

THE CRIMINAL LIABILITY OF ORGANIZATIONS FOR ECONOMIC CRIMES*

Pierre-Christian Collins Hoffman¹ and Guy Pinsonnault²

McMillan LLP, Montreal and Ottawa

*When Bill C-45 came into force in 2004, it introduced major modifications to the Canadian penal law system concerning the participatory liability of organizations for the commission of criminal offences. The main purpose of the Criminal Code amendments was to facilitate the conviction of organizations further to the commission of offences by its representatives, to induce them to do more to protect their employees and the public. Meanwhile, recent case law developments, more specifically the cases of *R. v. Pétroles Global Inc.* and *Canada v. Maxzone Auto Parts (Canada) Corp.*, demonstrate that, going forward, organizations will face a greater risk of criminal prosecution and conviction for the acts and omissions of their representatives, especially for subjective mens rea offences under the Competition Act and the Criminal Code. Although the changes made to the Criminal Code are now nearly 10 years old, it was only recently that the courts were called upon to analyze the effect and scope of the changes. In light of recent case law, this article discusses the impacts of the 2004 amendments in terms of subjective mens rea offences. In addition, this article analyzes and comments on the scope of the Bill C-45 amendments as they relate to economic offences and the participatory liability of organizations, the determination of the sentence, and the imposition of probation conditions suitable to organizations.*

*L'entrée en vigueur du projet de loi C-45 en 2004 a modifié de manière considérable le droit pénal canadien en matière de responsabilité participative des organisations pour la commission d'infractions criminelles. Les amendements apportés au Code criminel avaient pour objet principal de faciliter la condamnation des organisations suivant la perpétration d'infractions par ses représentants, afin d'inciter celles-ci à prendre davantage de mesures pour protéger leurs employés et le public. D'ailleurs, la jurisprudence récente, plus particulièrement les affaires *R. c. Pétroles Global inc.* et *Canada c. Maxzone Auto Parts (Canada) Corp.*, démontre que les organisations font désormais face à des risques accrus d'être poursuivies et condamnées au criminel pour les gestes et omissions de leurs représentants, particulièrement pour la commission d'infractions de mens rea subjective prévues à la Loi sur la concurrence*

et au Code criminel. Bien que les changements apportés au Code criminel datent aujourd'hui de près de 10 ans, ce n'est que récemment que les tribunaux ont été amenés à analyser l'effet et la portée des changements apportés. Au regard de la jurisprudence récente, cet article discute des impacts qu'ont eu les amendements de 2004 en matière d'infractions de mens rea subjective. En outre, cet article analyse et commente la portée des amendements du projet de loi C-45 en matière d'infractions d'ordre économique en ce qui a trait à la responsabilité participative des organisations, à la détermination de la peine et à l'imposition de conditions de probation propres aux organisations.

I. Introduction

On March 31, 2004, Bill C-45 entitled *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*³ came into force in Canada. The primary purpose of the amendments to the *Criminal Code*⁴ was to facilitate the conviction of organizations for offences committed by their representatives with a view to prompting organizations to take additional measures for the protection of their employees and the public. The Bill has its primary origin in the Westray mine disaster that occurred in Nova Scotia in 1992, where a collapse caused by mismanagement and workplace safety deficiencies resulted in the deaths of 26 workers who were inside the mine at the time of the disaster. Following a failed prosecution and a series of trials spread over seven years, the Crown abandoned all of its counts filed against the mining company Curragh Inc. and its four managers.

In parallel to the criminal proceedings, the Nova Scotia government also ordered a public inquiry into the accident and appointed Justice K. Peter Richard to conduct the official investigation. In his capacity as commissioner, Justice Richard received strong requests from the United Steelworkers of America to issue a recommendation regarding a reform of the employers' criminal liability regime with respect to workplace safety. While he recognized that it went beyond the scope of his mandate, Justice Richard made the following recommendation to the federal government:

The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate

executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.⁵

In response to the failed legal proceedings, public discontent and vigorous union lobbying, several bills were filed proposing amendments to the *Criminal Code* in order to facilitate the conviction of executives and their organizations for neglecting to implement proper workplace safety measures, only to die on the Order Paper. On June 12, 2003, these efforts were finally rewarded with the filing of Bill C-45.

The scope of the reform proposed by Justice Richard was expanded to embrace not only provisions regarding corporate liability for criminal negligence with respect to workplace safety,⁶ but also offences committed by “senior officers” that require prosecution to prove fault other than negligence beyond a reasonable doubt (s. 22.2 CrC). Thus, Bill C-45 also aimed to facilitate the conviction and sentencing of organizations for certain criminal offences committed in violation of the *Competition Act*,⁷ for financial fraud and for any other subjective *mens rea* offence committed by a “senior officer” with a view to benefit the organization. In addition to codifying the criminal liability of organizations for the offences of their representatives, the legislature replaced the concept of “directing mind” developed by the case law with the more extensive notion of “senior officer.” Bill C-45 also introduced provisions with respect to sentencing and established probation conditions specifically designed for organizations.

Although Bill C-45 has been enacted over a decade ago, its provisions regarding the criminal liability of organizations (ss. 22.1 and 22.2 CrC) have seldom been applied. The first ruling on the merits regarding the criminal liability of an organization for a subjective *mens rea* offence was handed down on August 9, 2013 by the Honourable François Tôth of the Superior Court of Québec in the matter of *R. v. Pétroles Global inc.*⁸ The Court determined that Pétroles Global inc. was criminally liable for the participation of its senior officers in a gasoline cartel. Justice Tôth’s ruling is currently being challenged before the Québec Court of Appeal.⁹

In light of recent judicial developments in Canadian criminal law, this paper presents an overall picture of the criminal liability of organizations for the commission of subjective *mens rea* offences. Furthermore, the authors analyze the scope of the Bill C-45 amendments in the context of economic crimes with respect to sentencing and the imposition of probation conditions designed for organizations.

II. Bill C-45 (Criminal Liability of Organizations)

(a) The Identification Theory

By triggering the liability of organizations for criminal offences committed by their “senior officers,” Bill C-45 establishes a regime bordering on vicarious liability. As explained by the Supreme Court of Canada, such a liability regime pursues a two-fold objective in respect of civil liability – deterrence and adequate indemnification:

Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future.¹⁰

While a vicarious liability regime may achieve the criminal law purpose of deterrence, courts have been reluctant to adopt such a model in criminal law because of its lack of a compensatory purpose.¹¹ Historically, courts have generally rejected the idea of corporate criminal liability. In the landmark decision *Canadian Dredge & Dock Co. v. The Queen*,¹² the Supreme Court of Canada held that no theory could rationally justify legal persons to be found guilty of the *mens rea* required to establish a criminal act:

There can be no complete rationalization of corporate criminal liability in the criminal law whether the attempt be made under the banner of vicarious liability or the identification theory or otherwise. The corporation does not have, in the human sense of the term, a mind capable of reaching the state identified in criminal law as *mens rea*. The criminal law does not recognize in *mens*

rea offences criminal liability in the proprietor employer for the unlawful actions of the proprietor's employees save in the case of authorization, express or implied.¹³

Legal scholars have argued that the criminal punishment of corporations unfairly impacts all individuals within an organization, including third parties whose guilt has not been proven. United States Professor Albert W. Alschuler wrote:

Of course criminal punishment cannot really be borne by a fictional entity. As Baron Thurlow, a Lord Chancellor of England, put it sometime before 1792, a corporation has "no soul to damn, no body to kick." This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too. The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.¹⁴ (citations omitted)

Throughout the past century, Canadian courts have adopted and developed the "identification theory" in order to establish corporate criminal liability through a sufficiently rational connection between the organization and the offence committed by a natural person. Such theory attempts to connect the liability of the "directing mind" to that of the corporation, rather than establishing a vicarious liability regime.¹⁵

Canadian courts have historically applied an old common law doctrine which granted legal persons a near-total immunity from prosecution for criminal offences that required evidence of intent.¹⁶ In 1915, the House of Lords took an initial step, holding that the criminal liability of a corporation could be incurred through the acts committed by its "directing mind," the person at the highest level of a corporation, since the acts committed by such *alter ego* could be held to have been perpetrated by the company itself.¹⁷

More than half a century later, the Ontario Court of Appeal confirmed this "identification theory," according to which the "vital organ" could engage the liability of a corporation. The Court proceeded to expand the net of liability by adding that there may be more than one directing mind within the same legal person.¹⁸ However, the theory remained

limited to the extent that corporation could only be held liable if its directing mind had committed a criminal act within the scope of his employment.

