out its activities¹⁵⁰ is that of the organization, regardless of whom the law of property for the individual province – both statute and common law – would define as the owner. In other words, when the criminal law is involved, the organization is the “owner” of the property.

The analysis provided above, in my view, creates the necessity of giving to a non-corporate organization a separate legal personality, but only in the required context. In the case of Bill C-45, separate legal personality is required only for the purposes of the criminal law. Therefore, if one were to view Bill C-45 as implicitly granting a separate legal personality for the limited purpose of providing a non-corporate organization with a means of holding the property used in carrying out its activities, a constitutional quagmire is avoided. First, the individuals behind the non-organization are not having their property taken away. This avoids issues of the applicability of ss. 2(d) and 11(d) of the *Charter*, as well as concerns about the potential application of s. 1. Second, such a compromise ensures that the provincial regulatory jurisdiction is respected. Third, the Parliamentary purpose is not blunted by provincial legislation. Thus, in my view, the compromise position – separate legal personality for organizations for the limited purposes of the criminal law – resolves the constitutional issues identified above.¹⁵¹ So, it would have undoubtedly been helpful if the legislative drafters of Bill C-45 had made explicit the basis for holding non-corporate organizations criminally liable. Since the legislative drafters did not do so, the courts will be charged with the

¹⁵⁰ We will see in Part VII, below, that assessing what constitutes “the property used by the organization in carrying out its activities” may not be a simple exercise. However, given that the other two alternatives are, according to the analysis above, unconstitutional, it seems important to at least attempt to find a solution that given meaning to Bill C-45’s specific inclusion of partnerships within its ambit.

¹⁵¹ During the writing process for this paper, one notable constitutional scholar encouraged me to make the argument that the imposition of separate legal personality on a partnership for limited purposes is really just a smokescreen for imposing liability on the partners directly. While I agree that this is a definite possibility, this would simply be a colourable attempt to impose liability on the partners. I have already dealt with the constitutional problems around the imposition of such direct liability in Part V, above. Those arguments will not be repeated. I choose in this section of the paper to adopt the perspective that it is at least constitutionally possible to give separate legal personality to a partnership for the limited purposes of the criminal law, and then, in Part VII discuss the practical implications of this possibility, assuming that this was the Parliamentary intent evidenced by the passage of Bill C-45.

task of interpreting the statute. I am hopeful that the court will be able to fill the void so as to ensure that Bill C-45 is constitutional.

As we will see, constitutionality is not the end of the story. There remain several practical impediments to the implementation of the Parliamentary purpose in enacting Bill C-45. It is to these practical impediments which we now turn our attention.

VII. IMBUING THE “ORGANIZATION” WITH SEPARATE LEGAL PERSONALITY FOR LIMITED PURPOSES – PRACTICAL CONSIDERATIONS

In the first place, the approach adopted above does seem to come closest to the avowed intention of Parliament.¹⁵² This interpretation of Bill C-45 treats corporate and non-corporate organizations alike.¹⁵³ After all, a shareholder does not expect that his or her personal assets can be used to pay a fine levied against a corporation in which he or she is a shareholder. However, the assets of the corporation’s business may be used to pay the fine. If we adopt a similar approach to partnerships (that is, the assets of the individual partner not used in the business are immune from seizure, but the assets used in the business may be seized), we achieve the parity between forms of business organization sought by Parliament.

There is also some case-law to support the idea that legislation may, in order to achieve its purpose, grant a limited separate legal personality to an entity which otherwise would not have one at law. As the House of Lords (adopting wording of Justice Farwell, as he then was, at trial) put it in the case of *The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants*:

Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to

¹⁵² However, the intention of Parliament in this regard (at least as drawn from the text of the legislation itself) is neither unambiguous nor as clear as legislative drafting could allow. Unlike its Canadian counterpart, the *Corporate Manslaughter and Corporate Homicide Act 2007* (U.K.), 2007, c. 19 is explicit about this issue. Section 14 of the United Kingdom Act reads as follows: “14 Application to partnerships (1) For the purposes of this Act a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate; (2) Proceedings for an offence under this Act alleged to have been committed by a partnership are to be brought in the name of the partnership (and not in that of any of its members); (3) A fine imposed on a partnership on its conviction of an offence under this Act is to be paid out of the funds of the partnership. (4) This section does not apply to a partnership that is a legal person under the law by which it is governed.” This, however, is not the forum for a detailed analysis of the U.K. legislation, nor an in-depth comparative piece. This will have to wait for another day.

¹⁵³ See *supra* note 21.

give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature ...¹⁵⁴

The above statement was adopted, albeit in a slightly different context,¹⁵⁵ by the Supreme Court of Canada in *International Longshoremen's*.¹⁵⁶ The Legislature must be presumed to know the bounds of its constitutional authority and to remain within them.¹⁵⁷ In the case of Bill C-45, the intention of the Legislature was clearly in the realm of criminal law. Therefore, the separate legal personality conferred by Parliament under the provisions of Bill C-45 is limited to those occasions where the criminal-law power is engaged.

Having disposed of constitutionality, therefore, there remain a number of practical considerations that remain for discussion. Bill C-45 seems to fail to appreciate (at least outwardly) the differences between partnerships and corporations. The simplistic analogy between the two organizational forms is, however, fraught with practical difficulties that are not easily overcome. In this Part, my attention will focus on problems arising out of the differences between corporations, on the one hand, and partnerships, on the other, at various stages in the process. For example, in sub-Part (a), one of the differences in the formation of the two types of organization expose potential issues with regard to the use of a separate legal personality for limited purposes. In sub-Part (b), I look at the rules preventing a transfer of assets from the owner for criminal-law purposes (that is, the organization, be it a corporation or the partnership) to the individuals behind the organization (be it a shareholder or the partners). In sub-Part (c), I will discuss perhaps the most problematic issue of all: At what stage of the partnership's existence does

¹⁵⁴ [1901] A.C. 426 (H.L.).

¹⁵⁵ The case discusses the amenability of a trade union certified as a bargaining agent for employees to prosecution under the provisions of the *Canada Labour Code*, S.C. 1972, c. 18, s. 1, dealing with illegal strikes and lockouts.

¹⁵⁶ *Supra* note 86 at 120, Estey J. Furthermore, in *Berry v. Pulley*, [2002] 2 S.C.R. 493 at para. 39 [Berry], Iacobucci J. held that the grant of statutory rights, powers and immunities implicitly justifies the grant of separate legal personality to a trade union (citing *International Brotherhood of Teamsters v. Therien* [1960] S.C.R. 265 at 277-278), given its statutory mandate (*Berry* at para. 9), and its specific amenability to prosecution under labour relations legislation (*Berry* at para. 42). See *Partnership Act*, *supra* note 17, for a discussion related to the holding of property are not such as to create the implicit basis for the creation of a separate legal personality. Notwithstanding this, Bill C-45 could provide a sufficient basis for the implicit grant of separate legal personality.

¹⁵⁷ *Sullivan*, *supra* note 34 at 459-461. See also *R. v. McKay*, [1965] S.C.R. 798 at 803-804, Cartwright J. (as he then was).

this separate legal personality attach to the partnership? As will be seen below, the answer to this question is likely to create many problems for the courts in dealing with Bill C-45.

To be clear, first, I do not believe that this is an exhaustive list of all the issues created by the application of these rules to non-corporate entities. On the contrary, it is very likely that there are other issues, not dealt with below, that may cause problems for the implementation of the strategy of creating a separate legal personality for limited purposes.¹⁵⁸ The discussion below is only meant to identify some of the more obvious problems created by Bill C-45 for partnerships, on which little practical guidance exists.

Second, it is important to point out that I do not profess to have the answers necessary to resolve these practical issues. Some of these issues may even defy simple solutions. However, the goal is not necessarily to resolve the issues that may confront (or even confound) the criminal courts for years to come. Instead, the focus here is simply to flag the issues on which further guidance and insight may be necessary, either in the form of statutory amendment,¹⁵⁹ or strong judicial reasoning.

¹⁵⁸ As an example of one additional problem that the courts may have to approach with caution is as follows: how will the government be able to present evidence as to how a given asset was used at the relevant time, such that it should be considered partnership property? In the civil realm, a designation of a particular asset as partnership property is not relevant to creditors, who can seek recovery based on ownership by one of the partners, whether the property is partnership property or not.

However, only partnership property is subject to the fiduciary obligation that it be used for the purposes of the business of the partnership. See *Partnership Act* references, *supra* note 23. The fiduciary obligation is owed to the other partners. If one partner makes an allegation that another is not using the partnership property appropriately, each is involved in the business. Therefore, the one partner should be in a reasonable position to present evidence in support of this conclusion. In its prosecution of the partnership, the government, on the other hand, is not likely to be intimately familiar with the use of particular pieces of property. If that familiarity is lacking, it may be difficult to prove whether a particular asset is used in the business or not. Clearly, if it is not used in the business, it cannot be part of the common fund. If it is not part of the common fund, the government cannot force payment of a criminal fine from the property. On the other hand, if it is used in the business, it is most likely part of the common fund. If it were part of the common fund, it would be exigible to pay the fine. Therefore, knowledge of whether an asset is used in the business would seem to be essential to a successful prosecution under Bill C-45.

¹⁵⁹ The likelihood of statutory amendment seems low. This is true for a number of reasons. Three spring immediately to mind. First, the Westray mine disaster in Stellarton, Nova Scotia was one major impetus for Bill C-45. The loss of the lives of 26 miners in a 1992 underground methane gas explosion led to calls for reform, especially after attempts to convict the corporate owner of the mine, Curragh Resources, Inc., and its managers of criminal offences were unsuccessful. Notwithstanding the strong public pressure, it took until 2003 for the statutory amendment to be passed.