In 1985, in *Canadian Dredge & Dock Co.*,¹⁹ the Supreme Court of Canada refused to apply the vicarious liability *simpliciter* model advocated by the Supreme Court of the United States in *New York Central R. Co. v. United States*.²⁰ The vicarious liability *simpliciter* model engages the doctrine of *respondeat superior* (“let the master answer”), according to which any person who is part of the corporation, regardless of his position within the organization, may engage liability on the part of the organization if he committed a crime with a view to benefit the organization. The Court instead opted for the identification theory specifying, however, that it could not be applied where the directing mind acted for his own benefit, to the detriment of the company’s interests:

The identification theory, however, loses its basis in rationality when it is applied to condemn a corporation under the criminal law for the conduct of its manager when that manager is acting not in any real sense as its directing mind but rather as its arch enemy. [...] In my view, the very pragmatic origins of the identification rule militate against its extension to the situation which would have existed here had one or more of the directing minds acted entirely for his own benefit and directed his principal efforts to defrauding the company. Where the corporation benefited or was intended to be benefited from the fraudulent and criminal activities of the directing mind, the rationale of the identification rule holds. Where the delegate of the corporation has turned against his principal, the rationale fades away.²¹

The Supreme Court of Canada also rejected certain grounds of defence which could restrict the rule of identification:

Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition.²² (emphasis added)

In 1993, the Supreme Court in *Rhône (The) v. Peter A.B. Widener (The)*²³ narrowed the identification theory as it was described several years before, distinguishing between a true delegation of executive authority, namely the power to establish policies within the organization, as opposed to the mere application of such policies by low-level managers who could not engage the organization's criminal liability.

In *R. v. Forges du Lac inc.*,²⁴ Québec Court of Appeal Justice Chamberland ruled that a criminal offence which benefited both the directing mind and the corporation was not a bar to the doctrine of identification and could give rise to corporate criminal liability.

Finally, in *Miscou motel ltée*,²⁵ the last decision handed down before the 2004 amendments, the Québec Court of Appeal ruled that the directing mind could delegate authority to low-level managers possessing certain decision-making autonomy, which “[TRANSLATION] characterizes the identification theory and the fact that more than one directing mind may exist, even in corporations with a very limited number of shareholders.”²⁶

In the 2012 preliminary inquiry decision *R. v. Pétroles Global*,²⁷ Court of Québec Justice Chapdelaine provided a good summary of the principles that were applicable before the coming into force of Bill C-45 in respect of the criminal liability of corporations:

1. [translation] The application of the identification theory has the effect of attributing to the legal person the mens rea and actus reus of its directing mind and thus engage the liability of the legal person.
2. Several directing minds may exist within the same legal person and each of these directing minds may be associated with a certain kind of activities or a certain territory.
3. In order to assess whether an employee is a directing mind, we do not consider the employee's title, but rather the functions that such person performs and the duties that he exercises in the area of activities that has been assigned to him or her.

4. The concept of directing mind is no longer limited to executive officers and the board of directors of a legal person.
5. The directing mind is a person who is capable of exercising decision-making authority with respect to the general policies of the legal person, rather than the one who merely applies such policies on an operational basis.
6. The following do not prevent the application of the identification theory:
 - (a) The fact that no express instructions to commit the criminal offence were given to the employee;
 - (b) The fact that there was no express delegation of authority to the employee who committed the offence;
 - (c) The fact that the board of directors or officers of the company were not aware of the activities in question;
 - (d) The fact that express or implied instructions prohibiting the unlawful acts specifically, or unlawful conduct generally, were given;
 - (e) The fact that the directing mind acted, in part, fraudulently towards the company which was his employer;
 - (f) The fact that the directing mind acted, in part, for his own benefit.
7. The fact that the directing mind acted entirely for his own benefit and directed his principal efforts to defrauding his employer-company constitutes a defense and prevents the application of the identification theory.²⁸

In light of the foregoing, one may wonder if the common law principles developed prior to the 2004 amendments became void following a complete reform that replaced the old regime, or if some principles are still applicable. In other words, the true scope of the reform as

intended by the legislature should be determined. This is in part what the Québec Superior Court had to determine in *Global*.

(b) Definitions

(i) Organization

The term “organization,” added to the *Criminal Code* by the passing of Bill C-45, encompasses not only legal persons, such as corporations, but also any “public body, body corporate, society, company, firm, partnership, trade union or municipality.”²⁹ It also includes associations without legal personality that meet the three criteria provided in the second part of the definition of “organization” in the *Criminal Code*: such associations should be (i) created for a common purpose, (ii) have an operational structure, and (iii) hold themselves out to the public as associations. Since the definition is silent with respect to the purpose sought by the organization, it must be read as including both profit and non-profit organizations. During the introduction of Bill C-45, the Parliamentary Secretary to the Minister of Justice explained the reasoning behind this broad definition:

There has been a great deal of creativity shown by corporate lawyers in developing new structures, for example, limited liability partnerships and joint ventures. Quite simply we want to ensure the *Criminal Code* applies to every organization of persons without any artificial distinctions based on how those persons chose to structure their legal relations.³⁰ (emphasis added)

While case law prior to 2004 referred mostly to legal persons, bodies corporate or corporations, the *Criminal Code* extends criminal liability to persons who do not possess separate legal personality. Thus, the term “organization” should be preferred to “corporation” when generally referring to ss. 22.1 and 22.2 CrC.

The definition of “organization” is broad enough to include associations without legal personality such as Québec general partnerships, whose partners may be held personally liable for the partnership’s obligations.³¹ In addition, the definition provides that “firms” are organizations, which could include unincorporated sole proprietorships.³² In *R. v. AFC Soccer*,³³ the Court of Appeal of Manitoba held that a sole

proprietorship with a provincially-registered business name did not meet the definition of “person” under s. 2 CrC (as it was in effect prior to the 2004 amendments). The definition of “person” now includes “organizations” and, by extension, “firms.” Therefore, the definition of “organization” could be broad enough to cover sole proprietorships, regardless of provincial registration.

(ii) Representative

A representative is defined in the *Criminal Code* as “a director, partner, employee, member, agent or contractor.”³⁴ Thus, even if an organization retains the services of a contractor or an agent, it risks criminal liability in the event that such contractor or agent acts as a “senior officer” of the organization at the time of the offence. Therefore, it is important for organizations to clearly define in writing the scope of mandate entrusted to the service provider in order to limit the risk of criminal prosecution. During the introduction of Bill C-45, the Parliamentary Secretary to the Minister of Justice pointed out that the criminal liability of an organization might not be established if the service provider committed an offence beyond the scope of his mandate:

Representative is defined broadly so that it includes not just officers and employees, but also agents and contractors. As long as they are acting within the scope of the authority given them by the organization, their actions should be the actions of the corporation.³⁵ (emphasis added)

Neither lack of a clear business title nor uncertainty regarding the exact status of a person within an organization should constitute obstacles for one to qualify as a representative. Insofar as the tasks and duties of a person demonstrate that one indeed acted as a representative of the organization, such person satisfies the definition.

(iii) Senior Officer

The concept of “senior officer” virtually replaces the notion of directing mind developed by the case law prior to the 2004 amendments. The *Criminal Code* defines the term as follows:

2. [...] “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. (emphasis added)

Since section 2 of the *Criminal Code* sets out a triple definition of “senior officer,” each definition deserves separate commentary.

a. Representative Who Plays an Important Role in the Establishment of the Organization’s Policies

In a manner similar to what the Supreme Court of Canada had held in *Rhône*, the *Criminal Code* provides that a person who plays an important role in the establishment of an organization’s policies may expose the organization to criminal liability. Thus, the conviction of a directing mind of an organization, as defined by case law prior to the 2004 amendments, may still lead to a conviction of the organization. In *Rhône*, Justice Iacobucci wrote:

The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.³⁶ (emphasis added)

However, the definition in the *Criminal Code* is broader than the concept of “directing mind” as set out by the Supreme Court of Canada: instead of the “capacity to exercise decision-making authority” in formulating policies, the *Criminal Code* provides that it suffices for a representative to play an “important role” in establishing policies for this representative to be deemed a “directing mind,” as stated by the Parliamentary Secretary to the Minister of Justice:

Through the definition of senior officer, we propose to broaden who can be the directing mind by including, in addition to those who would already be so considered, a person who has an important role in establishing policy rather than having to have the ultimate power to make policy [...].³⁷ (emphasis added)

Hence, a representative who advises the directing mind on formulating policies, even if he/she does not have the final say on their adoption, may also engage the organization's criminal liability. However, one should not immediately assume that a representative is a senior officer just because he/she makes suggestions to senior management with respect to policies. To meet the definition of "senior officer," one must, in the ordinary course of his duties and responsibilities within the organization, be required to advise the persons who make decisions with respect to the organization's policies, and must exercise an actual influence on the decision-makers, thus playing an "important role" in establishing policies.

While the new definition is broader, the majority of the principles developed by the Supreme Court apply *mutatis mutandis* to the first part of the definition of "senior officer" as set out in the *Criminal Code*. Therefore, the following rules still apply: there may be more than one "directing mind" in different territories or sectors of an organization; the "directing mind" is not only limited to senior management and members of the board of directors; and the authority to establish policies may be delegated.

In short, if the legislature codified the doctrine of identification in 2004, it was extended to include not only representatives with decision-making power with respect to policy choices, but also those who are materially involved in their establishment. However, this broad concept of directing mind is not the only innovation brought by the 2004 amendments which enables the Crown to establish criminal liability of an organization more easily: the second part of the definition requires no overlap of the senior management's intent with that of the organization.

b. Representative Responsible for Managing an Important Aspect of the Organization's Activities

This second definition outlined in the *Criminal Code* is the one that best demonstrates the legislature's intent to broaden criminal liability of organizations. Insofar as a representative has the responsibility for managing an aspect of activities of certain significance within the organization, even if his duties are limited to the implementation of policies adopted by the board of directors, the acts or omissions of

such representative may give rise to the liability of the organization. This definition of the term “senior officer” is the most problematic, as it departs from the rational connection that the courts have attempted to establish through the rule of identification. Connecting the liability of organizations with the offences perpetrated by their representatives responsible for “managing an important aspect of the organization’s activities” is more akin to a vicarious liability model, as there is little to no rational connection between the mental state of a manager who is not involved in the establishment of policies with that of the organization. Attribution of criminal liability based on the management of an important aspect of an organization’s activities does not require any overlap of intent in the textual meaning of s. 2 CrC. The choice of the term “senior officer” may thus seem contradictory for the purpose of the definition, considering that it appears to include mid-level managers.