Second, politically, in the absence of disasters like Westray, there is little reason to engage in a prolonged study of the issue, because getting it right (assuming that there is a single "right"

A. Differences in organizational formation

The first distinction between corporate and non-corporate forms is that one does not create a corporation by accident, or more importantly, without knowing that a corporation has been created. This gives the participants a clear indication of the separation created between themselves and the business.¹⁶⁰ However, in a partnership situation, a partnership can be created by accident,¹⁶¹ and can even be created contrary to the express intentions of those alleged to be partners.¹⁶² This distinction is crucial.

The idea of a separate legal personality for limited purposes assumes that the court can tell the difference between the property that is owned by the partnership and that which is owned by the partners. For the sake of convenience, I shall adopt the nomenclature of Law Reform Commission of Canada in reference to the property that is held by the partnership as the “common fund” of the organization.¹⁶³

If one does not think that one is in a partnership, that person has little reason to clarify that certain assets are used in the business, while others are not. The idea of concerning oneself with the distinction between one’s personal and business assets has no application when a person does not think

answer) is simply not part of the daily consciousness of everyday Canadians. The economy, infrastructure, social programs, and other government initiatives are all more likely to be direct concerns of a larger segment of the populace than is the organizational liability of partnerships for crimes. Therefore, the political will to amend the law is more difficult to provoke than in these other areas, because changes in these other areas are more likely to produce reactions from voters, and thus, potentially impact the outcome of the next election.

Third, knowing for certain that there is an issue with which Parliament should concern itself is a difficult exercise. Before Parliament will amend a statute, the government will generally want to see how the courts are interpreting the statute at issue. If the courts are deciding cases in the way that the government intended when it passed the statute, then the government is unlikely to intervene, despite what may be the actual or perceived weaknesses in the statutory drafting. Parliament is more likely to intervene where the reasoning of a court can be seen as undermining public confidence. For an example of a Parliamentary amendment designed to overturn a court decision, see *Criminal Code*, *supra* note 2, s. 33.1 (a direct response to the reasoning of the majority of the Supreme Court of Canada in *R. v. Daviault*, [1994] 3 S.C.R. 63). Unfortunately, despite the fact that Bill C-45 was passed in 2003, and came into force in 2004, there has yet to be a case where a charge laid pursuant to one of its provisions has gone to trial. Therefore, the government has yet to be given the opportunity to assess the impact of Bill C-45 on organizations. Until such an assessment can be made, it is unlikely that the government will seek to amend these provisions.

¹⁶⁰ This is so, even though there are cases where those who have incorporated a business did not fully understand the implications of the incorporation. See *Kosmopoulos*, *supra* note 28.

¹⁶¹ See *Seiffart v. Irving* (1887), 15 O.R. 173 at 175 (H.C.J., Ch. Div.), Chancellor Boyd, aff’d (1887), 15 O.R. 177 at 179-180 (Div. Ct.), Proudfoot J., and at 180, Ferguson J.

¹⁶² See *Redfern Farm Services Ltd. v. Wright*, *supra* note 20.

¹⁶³ *Criminal Responsibility for Group Action*, *supra* note 29 at 55.

that he or she is in business with anyone else. This is particularly true since, until Bill C-45 was created, there is no business advantage to placing property in the common fund. Personal assets are equally available to pay business debts, in addition to the assets dedicated to the business.¹⁶⁴ In determining whether to extend credit to the business, therefore, the creditor can take into account both the assets used in the business partnership, as well as the combined net worth of the partners. So, for a small, unincorporated business such as many partnerships, the individuals involved may not know that there is a distinction between themselves and the business. As such, it may be very difficult to ascertain what property, if any, will belong in the common fund.

As discussed above, the presumption of innocence must mean that the innocent partner cannot be forced to pay any fine levied against the partnership out of his or her personal assets.¹⁶⁵ Therefore, it seems clear that either:

- (i) the government must prove (at least on the balance of probabilities) that the asset sought to be used to pay the fine was that of the organization; or
- (ii) the organization or the partners must place a reasonable doubt as to the ownership of the asset in issue and at that point, the government must then prove (at least on the balance of probabilities) that the asset sought to be used to pay the fine was that of the organization.¹⁶⁶

Since the principals of the business may not have turned their minds to the ownership of the property at issue, it would seem difficult for the state to prove how exactly the property was being used.

In contrast, a corporation has a separate legal personality that provides a business-related incentive to put the assets to be used in the business into the corporation, and keep personal assets in the individual's own name. The individual is more inclined to move assets used in the business into the corporation to, for example, reduce the likelihood that a personal guarantee will be necessary to obtain credit for the corporation.¹⁶⁷ If the principals of the corporation do not have to give a personal guarantee, the principals are

¹⁶⁴ See VanDuzer, *supra* note 8 at 31.

¹⁶⁵ See Part V(B), above.

¹⁶⁶ The second option is drawn from jurisprudence with respect to the sanity of the accused, pursuant to the *Criminal Code*, *supra* note 2, s. 16. See *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1342.

¹⁶⁷ Creditors who are uncertain as to the ability of the corporation to repay the amounts owed often exact a personal guarantee given by the principals of a business corporation. Despite the separate legal personality of the corporation, the guarantee means that the principals of the corporation are responsible for the liabilities incurred by the corporation to the extent that the corporation is unable to make good on those liabilities.

generally able to ensure their personal assets are protected from seizure by business creditors.¹⁶⁸

Small partnerships can be formed by accident. Large partnerships, such as large law and accounting practices, would rarely be created other than with the specific knowledge and intention of the principals therein. Large partnerships are more likely to be formed under a specific partnership agreement, and bank accounts of the firm would exist which could be accessed as part of the common fund. In other words, under Bill C-45, to this extent at least, the assets involved in the criminal activity of large partnerships will be more easily accessible than those of their smaller counterparts.

It is interesting to note that this is the opposite of the English experience with *corporate criminal* liability for manslaughter. Convictions have only been registered against smaller companies, while the attempts to convict larger corporations have been unsuccessful.¹⁶⁹ However, despite the fact that there is much in common between the two countries in this area of the law, Canada and the United Kingdom do not necessarily operate in the same way. As Estey, J., explained:

The application of the identification rule in *Tesco, supra*, may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made.¹⁷⁰

So, even at common law, it is possible that the Canadian rules on corporate criminal liability did not suffer from the same difficulties as did their English counterparts. The passage of Bill C-45 has now increased the distinction between the two jurisdictions. However, it is clear that it may be difficult to implement the separate legal personality of organizations for small partnerships, where the participants do not make the distinction between the common fund, on the one hand, and personal assets of the partners, on the other. Bill C-45 provides no meaningful guidance on this issue.

B. Avoidance of liability as a going concern

As mentioned earlier, for larger partnerships, the fear of catching the participants off-guard with respect to having created a partnership is unlikely. Unlike smaller “accidental” partnerships, there will most certainly be a common fund from which recovery of the criminal fine can be sought.

¹⁶⁸ The courts have reserved the ability to ignore or disregard the separate legal personality of the corporation. This is often referred to as “piercing the corporate veil”. For discussions of piercing the corporate veil, see e.g. *Kosmopoulos, supra* note 28 at 10-12; *VanDuzer, supra* note 8 at 129-138.

¹⁶⁹ Sherna Noah, “Why previous corporate manslaughter cases have collapsed” *Press Association News* (9 July 2003).

¹⁷⁰ *Canadian Dredge, supra* note 37 at 693.

Nonetheless, a second practical problem presents itself. This problem revolves around the ability (and willingness) of partners in larger partnerships to structure their affairs so as to minimize liability risks. To take a simple example, Lawyer A is a partner in Firm X. The lawyer is concerned about the prospect of losing his or her house, car, or other valuable personal assets if Firm X is sued. What does Lawyer A do in such a circumstance? One possible answer is to transfer the assets to Lawyer A's spouse, who may have employment that has a significantly lower risk of being sued personally. Assume that Firm X is then successfully sued by one of its creditors, while Lawyer A is a partner of the firm. Lawyer A's assets are still made available to pay the judgment against the partners, but the assets which were transferred earlier to Lawyer A's spouse are not available. Through one transaction, Lawyer A has potentially avoided the full extent of his or her liability to creditors.

In other cases, the avoidance of liability can be more elaborate. Some large law firms in major Canadian cities have two organizations. The first is a partnership for the legal side of the business (that is, the partnership employs the associates). But, in addition, the partners also set up a corporation of which each partner owns a percentage. The corporation employs the administrative staff that works at the law firm (e.g. secretarial assistants, financial services, maintenance staff, human-resource professionals, etc.). Therefore, if there is a legal action involving something other than the direct provision of legal services, this could be the responsibility of the corporation, rather than the partnership. The partners would then only be liable to the extent of their respective investment in the corporation, rather than having all of their assets (both business and personal) at risk. Thus, the people involved in large partnerships are able to manipulate the amount of property at risk at any given time.

Some may ask "If the manipulation of property ownership to avoid partnership liability is common in the civil sphere, why should we be so concerned with it in the criminal sphere?" The answer, in my view, lies in the distinction between the criminal law and its civil counterpart referred to earlier.¹⁷¹ The criminal law is a statement of basic morality. The law of contracts is concerned with promoting economic certainty and the allocation of risk. Clearly, the contractual creditors of the business are taking a risk if they do not: (i) investigate the personal and business creditworthiness of the partners so that they know the available assets from which they can reasonably expect recovery; and (ii) place restrictions on the right of the partners to alienate those assets. The law of torts is concerned with wealth redistribution and compensation. Yet, generally, the economic motives of the

¹⁷¹ See notes 58-65, and accompanying text.

tort system are not considered to be more important than those of the law of property.