The term chosen by the legislature raises the following question: did the legislature intend to limit the scope of application of the definition by using the expression “senior officer” instead of just “officer”? In other words, does the term “senior” add anything to the definition? In its ordinary meaning or legal meaning, such as in labour law, it refers to senior management employees who participate in the strategic planning and adoption of corporate policies; whereas the definition of s. 2 CrC expressly includes managers who are not part of the top management level of organizations. The ambiguity is aggravated by the fact that the definition is even more restrictive in other areas of law than the notion of “directing mind” of the identification theory. The Québec Court of Appeal evidenced this fact in a decision rendered in 2001, where it ruled that the expression “senior officer” within the meaning of *An Act Respecting Labour Standards*³⁸ is limited to senior management:

[TRANSLATION] In my opinion, a senior officer is a person who participates in formulating management policies and strategic planning of the company. A senior officer is a person who is vested with broad decision-making authority, and not just coordinates the company’s activities or applies management policies established by the senior management.³⁹ (emphasis added)

Given the presumption that the legislature does not speak in vain, it is tempting to reason that this term was added to capture persons who manage an “important” aspect of an organization’s activities yet occupy

such a low rank within the organization that it would be illogical and unfair to conclude to its criminal liability. In such cases, courts may be tempted to refuse attributing senior officer status to a representative where his position on the corporate ladder is not “senior” enough to meet the definition. In their paper entitled “*The Changed Face of Corporate Criminal Liability*,” authors Archibald, Jull and Roach highlighted that the courts may choose to analyze the definition of senior officer in a restrictive manner in order to avoid irrational and unfair consequences for organizations:

Consistent with the principles of strict and purposive construction of the criminal law, courts may give the new concept a narrower reading in cases in which it is not fair and does not make sense to attribute the fault of an employee, low-level manager, agent or contractor back to the corporation.⁴⁰ (emphasis added)

This is in part what defence counsel argued in *Global*, contending, among other things, that to reconcile the definition with the term “senior,” the representative should not only be responsible for managing an important aspect of the organization’s activities, but should also exercise an important management of such aspect, which must be evidenced by extensive decision-making autonomy. The Superior Court rejected this interpretation, holding that the definition is self-sufficient.⁴¹

Another issue with the definition of “senior officer” lies within the meaning of “managing an important aspect of the organization’s activities.” The question whether a senior officer manages an important aspect is an issue of fact that should be determined on a case-by-case basis.⁴² Although the representative’s title in the organization may constitute a useful indicator, it is not conclusive. Courts must take into consideration the unique structure of each organization to determine its probative value.⁴³

The word “managing” carries some degree of uncertainty. One interpretation could be that it is not necessary that the representative be responsible for the main or significant management of “an important aspect of the organization’s activities.” For example, a national sales director and a retail department head would both be managers of important aspects of the organizations’ activities (sales), but at

different levels. They would both be senior officers of the organization and could both give rise to its criminal liability, despite the limited decision-making autonomy of the retail department head as compared to the sales director.

Considering again that the legislature does not speak in vain, the word “important” must have meaning. In other words, it is not the management of *any* aspect of an organization’s activities that may lead to the qualification of “senior officer.” Where the aspect managed is not “important,” the representative may not trigger the criminal liability of the organization by perpetrating a subjective *mens rea* offence pursuant to s. 22.2 CrC. However, to a certain extent, all aspects are important for rational organizations, as it can be presumed that they will not carry on useless or detrimental activities. However, should a representative be able to engage an organization’s criminal liability where the aspect managed is unprofitable? One may wonder if it was the legislature’s intention to allow, by using the word “important,” a defence to liability where the activity in question generated insignificant benefit. For example, a company could argue that the management of charitable activities is not an important aspect of the organization’s activities, since ending such charitable activities would not affect the organization’s financial viability. This would seem incongruous. In any case, courts should not require that the aspect managed be essential to the economic viability of the organization. Further, while the economic viability of an aspect managed may constitute a relevant factor in determining its importance, it should not be the sole criterion. Returning to the example of charitable activities within a for-profit organization, it could be argued that such an aspect is important to the organization despite the lack of tangible economic benefits, as it promotes and enhances its reputation. For NPOs, the importance of the activity should be assessed according to its connection with the objective pursued by the organization.

Given the ambiguous nature of the term “managing an important aspect of the organization’s activities,” it could be argued that it is vague to the point of being inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*.⁴⁴ In *R. v. Nova Scotia Pharmaceutical Society*,⁴⁵ the Supreme Court held that certain laws can be unconstitutional if they do not “sufficiently delineate an area of risk to allow for substantive notice to citizens.”⁴⁶

The Supreme Court held in *Irwin Toy Ltd. v. Quebec (Attorney General)*⁴⁷ that corporations cannot invoke for themselves the protection of s. 7 of the *Charter*.⁴⁸ However, the definition of “organization” is broad enough to include associations and businesses without legal personalities, such as Québec general partnerships, which may hire employees or retain the services of a contractor. The personal liability of the partners or owners may be engaged with respect to the payment of a fine for the perpetration of criminal offences by such employees or service contractors that qualify as representatives or senior officers.

Yet, the argument of vagueness requires that the impugned law violates one of the guarantees of s. 7. In *Entreprises M.G. de Guy ltée v. Québec (Procureur général)*,⁴⁹ Fish J., then sitting at the Québec Court of Appeal, wrote:

In order for appellants to succeed, they would have to establish, insofar as their vagueness claim depends on s. 7 of the Charter, not only that the legislation under which they are charged affects the liberty or security of defendants, but also that it is impermissibly vague and therefore violates a principle of fundamental justice.

Once convicted, the only penalty that may be imposed upon an organization is a fine.⁵⁰ It is doubtful that the imposition of a fine on an individual and the stigma attached to a conviction under ss. 22.1 or 22.2 CrC affect the rights to “life, liberty and security of the person, and the right not to be deprived thereof except by due process of law.” The liberty interest protected under s. 7 is most often affected where there is the possibility of imprisonment; yet the imposition of a fine is a financial punishment. Although the Supreme Court of Canada has never directly ruled on whether economic rights are protected by the *Charter*,⁵¹ lower courts have generally concluded that such rights are not subject to protection. The imposition of a fine also does not appear to affect the security interest. In *R. v. Transport Robert (1973) Ltée; R. v. 1260448 Ontario Inc.*,⁵² the Court of Appeal for Ontario held that the possibility of a heavy fine for an offence of absolute liability does not violate the guarantee of security under s. 7 by imposing serious psychological stress on the individual convicted.

In addition, s. 734.7 CrC does not seem to apply in cases of default of payment. Section 734 excludes organizations from its application and

s. 735, which is specific to organizations, does not expressly refer to s. 734.7. The latter provides the possibility for a court to issue a warrant of committal against an offender who fails to pay a fine where he “has, without reasonable excuse, refused to pay the fine.”⁵³ However, even if the issuance of a warrant of committal were possible for partners or unincorporated sole proprietors, since the court must consider the offender’s ability to pay, the threat of imprisonment would probably be too speculative and hypothetical to successfully argue a violation of the s. 7 liberty interest.⁵⁴

Furthermore, one who claims that a standard is impermissibly vague faces a high threshold: it is “an exacting standard, going beyond semantics.”⁵⁵ A provision is only vague where “it fails to give sufficient indications that could fuel a legal debate,”⁵⁶ where it “provide[s] neither fair notice to the citizen nor a limitation of enforcement discretion.”⁵⁷ The Supreme Court of Canada outlined the following factors when determining the vagueness of a legal provision, which demonstrate the difficulty in raising this argument:

Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist [...].⁵⁸ (citations omitted)

In *Ontario v. Canadian Pacific Ltée*,⁵⁹ the Supreme Court added that “a court must first develop the full interpretive context surrounding an impugned provision”⁶⁰ by considering the “(i) prior judicial interpretations; (ii) the legislative purpose; (iii) the subject matter and nature of the impugned provision; (iv) societal values; and (v) related legislative provisions.”⁶¹ A court may therefore be able, after evaluating these interpretation factors, to determine a sufficiently accurate criterion to provide for an intelligible character to the provision. Considering the foregoing, it would be difficult to contend that the definition of “senior officer” is impermissibly vague with respect to the notion of an “important aspect of the organization’s activities.” Moreover, even if a court were to conclude that the definition suffers from vagueness, it may be still justified under s. 1 of the *Charter*.⁶²

The legislative history surrounding Bill C-45 clearly reveals that, despite the use of the word “senior,” the definition should be interpreted to include middle managers:

While the courts would still have to decide in each case whether a particular person is a senior officer, I believe the proposal clearly indicates our intention that the guilty mind of a middle manager should be considered the guilty mind of the corporation itself. For example, the manager of a sector of a business such as sales, security or marketing, and the manager of a unit of the enterprise like a region, a store or a plant, could be considered senior officers by the courts.⁶³ (emphasis added)

However, there is no indication that the legislature intended, by the adoption of Bill C-45, to extend the criminal liability of organizations to the point where they can be convicted for acts and omissions of managers of all levels, including those performing management functions of very low importance. In addition, as rightfully pointed out by authors Archibald, Jull and Roach, such an approach would be dangerously akin to pure vicarious liability,⁶⁴ which was explicitly rejected by the Government.⁶⁵

If courts were to require that the representative must also exercise important management duties, in addition to managing an important aspect, the definition could potentially be precise enough to distinguish between low-level officers and “senior officers,” as was intended by the enactment of s. 2 CrC. The management of an “important aspect of the organization’s activities” should imply a certain level of decision-making autonomy at the operational level. In *Global*, the Court considered the “important operational powers” of Global’s General Manager to conclude that he met the definition of “senior officer,” while rejecting the defence’s argument to the effect that a senior officer must be a “senior executive empowered with significant decision-making autonomy.”⁶⁶ Thus, without needing to be a senior executive, a manager should have at least important management functions in an important aspect of activities. Such a standard could help distinguish between mid-level managers, which meet the definition, from low-level managers.

In this vein, the aforementioned authors suggest an interesting approach based on assessing the risk that the representative is authorized to take when making business decisions.⁶⁷ The authors draw on the business judgment rule, as articulated by the Supreme Court of Canada in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*⁶⁸ and *Kerr v. Danier Leather Inc.*⁶⁹ In the latter, Justice Binnie mentioned that corporate directors “should be free to take reasonable risks without having to worry that their business choices will later be second-guessed by judges.”⁷⁰ The aforementioned authors propose that to qualify as a “senior officer,” according to the second definition of the term, “a manager must exercise some business judgment which involves business decisions that weigh risk.”⁷¹ This is a very interesting solution, but we are of the view that it is not always necessary to conduct an analysis of the reasonable risks that a manager is authorized to undertake in terms of business decisions. Such an analysis can often be relevant, but it might not always be correlative to the importance of the management exercised. Some managers may enjoy considerable powers of management, without having the authority to make business decisions involving reasonable risks for the organization. For example, some agents whose duties relate solely to internal management incur less risk to the organization than a manager interacting with suppliers and third parties; yet both could meet the definition.

c. Director, Chief Executive Officer and Chief Financial Officer of a Body Corporate

Finally, the *Criminal Code* provides that the director, chief executive officer and chief financial officer of a body corporate are senior officers. Since the legislature has not defined these three terms, the courts may refer to the definitions set out in business law legislation or case law. For example, where a corporation is incorporated under the *Canada Business Corporations Act*,⁷² a court may consider that the person acting as its “president” according to the definition of “officer” set out in the CBCA is also its “chief executive officer” within the meaning of the *Criminal Code*. One should note, however, that the title attributed to a representative within an organization may be misleading. Thus, a court seized of proceedings commenced pursuant to ss. 22.1 or 22.2 CrC should review the concrete tasks performed by the representative.

One can wonder if information contained in public registers (e.g. *registre des entreprises du Québec*, Corporations Canada) and in internal documents of the company (e.g. resolutions, by-laws, shareholder agreements) may be used by a criminal court to determine if a person acted as a director, chief executive officer or chief financial officer at the time of perpetration of the offence. Although such information may have probative value to determine if a person was a senior officer when he committed a crime, it is not conclusive. In certain cases, one or more *de facto* directors might actually have been responsible for managing the company at the time of the crime and the guilty director whose name appears in the register or on internal documents of the company might not have actually acted as a senior officer of the organization. Furthermore, while companies are legally required to update their information kept in public registers, there may be a delay between the update of the register and the actual resignation or termination of a director.

Finally, this third definition only applies to bodies corporate. Thus, the chief executive officer or chief financial officer of an association with no distinct legal personality (e.g. a Québec general partnership) would not fall under this definition. However, such officers can still play an important role in the establishment of policies or manage an important aspect of the organization's activities and thus meet the definition of "senior officer."

In short, a court should not assume that merely because a public register or a corporation's internal documents name someone as a director, CFO or CEO, he was empowered with the directing, finance management or executive management of the organization. The status of a person within an organization for the purposes of ss. 22.1 and 22.2 CrC should be determined based on the tasks, duties and responsibilities documented and actually performed by such person.

(iv) Recent Case Law on the Definition of "Senior Officer"

a. *R. v. Pétroles Global inc.* (2013)

In *Global*, the Superior Court of Québec, presided by Justice Tôth, had to determine whether Pétroles Global inc. (Global) could be held criminally liable for the involvement of its representatives in a cartel

to fix gasoline prices in the cities of Sherbrooke, Magog and Victoriaville. Two territorial managers who used to work for Global, as well as its General Manager for Québec and the Maritimes, pleaded guilty to charges of conspiracy, agreement or arrangement between competitors for the fixing of gasoline prices in breach of s. 45(1)(c) the *Competition Act*. The prosecution had to show that the territorial managers or the General Manager satisfied the definition of “senior officer” to establish the criminal liability of Global under s. 22.2 CrC.

Under the supervision of the General Manager, the territorial managers were required to manage, among other things, corporate locations (service stations operated by a tenant representative) of their respective territories, to fix the prices of gasoline, to ensure maintenance repairs and to interview, hire and terminate tenant representatives. They were also assigned the task of applying the “*economics*” designed by Global’s senior management, which consisted in spreadsheets that were aimed to maximize the profitability of the service stations. The General Manager’s responsibilities included supervising the territorial managers, ensuring that Global’s policies were carried out, coordinating vacations, acting as translator between senior management and territorial managers, ensuring the implementation of the *economics* and presenting the managers’ investment proposals to the Vice-President for approval.

In its defence, Global claimed that the term “senior” was used by the legislature in order to maintain the rational connection developed by the case law prior to the 2004 amendments. Thus in Global’s argument, to be qualified as a senior officer, a representative must be empowered with significant decision-making autonomy in managing an important aspect of the organization’s activities and possess the same intent as that of the organization. Since the territorial managers did not agree with the *economics* adopted by the senior management, and because they only carried out policies conceived by the organization, Global argued that they did not qualify as senior officers. From the defence’s point of view, the territorial managers did not exercise price management because the prices “automatically” reflected the price fixed by major market players in gasoline sales. A similar argument was made with regard to the General Manager, who only translated the information and passed on requests from the territorial managers to senior management, which made the decisions. The General Manager

was not empowered to authorize major investments with respect to service stations and could only approve repairs, gas pump changes and other minor expenditures necessary for the operation of the corporate locations.

The Crown contended that only the definition mattered, and that where the legislature has clearly defined a term, the latter may not be redefined according to its ordinary meaning or the meaning assigned to it by other areas of law, such as labour law. Thus, according to the prosecution, the legislature was free to borrow a term of its choice and to re-define it as it saw fit. Since it was expressly defined, there remained no ambiguity about the term “senior officer” that the accused might use to its advantage. Nor could the defence add to the law claiming that a manager must possess significant decision-making autonomy and be part of senior management. The prosecution argued that Parliament’s clear intent to widen the scope of corporate criminal liability dictated that the territorial managers and the General Manager should be qualified as senior officers within the meaning of s. 2 CrC.

The Court held that the evidence demonstrated that Global’s General Manager was a “senior officer” within the meaning of the *Criminal Code*, as he managed an important aspect of the company’s activities.⁷³ To come to this conclusion, the Court considered the following factors: that he supervised over 200 service stations in Québec, which corresponded to approximately two thirds of the stations operated by Global across Canada; was the third highest-paid employee of Global at that time; ensured implementation of the *economics* developed by the senior management; and approved expenditures exceeding \$1,000 before recommending them to senior management.⁷⁴ Justice Tôth also noted that the fact that certain expenditures required approval from the Vice-President did not reduce the scope of the General Manager’s responsibilities.⁷⁵ Considering that the General Manager met the definition of “senior officer,” the Court made no determination as to whether the territorial managers also satisfied the definition.⁷⁶

In his comments, Tôth J. explained that the legislature intended to extend criminal liability of organizations by removing the necessity of decision-making authority with respect to the establishment of policies.⁷⁷ According to the Court, the purpose of the amendments was not to solely extend the definition of “directing mind” to representatives

that are not members of the board of directors.⁷⁸ Justice Tôth ruled that while the *Criminal Code* maintains the identification doctrine as the basis for the establishment of the criminal liability of organizations, it went further by establishing a “new criminal liability regime for corporations.”⁷⁹ The Court dismissed the defence’s argument that the term “senior” implied that the officer must have had significant decision-making autonomy and be a senior executive of the organization to qualify as a “senior” officer; as such a definition would restore the notion of “directing mind” from which the legislature intended to distance itself.⁸⁰ Justice Tôth also refused to apply the definition of “senior officer” as used in labour law and cautioned against the use of case law developed pursuant to *An Act Respecting Labour Standards*, as its objective is different from that of the *Criminal Code*.⁸¹

Pending the Court of Appeal’s judgment, the following conclusions may be drawn from Justice Tôth’s ruling:

- The definition of the term “senior officer” is self-sufficient. It may not be interpreted based on statutes whose objectives are different from those of the *Criminal Code* or by reference to its ordinary meaning, for the legislature chose to define it expressly.
- The choice of the word “senior” does not add to the definition. An officer does not need to be vested with significant decision-making autonomy and be part of senior management.
- Bill C-45’s purpose was not solely to broaden the rule of identification as described by the Supreme Court in *Rhône*. The amendments made to the *Criminal Code* constitute a new criminal liability regime, the legislature having established provisions bordering on vicarious liability.