But, to put the question rhetorically: “Should society set up a system of criminal justice where those who break the criminal law can arrange their affairs as to minimize or avoid any form of punishment?” In other words, our society did not make a system of criminal justice at which people can thumb their noses if they had the foresight to know in advance that a crime might be committed and the resources to arrange that their business be unable to pay a fine levied against it. This is a practical problem for the organizational liability of partnerships.

Again, a corporation is different. There are compelling business reasons to put assets into – and leave assets in – the corporation. As a general rule, the shareholders can only receive dividends to the extent that the corporation will be able to pay its debts. The *Canada Business Corporations Act* provides as follows:

A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that

- (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
- (b) the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.¹⁷²

This provision means that the money paid to the corporation in return for the issuance of shares generally remains with the corporation as long as it is a going concern.¹⁷³ This ensures that pool of assets will be available to pay debts, including criminal fines, if necessary. The law of partnership contains no similar provisions. This is unsurprising, given that the law allows creditors to seek repayment from the partners personally, as well as from business assets. So, if a partner withdraws an asset from the business, even to sell it for personal benefit, the proceeds remain exigible to pay business creditors. Therefore, unlike a corporation, the transfer of an asset to a principal of the partnership business is generally not problematic from a creditor’s point of view.

Thus, if Bill C-45 is simply meant to provide parity between incorporated businesses and partnerships, the ease with which partnership property can be

¹⁷² R.S.C. 1985, c. C-44, s. 42 [CBCA].

¹⁷³ In general, “stated capital” is the aggregate of all consideration received in returned for shares issued by the corporation (*ibid.*, s. 26). While shareholders can, by special resolution, reduce stated capital (*ibid.*, s. 38(1)), this can only be done if there are no reasonable grounds for believing that: (a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due; or (b) the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities (*ibid.*, s. 38(3)). In other words, creditors cannot be negatively impacted by the reduction in stated capital.

moved between the partnership and the partners makes this supposed parity exceptionally difficult to achieve.

C. When does separate legal personality attach to the partnership?

It is clear that attaching separate legal personality to the partnership may be necessary in order to facilitate the operation of Bill C-45 and avoid problems with the guarantees provided by the *Charter*. It is equally clear that the division of powers under the *Constitution Act, 1867* prevents the federal government from ascribing a separate legal personality to the partnership until the partnership comes into contact with the criminal law. This leaves open the following question: If the partnership does not begin with a separate legal personality, when exactly does it acquire this personality? Depending on the answer to the question, different practical consequences arise.

1. The time of the offence

The earliest point at which the partnership could acquire the separate legal personality ascribed to it by Bill C-45 is when the offence occurred. At that point, it is at least possible that the partnership may come into contact with the criminal-justice system. It could be argued that the criminal law has an interest in the property of the partnership at that time; therefore, the assets of the partners used in the business of the partnership could be transferred to the partnership, which now has separate legal personality. The problem with this approach is that the innocent partners may have no idea that the offence has occurred, and therefore will assume that they continue to own the assets at issue.

To better explain this, I shall again add some facts to our original hypothetical fact-scenario.¹⁷⁴ Assume the following facts:

- i. Adam commenced his scheme on January 1, 2006;
- ii. At that time, \$20,000 of assets are dedicated to the business;
- iii. There is no written partnership agreement between Adam and Brian;
- iv. Every December 31, the partners remove all profit from the partnership, with the exception of amounts required to cover debts incurred in the year just ending, but to be paid in the following year, plus \$20,000 for operating expenses for the coming year;
- v. On August 1, 2008, one of the intended victims becomes aware of the fraud and reports it to Brian;

¹⁷⁴ See Part III, above.

- vi. Brian immediately confronts Adam, and puts a stop to the activity;
- vii. After this, most of the assets that are part of the \$20,000 on the partnership books as of January 1, 2006 are used to pay bills, accumulated as part of the business of the partnership, while the remainder is used to acquire further assets;
- viii. On June 1, 2009, Adam and Brian take on a new partner, named Derek;
- ix. Derek pays \$10,000 in return for his partnership interest;
- x. On April 1, 2010, Brian withdraws from the partnership. His former partners agreed to pay him over time from the earnings of the partnership, which took place every month from May 1, 2010 to September 1, 2012. As of September 1, 2012; Brian is still owed \$5,000 from his former partners;
- xi. In June 2010, the partnership takes on a new partner, named Ethan, who pays \$25,000 for his partnership interest;
- xii. In October, 2010, unbeknownst to any of the partners (current or former), the police begin an investigation into the activities of the partnership between January 1, 2006 and August 1, 2008 relating to the fraud undertaken by Adam;
- xiii. By February 1, 2011, the partnership has assets worth \$60,000, and additional cash of about \$15,000;
- xiv. On February 1, 2011, Adam, without the consent of his partners, withdraws \$10,000 in cash from the firm account, and withdraws from the partnership, to take up residence in the Cayman Islands;
- xv. On March 1, 2011, the remaining partners are informed of the police investigation;
- xvi. On November 1, 2011, the partnership was charged with fraud over \$5,000 under the *Criminal Code*;
- xvii. On September 1, 2012, the matter came to trial before a judge alone.

On these facts, what are the assets of the partnership as of the date of the offence? Clearly, this would be the \$20,000 assets mentioned at point (ii). But, as mentioned at point (vi), most of these assets have been used to pay debts of the partnership.¹⁷⁵ It is also clear that none of the partners who comprised the firm at the time of the offence are still partners of the firm at the time of the trial. This having been established, at least three subsidiary questions remain

¹⁷⁵ For the sake of simplicity, I am assuming that the partners have not dissipated any of the assets in an attempt to render the partnership judgment-proof. This is not the forum in which to confront these issues.

for consideration. First, can the government seek to recover the assets that belonged to the partnership on January 1, 2006 (that were subsequently used to pay debts of the partnership) from the creditors who were paid with those assets? Secondly, if not, can the partners at the time of the offence be asked to make good on the value of the assets lost between the time of the offence and the time of trial out of assets that are not part of the common fund of the partnership? Third, can the new partners be expected to make good on the fine assessed at trial, if any?

On the first issue, the equitable remedy of tracing would seem to be the proprietary remedy at issue. The *Personal Property Security Act*¹⁷⁶ seems to be far broader in its use of tracing than its common-law counterpart. Tracing is defined as “a process where an owner with a legal or equitable interest can trace the original property to the new [property]”.¹⁷⁷ I leave aside issues of the need for a fiduciary relationship in order to assert a claim against the property followed through the tracing process.¹⁷⁸ It is elementary that assets used to pay bills are not traceable into the hands of the creditors whose debt was extinguished by the transfer of the assets.¹⁷⁹ Perhaps even more importantly, tracing is not available until the person seeking to trace the asset is in a position to assert an interest, be it legal or equitable, in the property sought to be traced into a new form of property.¹⁸⁰ In the case of Bill C-45, the potential defendant organization does not owe a debt or obligation in respect of the offence charged until the sentence is imposed. It is not entirely clear that Parliament intended to be able to trace the assets out of the separate legal

¹⁷⁶ *The Personal Property Security Act*, C.C.S.M. c. P35 [PPSA (Manitoba)] will be used for illustrative purposes. Each of the common-law provinces and territories has a statute based on similar principles.

¹⁷⁷ *Sneddon v. British Columbia Hydro & Power Authority* (2003), 16 B.C.L.R. (4th) 254 (S.C.) at para. 41, aff'd (2004), 35 B.C.L.R. (4th) 212 (C.A.).

¹⁷⁸ In the PPSA context, the requirement for a fiduciary relationship has been removed by statutory amendment. See PPSA (Manitoba), *supra* note 176, s. 2(3). For a discussion of the fiduciary requirement under the PPSA, see *General Motors Acceptance Corp. of Canada Ltd. v. Bank of Nova Scotia* (1986), 55 O.R. (2d) 438 (Ont. C.A.).

¹⁷⁹ A.H. Oosterhoff *et al.*, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed. (Toronto: Carswell, 2009) at 1267-1268 [*Oosterhoff on Trusts*]. However, there is some uncertainty whether a debt-repayment transfer may be traceable if it appears that the debt was created for the purchase a particular property, and was repaid by assets sought to be traced, see Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Essentials of Canadian Law: Personal Property Security Law* (Toronto: Irwin Law, 2005) at 475. The authors of *Oosterhoff on Trusts* similarly question the appropriateness of the “no proceeds from payment of a debt” rule, but seem to acknowledge that this is a statement of the law, as it currently stands. For the purposes of the present discussion, the debt is acquired by criminal wrongdoing and would not have a strong connection with acquiring any particular asset, and so this uncertainty in the law does not affect the immediate issues.

¹⁸⁰ *Oosterhoff on Trusts*, *ibid.* at 1235-1237.

entity of the partnership, and into the hands of the individual partners. There is nothing in the language of the statute to suggest this. However, even assuming that this is Parliament's intention, the common law does not allow this to occur until there is a claim to the property. There can be no claim until there is a finding of guilt. Until then, whether the partnership is a separate legal person from the partners or not, the property can be dealt with as the business requires, and no tracing process is likely to succeed. Therefore, in my view, the answer to the first subsidiary question posed above must be a resounding "no".