The scope of the term “important aspect of the organization’s activities” remains uncertain, especially since the Court made no determination on whether Global’s territorial managers, whose management powers were more limited as compared to those exercised by the General Manager, were “senior officers.” At any rate, the question of whether or not a representative is someone responsible for managing an important aspect of an organization’s activities is clearly an issue of fact that must be assessed in light of the specific circumstances of each

particular case, including the organizational structure and activities of the organization.⁸²

b. *R. v. Metron Construction Corporation* (2013)

On September 4, 2013, the Court of Appeal of Ontario⁸³ overturned a decision rendered by the Ontario Court of Justice,⁸⁴ which had convicted Metron Construction Corporation (“Metron”), imposing a fine of \$200,000. At trial, Metron pleaded guilty to criminal negligence by virtue of the actions taken by a construction site supervisor hired by a project manager on behalf of the defendant, who was himself an employee of Metron.

The site supervisor, Fayzullo Fazilov, was responsible for supervising the assembly and installation of a scaffold platform to perform repairs on a high-rise building, in addition to overseeing the work. Due to major safety issues, the platform collapsed causing the deaths of four out of six employees, including the site supervisor. The evidence revealed the presence of marijuana in the systems of three out of the four deceased, including the supervisor, and that the four employees who died in the accident were not wearing safety belts.

It was thus a factual situation of criminal negligence. Section 22.1 CrC introduced at the same time as s. 22.2, provides for the possibility to give rise to the criminal liability of an organization for the perpetration of an objective *mens rea* offence committed by its representative or senior officer. This section refers to the same definition of “senior officer” as that set out in the *Criminal Code* for subjective *mens rea* offences in s. 22.2. Section 22.1 reads as follows:

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

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the

conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

Since Metron pleaded guilty to accusations pursuant to s. 22.1 CrC for the failure of its supervisor “to prevent bodily harm to that person, or any other person, arising from that work or task,”⁸⁵ the Ontario Court of Justice did not make a determination on whether the site supervisor met the definition of “senior officer.” The Court thus only determined an appropriate sentence for Metron.

In *obiter*, the Court of Appeal ruled that the site supervisor was both a representative and senior officer of Metron, clearly stating that “Fazilov fell within the definitions of representative and senior officer.”⁸⁶ While this statement is not part of the *ratio decidendi* of the judgment, its implications are important. Since it comes from an appellate court, this *obiter* is persuasive and constitutes a strong indicator of the scope of the definition of “senior officer.”

Fazilov was likely the lowest level manager on Metron's corporate ladder, a “floor manager” who benefited from very limited authority within the organization, having no role or function in the establishment of policies and having been hired by a subcontractor to perform a temporary job. Even though Pepall J.A. was silent as to her motives, it obviously concluded that Fazilov met the second definition of “senior officer,” namely a representative managing an important aspect of the organization's activities at the time of the accident. When Fazilov's duties are considered, one can understand how the Court came to such a conclusion: he managed an important aspect of Metron's activities through his significant operational powers with respect to workplace safety measures. Ensuring that managers responsible for workplace safety can engage the criminal liability of organizations is precisely why the legislature initially wished to reform the criminal liability

of organizations, in response to the Crown's failure to prosecute the Westray tragedy.

The Ontario Court of Appeal's *obiter* seems to go even further than *Global*: even day-to-day managers occupying the lowest level of an organization's corporate ladder may qualify as "senior officers" within the meaning of section 2 of the *Criminal Code*.

(c) Subjective *Mens Rea* Offences (s. 22.2 CrC)

(i) Offences Covered

Section 22.2 CrC sets out the conditions required to establish the liability of an organization for the commission of a subjective *mens rea* offence by a senior officer, that is to say an offence for which the prosecution must establish the mental element of the offence beyond a reasonable doubt. Except for crimes of negligence, the majority of offences contemplated by the *Criminal Code* fall within this category, including crimes enacted under the *Competition Act*, such as conspiracy between competitors.⁸⁷ Only subjective *mens rea* offences committed after the effective date of the amendments — March 31, 2004 — may be prosecuted under s. 22.2 CrC. Since the amendments are not retroactive, the identification doctrine remains applicable for criminal acts committed prior to the effective date.⁸⁸

Similarly to the identification theory,⁸⁹ s. 22.2 CrC does not apply to strict and absolute liability offences. By its very nature, the identification doctrine only applies to crimes requiring proof of *mens rea*, as its purpose is to draw a link between the mental state of the directing mind and that of the corporation. On the other hand, strict and absolute liability offences are direct: they are established by the terms of statutory provisions and are not dependent on intent or the misconduct of others.⁹⁰

The Ontario Court of Justice ruled that the new provisions of the *Criminal Code* regarding the criminal liability of organizations may not be applied to subjective *mens rea* offences enacted under provincial acts and regulations where a province has adopted a statute replacing the summary conviction procedure for such offences set out in the *Criminal Code*.⁹¹ For example, the *Québec Code of Penal Procedure*⁹² and

the Ontario *Provincial Offences Act*⁹³ are acts that replaced summary conviction procedures provided for by the *Criminal Code* with respect to provincial offences.

Therefore, in provinces in which a statutory penal procedure has been adopted, where a provision contains the words “knowingly,” “intentionally” or “voluntarily,” which denote the presence of an offence that requires proof beyond a reasonable doubt of a mental element,⁹⁴ s. 22.2 CrC is not automatically applicable. Therefore, common law identification theory principles prevailing prior to 2004 still apply to subjective *mens rea* offences adopted by legislatures such as the provinces of Alberta, New Brunswick, Ontario, Québec and Newfoundland and Labrador.

(ii) Intent to Benefit the Organization

The organization is considered to have participated to the offence where its senior officer has acted “with the intent at least in part to benefit the organization.”⁹⁵ This rules out a significant number of criminal offences that may be committed by senior officers which, by their very nature, rarely benefit the organization — such as offences against the person and crimes committed against the organization. Offences that are most likely to give rise to the liability of organizations are those of an economic nature, such as criminal anti-competitive practices committed for the purpose of profiting the organization.

Clearly, where the sole victim of the offence is the organization itself, it would be incongruous to argue that the organization should be held liable. In *Canadian Dredge*, the Supreme Court of Canada held that if an offence was committed with the purpose of harming the organization (e.g. fraud committed against the organization), the organization could not be convicted, for “a person however dishonest cannot defraud himself.”⁹⁶

The criterion set out in s. 22.2 appears to be slightly different from that which the Supreme Court had retained prior to the 2004 amendments, when it suggested that to be held criminally liable the organization must have “benefited or was intended to be benefited from the fraudulent and criminal activities of the directing mind.”⁹⁷ Prior to 2004, a corporation could be held criminally liable if a criminal act committed

by the directing mind “(a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.”⁹⁸ (emphasis added) Corporate criminal liability could therefore be established through the directing mind’s intent or based on the consequences of the crime. Thus, if the offence benefitted the organization, it could be held liable, even if that was not the intent of its directing mind.

Instead of focusing on the result of the offence, the *Criminal Code* now focuses solely on the mental state of the senior officer, which must show his intent to benefit the organization by committing the criminal act. Such criterion might offer organizations an additional defence that did not exist prior to Bill C-45. Where an organization incidentally benefits from the effects of an offence, without any intent from its officer that such benefit occur, the criminal liability of the organization may not be established.

However, establishing a connection between the liability of an organization and the intent of its senior officer may yield absurd results. It appears that if a senior officer commits a criminal offence with the intent of benefiting the organization, it may be held liable even if such offence results in harming the organization; a senior officer who commits a particularly reprehensible crime that in any event would harm the organization’s reputation, may engage the organization’s liability, since his intent, even in part, was to generate profits for the organization. For instance, a reckless manager who would set fire to a competitor’s place of business with the intent of benefiting its employer, although it is obviously not in the policies nor in the interests of the organization to commit crimes to combat competition, likely would lead to the conviction of the organization if such manager can meet the definition of “senior officer.” In such a case, the manager would certainly have acted with the intent to generate economic benefits for his organization by the destruction of a competitor, but the negative consequences of his act (e.g. loss of reputation, lawsuits) may have had the effect of completely eliminating the financial benefit generated initially. Authors Archibald, Jull and Roach rightly highlight that s. 22.2 CrC establishes a model bordering on vicarious liability, since the crime committed by the organization arises from negligence with respect to the selection of its management personnel, whereas the crime perpetrated by its senior officer giving rise to the liability of

the organization under the *Criminal Code* is of subjective *mens rea*.⁹⁹ Section 22.2 appears to eliminate, to a certain extent, the rational connection between the corporation and its directing mind that courts have attempted to establish via the identification theory.