As to the second subsidiary question, I believe that the answer is equally in the negative. After all, the entire point of giving separate legal personality to the partnership is to separate the assets belonging to the partnership from those owned personally by the partners. If, once the charge is laid, the partners at the time of the offence are expected to ensure that the partnership has at least as much property as on the date of the offence, this essentially makes the partners guarantors of the payment of the fine up to that amount. If this is so, then, to the extent that the partnership is unable to pay the fine levied, the partners are personally liable for the shortfall. As soon as the partners are liable to dip into their personal assets to pay any shortfall that has resulted from the imposition of a criminal fine against someone who is not guilty of the underlying offence, "true penal consequences" are being foisted upon that person. As discussed earlier, this raises constitutional issues with respect to the presumption of innocence.¹⁸¹ Therefore, it is unlikely to be constitutional to demand that the partners at the time of the offence contribute to the assets of the partnership.

The answer remains the same for forcing the new partners to use their personal assets to pay the fine. On the facts presented, neither of the people who are the partners at the time of the verdict – and the imposition of sentence – were members of the partnership at the time of the offence. Clearly, just as Brian has done nothing wrong on the original facts, Derek and Ethan have done nothing wrong on the additional facts set out in this Part. To ask them to pay the fine levied against the partnership raises (and exacerbates) the same constitutional issues referred in Part V. The new partners were not members of the partnership when the offence took place. Therefore, the case in favour of *not* requiring the new partners to contribute personal assets to ensure that the partnership has at least as much property as on the date of the offence to pay the fine is *even stronger* on these facts than it is when the original partners remain involved in the business of the partnership.

¹⁸¹ See the discussion of the importance of "true penal consequences", Part V(B), above.

2. The time of sentencing

If Bill C-45 attaches separate legal personality to a partnership as of the date of sentencing, different issues arise. Clearly, this avoids issues of forcing partners to provide their personal assets to the partnership to make up any difference between the assets at the date of the offence and the date of sentencing. Whatever partnership property exists at the time of sentence would be exigible to pay the fine levied against the partnership. Thus, the assets in the partnership as at the date of the offence would be irrelevant for the purposes of the criminal law.

Take the facts of our example. At the time of sentencing, the partnership is comprised of partners who had nothing to do with the wrongdoing being punished. Yet, it is the assets with which those people (in our example, Derek and Ethan) seek to make their livelihood that are being removed on account of wrongdoing that occurred before they became involved in the partnership.

Nonetheless, in civil law, the incoming partner is not personally liable for obligations arising prior to his or her becoming a partner.¹⁸² Notwithstanding this fact, the value of the interest purchased by the incoming partner may be reduced by the need to pay the debt out of partnership property.¹⁸³ Thus, it is unclear whether Derek and Ethan have any reason to think that the assets given by them will be used to pay debts arising prior to their arrival. As Manzer puts it:

The admission of a new partner to a partnership may result in the creation of a new partnership and the dissolution of the old one. Whether this occurs will depend upon the relevant provincial legislation and the terms of the specific partnership agreement.¹⁸⁴

Thus, whether the admission of a new partner (or the retirement of a current one) will dissolve the partnership is highly fact-dependent. Anything fact-dependent creates uncertainty. This uncertainty could in turn generate a desire to manage the risk that it creates. The tax system already creates a significant incentive for partners to remove profit from the partnership on an ongoing basis, because it forces partners to pay tax on earnings, even if those earnings remain in the business, and are *not* used for the personal purposes of the individual partner. Therefore, the tax system causes the individual partner to take money from the common fund of the partnership, if only to pay the tax on the earnings.¹⁸⁵

¹⁸² See *Partnership Act* (Manitoba), *supra* note 17, s. 20(1).

¹⁸³ See VanDuzer, *supra* note 8 at 58, Figure 2.4.

¹⁸⁴ *Supra* note 8 at para. 6.480.

¹⁸⁵ The taxpayer is the individual partner. The amount of income or loss is calculated at the level of the partnership (see *Income Tax Act*, *supra* note 18, s. 96(1)), and then each partner must

The provisions of Bill C-45 may increase this incentive to remove profit from the partnership. Bill C-45 creates the possibility that the partners may have property of the business taken away to pay criminal fines resulting from events occurring prior to when they became partners. This seems likely to increase the perceived need to engage in activities that lower the amount of partnership property that is exigible to pay debts at any given time. The civil law allows such techniques to be employed.¹⁸⁶ For reasons mentioned earlier, differences between the purposes of the criminal and the civil law (morality v. compensation) may mandate a different approach in criminal cases than that taken in the civil law.

Perhaps even more important are the purposes of sentencing. This leads me to question what is just about holding the partnership liable for the action of a former partner, when the current partners are completely different from those in place at the time of the offence.

In fact, one could claim that once all the people who were partners at the time of the offence have left the partnership, the partnership that existed at the time of the offence no longer exists. In other words, since a partnership is a relationship amongst people, if none of the people in the relationship were the original parties to it, does the original relationship continue to exist?¹⁸⁷ If not, then the partnership does not exist at the time of the sentence, and this makes fining the partnership exceptionally problematic.