The coercive effect of the section resides in the fact that the organization must exercise due diligence and caution in supervising and selecting its personnel and in establishing policies and compliance programs in order to prevent its senior officers from committing an offence, allowing a representative to commit an offence or omitting to take preventive measures. During the second reading of the Bill, the Parliamentary Secretary to the Minister of Justice stated that reasoning behind the amendments in respect of corporate liability as follows “[a]n organization should not be able to avoid criminal liability by turning a blind eye to indications that its representatives are committing crimes.”¹⁰⁰

Thus, the purpose of Bill C-45 is, in part, to hold senior management accountable. An organization can no longer ignore criminal conduct on the part of its managers based on the argument they are the only persons that can be held liable for their actions and omissions due to the absence of an overlap of intent with that of the organization or a lack of authority to establish policies. However, diligent supervision and careful selection of senior officers with the implementation of strict compliance policies,¹⁰¹ although considered as mitigating factors in reducing the amount of a fine,¹⁰² cannot be invoked as a defence by the organization in an attempt to avoid criminal liability since these factors fall within a due diligence defence.¹⁰³ It should be noted that prior to the 2004 amendments, the Supreme Court of Canada ruled that an express prohibition from the board of directors did not constitute a valid defence.¹⁰⁴

(iii) Participation, Influence or Omission by Senior Officer

Under s. 22.2 CrC, subjective *mens rea* offences are established through participation, influence of representatives or omission by a senior officer:

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party

to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Therefore, to the extent that a senior officer has the intent of benefiting the organization, he/she may cause the organization to be convicted even though he/she is not the direct offender.

Paragraph (a) is straightforward and in line with previous case law. Senior officers who participate in an offence within the scope of their authority engage the criminal liability of their organizations. Paragraph (b) specifies that a senior officer may not delegate the commission of an offence to representatives of the organization to avoid exposing it to criminal liability, where such senior officer has the *mens rea* to commit the crime by influencing representatives in a way that makes them commit an act or omission constituting the material element of the offence.

By using the expression “within the scope of their authority” in paragraphs (a) and (b) of s. 22.2, the legislature chose to follow the analysis carried out by the Supreme Court in *Canadian Dredge*, where it rejected the restrictive approach according to which a criminal act had to be committed within the “scope of employment,” stating that “the expression comes from the law of tort and agency and from master and servant law. It is not apt in relation to the identification theory.”¹⁰⁵ Thus, the Supreme Court’s comments that a corporation may not be relieved of criminal liability by claiming that its employee was not following orders remain applicable:

It is no defense to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition.¹⁰⁶ (emphasis added)

The requirement that senior officers must have committed the act within the scope of their authority does not appear in paragraph (c), which states that the liability of an organization is established where a senior officer omits to take “all reasonable measures” to prevent an offence, which to his knowledge is being committed or is about to be committed by a representative. It should be noted that wilful blindness could suffice to implicate the organization’s *culpa in omittendo* where a senior officer fails to take necessary measures to prevent the commission of the offence, namely where “the accused is deliberately ignorant as a result of blinding himself to reality.”¹⁰⁷

In their analysis of Bill C-45, authors Archibald, Jull and Roach note that the third paragraph of s. 22.2 encompasses a subjective fault (the senior officer’s awareness of the offence being perpetrated) combined with a duty akin to due diligence for strict liability offences (the senior officer’s duty to take reasonable measures to prevent the commission of the offence).¹⁰⁸ The authors state that to determine the scope of the “reasonable measures” under given circumstances, a court might take into account factors traditionally used in case law with respect to strict liability offences, namely “industry standards, risk management techniques and other factors that have traditionally been relevant to the determination of the due diligence defence.”¹⁰⁹

However, it should be specified that where a senior officer is aware that “a representative of the organization is or is about to be a party to the offence” under s. 22.2(c), the mere existence of compliance policies established by the organization affords no defence. Such policies are established to prevent offences, whereas paragraph (c) rather refers to the concrete steps taken by a senior officer following the discovery of

an offence or when an offence is imminent. A senior officer will have taken “all reasonable measures” in an attempt to prevent or stop an offence where he has applied an efficient compliance policy diligently and in a timely manner.

(d) Sentencing

In addition to enacting a new criminal liability regime for organizations, Bill C-45 also comprised the addition of s. 718.21 CrC, which sets out ten aggravating and mitigating factors for sentences to be imposed on organizations. The only sentence that may be imposed on an organization is a fine,¹¹⁰ which may be accompanied by a probation order.¹¹¹ Section 718.21 CrC grants courts considerable discretion when ordering a fine; courts should convict organizations to pay sums that, without materially affecting their economic viability, are fair and sufficient to prevent recidivism and serve as an example for other organizations, thus creating a deterrent against such offences and an incentive for their prevention. It should be emphasized that s. 718.21 only adds to the general criteria that were already set out in the *Criminal Code*. Therefore, courts should also take into account all of the criteria provided under ss. 718 to 718.2 as well as those articulated in the case law, where such criteria are applicable to organizations. In any event, the fine imposed must satisfy the fundamental objective of sentencing, namely that it must be proportionate to the seriousness of the offence and degree of responsibility of the offender in accordance with s. 718.1 CrC, “whatever weight a judge may wish to accord to the objectives.”¹¹² Thus, if the amount of the fine determined through the application of the criteria set out in the *Criminal Code* is not proportional, it must be reduced or increased to become so.

(i) Sentencing Factors

a. Advantage Realized

Section 718.21(a) provides that courts must consider the “advantage realized” by the organization as a result of the offence committed by its senior officer. This criterion has increased significance in cases of economic crimes (e.g. conspiracy between competitors, bid-rigging, fraud, theft). One may wonder if by employing the terms “advantage realized by the organization,” the legislature only intended to encompass

monetary and measurable advantages initially resulting from an offence before the authorities reveal it. An organization could claim that although it did financially benefit from the crime perpetrated by its senior officer, the offence also damaged its reputation and entailed other fees (e.g. civil lawsuits) which might have significantly reduced or even eliminated the economic advantage initially realized as a result of the crime. The reputation of an organization may be even more affected if, in addition to the fine, the court issues a probation order with the condition that the organization must inform the public of the crime pursuant to s. 732.1(3.1) CrC.

The new liability regime introduced by the 2004 amendments may yield seemingly unfair results where a low-level manager considered as a “senior officer” had the intent of making the organization realize an advantage by committing an offence with a high risk of being discovered, but instead ends up harming the organization. There may be cases where a reckless senior officer commits a crime with the full or partial intent to make the organization realize a monetary advantage therefrom, but overlooks the real objective and probable consequences. Where these consequences are such that no actual advantage was realized by the organization (damaged reputation, decrease in share price, loss of clients, legal fees, etc.), even though a monetary gain might have been initially realized before it was revealed to the public and the authorities, it might appear unfair for a court to take into consideration the initial economic advantage realized as a result of the crime to increase the amount of the fine. A court that would grant too much weight to the first criterion would run the risk of imposing a fine that is inconsistent with the fundamental principle of proportionality of the sentence with the offender’s degree of liability.¹¹³

Therefore, in order to give a fair and rational interpretation to the first factor of s. 718.21, courts may be tempted to analyze all of the consequences for the organization, negative and positive, which have resulted from the offence committed by its senior officer, to determine if the organization did in fact realize an advantage. However, the discovery of a criminal offence committed by a senior officer will never benefit an organization in terms of public opinion. Organizations should thus not be able to simply assert damage to their reputations in order to mitigate or cancel the “advantage realized” criterion under paragraph (a) of s. 718.21. Consequently, where an organization argues

that it has in fact obtained no or little advantage from the perpetration of the offence, courts could request evidence that the negative effects related to public discovery of the crime are such that it realized no advantage or that the advantage realized initially was substantially reduced.

However, as far as competition law is concerned, “fines must take account of the low probability of detection, prosecution and conviction.”¹¹⁴ In *McNamara Construction et al. v The Queen*¹¹⁵ the Supreme Court of Canada ruled that the fact that a cartel did not work out as planned is immaterial. Although s. 718.21 uses the term “advantage realized,” the Federal Court has recently held that for price fixing, the objective of deterrence commands that a court must consider the “expected gain” of the cartel and not the gain that was actually obtained, together with “the level of the multiple required to render negative, in approximate terms and on average, that gain.”¹¹⁶ Thus, it appears that for criminal offences under the *Competition Act*, the first factor of s. 718.21 cannot be reduced by the damages suffered by the organization due to the disclosure of the crime to the public. In *R. v. Constructions GTRL (1990) inc.*,¹¹⁷ the Superior Court of Québec refused to take into consideration negative publicity suffered by an organization as a mitigating factor, ruling that it constituted “[TRANSLATION] the price to pay for the crimes committed clandestinely and against public interest.”¹¹⁸

However, even if a court were to consider that damages arising from the discovery of a crime cannot be considered for the purpose of the first criterion of s. 718.21 CrC, it could nonetheless take into account the economic impact produced by the loss of reputation pursuant to the fourth factor of the section, where an excessively high fine would have the effect of jeopardizing the economic viability of the organization and the continued employment of its employees.¹¹⁹

b. Complexity, Planning, Duration

Courts should consider the complexity and duration of the offence and the degree of planning involved.¹²⁰ This is essentially a codification of the case law, which recognized, at least for natural persons, that the degree of premeditation in designing and planning of the wrongful scheme should have an effect on the sentence.¹²¹ Sentences imposed

on organizations for isolated events should be less than for offences that have been planned extensively, such as complex cartels organized by several competitors for many years. In the words of the Department of Justice, “[c]areful planning shows a deliberate breaking of the law and should be punished more than a case where the senior officers took advantage of an unexpected opportunity to make a quick, illegal profit.”¹²²

c. Concealment and Conversion of Assets

An attempt by an organization to conceal or convert its assets to avoid payment of a restitution or fine is also an aggravating factor.¹²³ Courts have considered this criterion in the past for sentencing individuals.¹²⁴ The Ontario Court of Justice has further held that hiding assets justifies a restitution order.¹²⁵ With respect to civil law matters, the Superior Court of Québec has once considered the concealment of assets as an aggravating factor in the awarding of punitive damages.¹²⁶

d. Economic Viability and Continued Employment

The fourth factor that a court must consider is the organization’s economic health and continued employment of its employees.¹²⁷ The sustainability of the company convicted to pay a fine was deemed a relevant factor prior to the 2004 amendments.¹²⁸ This factor is justified by the fact that in a free and democratic society, crime deterrence should not be achieved by unduly punishing the innocent. Where a court sentences an organization to the payment of a fine, it runs the risk of indirectly punishing the employees, shareholders, creditors and clients who are innocent of the crime committed by the senior officer. Causing the bankruptcy of a business may also have adverse economic implications for a local community, which the court should consider.¹²⁹ With respect to competition law, where crimes may adversely affect the economy, it would be illogical to punish the economy a second time with a fine so heavy as to cause the organization that contributed to the Canadian economy to become bankrupt. The court should take into account the size of the organization when assessing the weight of this criterion in order to evaluate the economic impact of the fine.¹³⁰ In *R. v. Transpavé*,¹³¹ the Court of Québec took into consideration the survival of the organization in determining the fine to be imposed for an offence of negligence pursuant to s. 22.1 CrC:

[15] [TRANSLATION] The fine to be imposed by the court must not jeopardize the sustainability of the company and cause the hundred employees to lose their high-paying jobs.

[...]

[25] This fine, while onerous, ensures the survival of the company and continued employment of a hundred jobs. (emphasis added)

Thus, considering that a court may punish individuals that are innocent when it imposes a fine on an organization, it must account for the potential harm that it may cause by imposing a sentence that would substantially affect the economic viability of the organization and the continued employment of its employees. However, a fine that is reduced to a mere slap on the wrist or a licence fee to commit illegal activity does not achieve deterrence and denunciation for economic crimes.¹³² The court must therefore ensure that the fine punishes the organization financially,¹³³ without endangering its financial sustainability or continued employment of its employees. As the Court of Appeal of Alberta stated, “[t]he penalty must be more than a slap on the wrist but less than a fatal blow.”¹³⁴

Yet, where the evidence shows that the organization realized most of its profits from the criminal activity, a fine onerous to the point that it could cause the business to go bankrupt may be justified. In certain serious cases, the Ontario Court of Appeal has held that courts should not automatically rule out the prospect of bankruptcy.¹³⁵ In *Metron*,¹³⁶ the Court of Appeal increased the fine imposed by the Ontario Court of Justice from \$200,000 to \$750,000 for the criminal negligence of Metron’s senior officer, which resulted in the death of four employees. Justice Pepall held that the trial court committed a mistake of law by declaring itself bound by the necessity to avoid causing the bankruptcy of the organization.¹³⁷ In other words, while courts must consider the prospect of the organization’s bankruptcy and insolvency, it is not the decisive factor.¹³⁸

Even where there is no doubt that the organization would be incapable of paying the amount of the fine, courts can still impose it. In the matter of *R. v. Datacom Marketing Inc.*,¹³⁹ the Ontario Superior Court of Justice imposed a fine of \$15,000,000 on Datacom for the offence of

conducting a misleading telemarketing scheme in violation of s. 52.1(3) (a) of the *Competition Act*, despite the fact that the organization could not afford to pay a fine greater than \$250,000. In its ruling, the Superior Court held that imposing a fine on a corporation which clearly cannot be paid is justified by a double purpose: it constitutes a warning to other organizations of the consequences of committing a crime and increases awareness that the concealment of the organization's assets does not necessarily put an end to the law enforcement process.¹⁴⁰

e. Costs of Investigation and Prosecution

The fifth criterion of s. 718.21 provides that courts may adjust the fine depending on the amount of fees incurred by the government with respect to investigations and prosecutions initiated against the organization.¹⁴¹ In a judgment handed down in 2001, the Superior Court of Québec took into consideration the fact “[TRANSLATION] that the decision of the two accused to plead guilty saved considerable costs with respect to the continuation of the Competition Bureau's investigation and the trial which would have taken place thereafter.”¹⁴² This factor may therefore be mitigating where the organization chooses to cooperate with the authority in its investigation and pleads guilty to the charges filed by the Crown. The Federal Court has recently held that courts should give significant weight to this criterion where the organization has fully cooperated with the authorities.¹⁴³ However, where the organization has participated in the Competition Bureau's Leniency Program¹⁴⁴ by cooperating with the prosecution, this factor cannot be considered, as it is already integrated in the “starting point” of the sentencing agreed to by the parties — the program being “entirely premised on cooperation.”¹⁴⁵ Thus, “absent an extraordinarily high degree of cooperation,”¹⁴⁶ this factor may not be taken into account a second time if the organization participated in the Leniency Program.

It should be noted that this fifth criterion could also be an aggravating factor. To the extent that it allows a court to consider prosecution costs incurred by the Government to increase a fine because of an organization's challenging of criminal charges, it may seem odd in criminal law to blame a person who was presumed innocent to have fully defended itself. On the other hand, it may also seem fair that a guilty organization should be responsible for the prosecution costs incurred due to its own criminal conduct. Courts have imposed investigation

costs on organizations in the past. In 2006, the Federal Court issued a prohibition order against Sotheby's (Canada) Inc., which provided for, pursuant to s. 34 of the *Competition Act*, payment of the amount of approximately \$800,000 to assume investigation costs.¹⁴⁷

f. Imposition of Regulatory Penalties

Where the organization or its representatives were given regulatory penalties for the activity constituting part of the offence, the organization may benefit from a reduced sentence.¹⁴⁸ While the French version of s. 718.21(f) CrC only mentions the word “*pénalités*” (penalties), the English text uses the term “regulatory penalties.” However, the Department of Justice’s Explanatory Guide to Bill C-45 clearly states that paragraph (f) should be interpreted to include only regulatory penalties:

Any regulatory penalties, which are distinct from those under the *Criminal Code*, imposed on the organization for the offence - Courts consider whether individuals have been punished in other ways, for example, by losing their jobs. Similarly, a court would consider whether the public interest is served by adding a large fine to the penalties that may have already been imposed by a body such as a securities commission.¹⁴⁹ (emphasis added)

Consequently, an organization could not invoke the fact that one of its senior officers served a prison sentence for having committed an offence set out in the *Criminal Code* in order to obtain a reduction of the fine for the same offence, as it is not a regulatory penalty. In *Datacom*, the Ontario Superior Court of Justice held that the imposition of a prison sentence on an organization’s president did not bar the imposition of a heavy fine on the organization, which also fulfilled the objectives of denunciation and deterrence.¹⁵⁰

This factor enshrines the totality principle for organizations.¹⁵¹ However, it stands out from the general principle in that it also considers penalties imposed on third parties, namely representatives of the organization, as a mitigating factor to the sentence imposed. Consequently, the regulatory penalty imposed on the representative should have a direct connection with the actions that led to the commission of the offence.

For international conspiracies in the form of cartels pursued in violation of competition law, one may wonder if courts should consider fines imposed in other jurisdictions, just as regulatory penalties imposed on senior officers are taken into account. In the matter of *Canada v. Maxzone Auto Parts (Canada) Corp.*,¹⁵² the Federal Court refused to recognize a fine of US\$43,000,000 imposed on Maxzone Canada's parent company as a mitigating factor. US courts often impose substantial fines on organizations for the same illegal activity discovered in Canada, but the fine will be determined based only on the volume of commerce in the United States. By contrast, for individuals, sentences imposed in the United States (which are quite often prison sentences) should be taken into consideration.

g. Prior Conviction for a Similar Offence and Regulatory Penalties for Similar Conduct

Paragraph (g) provides an aggravating or mitigating factor relating to the existence or absence of prior convictions for a similar offence or the existence or absence of regulatory penalties imposed for conduct similar to the offence. Courts may consider past regulatory penalties and offences imposed on both the organization and its representatives. However, this paragraph does not specify whether the conduct similar to the offence may have occurred prior to the representative's employment with the organization. A court might potentially acknowledge as an aggravating factor the fact that the organization hired a representative while being well aware of his criminal past for offences similar to the charge at issue. For example, a court could consider the hiring of a senior officer who was previously convicted for conspiracy between competitors in its determination of an appropriate sentence to impose on the organization following a second conviction of the senior officer for the same or a similar offence. It is unlikely that this section has the effect of imposing on an organization the duty to verify the criminal records of all employees and job applicants, where such records do not relate to their duties within the organization. However, a cautious and diligent employer should always make inquiries about the criminal past of applicants, particularly for managerial and executive positions within the organization.