Even if the *Partnership Acts* do not specifically provide that the partnership is terminated by a change of partners, it is clear that the partners may, by agreement, choose to terminate the partnership on the retirement of any partner. The remaining partners can then reform the partnership with the remaining partners only, while informing creditors of the firm that the retired partner is no longer part of the firm.¹⁸⁸ This may provide some protection for innocent partners.

pay tax on his or her share of the income so calculated, or to deduct the loss so calculated from the partner's other income, if any. See *Backman, supra* note 18.

¹⁸⁶ See Part VII(B), above.

¹⁸⁷ It is clear that any partner may terminate the partnership on notice to his or her partners, unless this right is removed by the unanimous agreement of the partners. The *Partnership Act* (Manitoba), *supra* note 17, s. 29 is representative. It reads as follows:

29(1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention to do to all the other partners;

29(2) For the purpose of subsection (1) where the partnership was originally constituted by deed, a notice in writing, signed by the partner giving it, is sufficient.

¹⁸⁸ *Partnership Act* (Manitoba), *ibid.*, s. 40.

This is not to suggest that there are no negative consequences to this approach. The tax consequences may be bad for the partners. In her discussion of tax, Manzer explains,

As previously mentioned, a properly drafted partnership agreement will provide that the admission of a new partner does not terminate the old partnership but continues the existing one. ... Generally, one would want to ensure that the partnership is not dissolved on the admission of a new partner.¹⁸⁹

However, under the right circumstances, the innocent partners may be willing to accept the potentially negative tax consequences of dissolution to ensure that the wrongdoing of the former partners of the firm are not visited upon the assets from which the current partners intend to make their livelihood.

The partners can choose the events that will cause dissolution in advance of their occurrence. The partners are free to choose that the partnership be dissolved by any activity by any partner that could subject the partnership to criminal liability. How the courts might choose to deal with this possibility is at best unclear.

The dissolution of partnerships is different from that of corporations. First, if the shareholders of a corporation choose dissolution, there is a significant procedure that must be followed to dissolve the corporation.¹⁹⁰ Also, the government official in charge of administering the incorporating statute must issue a document before the corporation may dissolve. According to the CBCA, it is clear that:

- (i) the existence of the corporation continues notwithstanding a stated intent of the shareholders to dissolve it;
- (ii) public notification of the intent to dissolve must be provided; and
- (iii) the Director can ask for court supervision of a corporate dissolution.

Thus, the Crown in the province where criminal charges may be laid could potentially ask the Director to seek court supervision if charges have been, or are soon to be, laid against the corporation. The Court could then manage the risk that the corporation will be dissolved prior to the verdict in the criminal case.

There is a second difference between the partnerships and corporations that is also relevant here. Shareholders know before buying shares that there is a continuity of existence of the corporation by virtue of its separate legal personality. In other words, shareholders should know that whomever else

¹⁸⁹ Manzer, *supra* note 8 at para. 6.490.

¹⁹⁰ CBCA, *supra* note 172, Part XVII

holds shares in the corporation does not affect the liability of the business. The shares are separate property from the business itself.

With partnerships, separate legal personality is not an issue in civil law. Partners may only find out after purchasing their partnership interest that there is a continuity of existence in the partnership for limited purposes – that is, the partnership continues to exist as its membership changes – and that notwithstanding the provisions of the *Partnership Act*, assets which the new partners bring to the business may be exigible to pay for wrong of other partners occurring prior to his or her admission to the partnership.

Consequently, regardless of when the separate legal personality attaches to the partnership, practical issues arise. Since the legislative branch of government has provided no guidance on these difficult issues, the courts will undoubtedly be forced to confront them.

VIII. WHAT COMES NEXT?

The conclusions sought to be drawn from the analysis above have already been set out,¹⁹¹ and will not be repeated. However, it is interesting to speculate about the questions that will need to be answered in the future. In my view, the next move belongs to prosecutors. Will the Crown choose to aggressively pursue potentially criminal wrongdoing occurring in partnerships? Or, on the other hand, will prosecutors wait for a test case that might not offer so many practical difficulties as the hypothetical facts used herein, before invoking Bill C-45 against the partnership form? When a test case does arise, will prosecutors attempt to analogize the partnership to its corporate cousin? If so, how successful will this analogy be? Will prosecutors find a legal theory that allows the courts to resolve the practical problems of criminal liability for partnerships on an intellectually defensible basis? If so, what will that basis be? If not, how will the courts interpret Bill C-45 when applying its provisions to partnerships?

While the questions are numerous, the answers may have to wait for judges and lawyers to wade into the fray. The goal of this paper was to identify the issues that might need to be answered, and point out some of the roadblocks between Bill C-45 and its intention to create the possibility of holding a partnership liable for an offence requiring proof of *mens rea*. Unfortunately, only the development of case law in this area will tell us for certain whether or not these roadblocks can be overcome.

¹⁹¹ See Part IV, above.