h. Imposition of Penalties on Representatives

Following the commission of an offence, an organization that imposes internal disciplinary penalties on the offenders may obtain a reduction of its fine.¹⁵³ The purpose of this mitigating factor is to prompt organizations to take steps to prevent recidivism by taking disciplinary measures (suspension, dismissal, demotion, legal action). Courts had already recognized remedial measures taken after the commission of the offence as a mitigating factor before 2004.¹⁵⁴

i. Restitution or Voluntary Indemnification

The *Criminal Code* provides that the court should also consider whether the organization was convicted to pay restitution to the victim or whether the organization voluntarily indemnified the victim.¹⁵⁵ This criterion encompasses two objectives: (1) it supplements paragraph (d) by ensuring that the organization is not sentenced to pay an amount that might affect its economic viability; and (2) it encourages organizations to indemnify the victim voluntarily, by saving the victim the trouble of bringing a civil action against the organization, which in terms of time and money, may be extremely costly and laborious for the victim.

j. Measures to Prevent Recidivism

An organization that has adopted measures to prevent recidivism after the commission of the offence may benefit from a reduction of sentence.¹⁵⁶ Similar to paragraph (h), this factor encourages the organization to take preventive measures. With respect to competition law, the courts have stated that a credible and effective compliance program constitutes a mitigating factor in the case of a contravention¹⁵⁷ and may affect the Commissioner of Competition's recommendation of the adequate sentence to the Crown Attorney.¹⁵⁸

To encourage organizations to adopt measures to prevent competition law violations by their representatives, the Competition Bureau provides guidelines to assist businesses in developing compliance programs.¹⁵⁹ In addition to reducing economic risks inherent to the discovery of offences by the authorities (e.g. loss of reputation, legal costs, fines, prohibition to participate in requests for proposals),¹⁶⁰ an

organization that has established a credible and effective compliance program which is actively promoted and implemented may see its fine reduced.

The Competition Bureau suggests five “essential components” of an effective compliance program the company should consider:

- First, senior management must truly support the program, thus setting an example for the rest of the organization. In addition to complying with the policies, it must take them seriously. The board should also be involved, namely in the appointment of a compliance officer and by monitoring senior management to prevent a situation where the latter could be involved in illegal activity.¹⁶¹
- Second, to be effectively applied, compliance policies must be easily understood by employees. To this end, the organization must summarize the highlights of the policy in a publication kept up-to-date that reflects major changes to the company, to the statutes or the Competition Bureau’s policies.¹⁶² The policy should provide specific examples of common situations that employees are likely to face and not just principles with respect to ethics.¹⁶³ The organization may also require that employees sign a certification letter stating that they have read and understood the compliance program.¹⁶⁴
- Third, the organization must provide adequate training to its employees in order for them to easily recognize illegal acts and increase awareness of their consequences.¹⁶⁵ A more rigorous training must be provided to employees who are more likely to deal with competition law issues. The Bureau recommends that the training be offered by experts (e.g. lawyers or compliance officers) and be evaluated from time to time.¹⁶⁶ It is crucial that the organization keep records of the date of training and the names of the participants to provide evidence of same in the event of proceedings.
- Fourth, it is essential that the company establish monitoring, auditing and reporting mechanisms in order to “prevent and detect misconduct, educate staff, provide both employees and managers with the knowledge that they are subject to oversight and determine the program’s overall efficacy.”¹⁶⁷

- Fifth, the organization must ensure that it has consistent disciplinary procedures in place with respect to dismissal, demotion, suspension and even legal action against employees who do not comply with compliance policies.¹⁶⁸ The company should obviously keep documental proof of disciplinary measures that were taken following a breach of its compliance program in order to be able to provide evidence of the due application of such disciplinary measures for sentencing¹⁶⁹ (it is a mitigating factor pursuant to s. 718.21(h) Cr.C).

While taking steps to prevent other offences from being committed is not the only factor to be considered in sentencing, the effective implementation of a program that meets the five criteria developed by the Competition Bureau should ultimately reduce the sentence, whether through the recommendation of the Crown or by the court.

(ii) *Canada v. Maxzone Auto Parts (Canada) Corp.* (2012)

In the recent matter of *Maxzone*,¹⁷⁰ the Federal Court conducted an exhaustive analysis of the principles applicable to imposing fines on organizations for cartel offences. In that matter, Maxzone Auto Parts (Canada) Corp. (Maxzone) cooperated with the investigators and eventually pleaded guilty to charges of following foreign directives with respect to price fixing pursuant to s. 46 of the *Competition Act*. Drawing on the Leniency Program administered by the Competition Bureau, Maxzone and the Crown jointly proposed a fine of \$1,500,000 “arithmetically determined by reference to the volume of Maxzone Canada’s total sales, or volume of commerce, in Canada during the Relevant Period.”¹⁷¹

“[G]iven that past practice gave rise to understandable expectations that the Court would accept the jointly recommended sentence,”¹⁷² Chief Justice Crampton reluctantly accepted the fine proposed by the parties. However, to guide future expectations, the Court ruled that a fine solely calculated by multiplying the volume of sales obtained during the perpetration of the offence by a particular percentage does not follow the spirit of the *Criminal Code* in terms of sentencing:

However, a jointly proposed fine that is determined exclusively by multiplying an accused corporation’s volume of commerce

by a particular percentage is not consistent with the letter or spirit of the Leniency Bulletin, the aforementioned provisions in the *Criminal Code* or the jurisprudence. The same is true with respect to a jointly proposed fine that was initially calculated in this manner, and then adjusted by further multiplying the amount so reached by a second percentage, to reflect the fact that the offender sought leniency in a particular sequence, relative to the other participants in the prohibited agreement.¹⁷³

While he recognized the existence of “good reasons” to use a base level of 20 percent of the organization’s volume of affected commerce in Canada, Chief Justice Crampton stated that it would be contrary to public interest and bring the administration of justice into disrepute to allow a joint sentencing submission based solely on arithmetical evidence. Crampton J. held that “cooperation cannot so dominate the approach to sentencing as to leave virtually no meaningful role for relevant aggravating factors, other mitigating factors, and the principles of sentencing.”¹⁷⁴ In *Global*, the Québec Superior Court has agreed to hear expert testimony with respect to sentencing in the context of cartels.¹⁷⁵ The Court will have to make a determination on the existence of the 20% rule in Canada and determine whether it should apply to the facts in *Global*.

Moreover, taking into account the objective of denunciation in criminal law, it is not sufficient that the fine solely have the effect of eliminating the profit generated by the organization to re-establish the *status quo*. The Court in this case held that a fine awarded for a cartel agreement should satisfy at least two goals: “(i) ensur[ing] that the accused corporation does not profit from its illegal conduct, and (ii) includ[ing] an additional significant amount to communicate the Court’s recognition of the very serious nature of such illegal conduct, its substantial adverse impact on the economy, and society’s abhorrence of the crime.”¹⁷⁶

In addition to the factors contemplated by the *Criminal Code*, the Court retained some additional aggravating criteria for the sentencing of organizations for *Competition Act* offences. For example, it considered as an aggravating factor the fact that the organization was a “ring leader” by coercing “others to participate in the offence” and that the offence was committed against a vulnerable victim.¹⁷⁷ Moreover, Justice

Crampton held that the scope of economic harm caused by the offence should be taken into consideration.¹⁷⁸ On the other hand, the Court retained as mitigating circumstances the fact that the organization was no longer doing business in Canada and submitted to the jurisdiction of the Canadian Courts.¹⁷⁹ However, it refused to consider as mitigating factor the fact that the organization voluntarily submitted to the jurisdiction of the United States, pleaded guilty and was fined \$43,000,000 for the offence.¹⁸⁰ The Federal Court concluded that given the objectives of denunciation and deterrence of crime in Canada, an organization which has a subsidiary in Canada “should not benefit from the sentences imposed on their parent or other related companies, or on individuals associated with those related companies, in respect of offences committed in other jurisdictions, whether as part of the same overall international conspiracy, or otherwise.”¹⁸¹

Finally, in light of the increased maximum sentences introduced in 2009 for criminal offences under the *Competition Act*, the Federal Court has held that “price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.”¹⁸²

(e) Probation Conditions

In addition to providing criteria with respect to sentencing, Bill C-45 provided for specific conditions regarding probation orders that courts may impose on organizations, as general probation conditions were designed for natural persons and were therefore difficult to apply to organizations. A probation order issued in addition to a fine may serve as an added factor for general and specific crime deterrence. A parallel may be drawn to prohibition orders under s. 34 of the *Competition Act*. Courts have repeatedly acknowledged their rationale, in particular for their contribution to the objectives of denunciation and deterrence.¹⁸³

Before convicting an organization to any probationary condition, the judge should determine if a specialized regulatory body would be more suited to ensure the supervision of the organization.¹⁸⁴ For example, with respect to economic crimes, the Competition Bureau and the *Autorité des marchés financiers* might be more appropriate governmental bodies than the court to verify compliance with probation orders regarding changes to the practices of the organization.

In its order, the court may provide for the following:

(a) make restitution to a person for any loss or damage that they suffered as a result of the offence;

(b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;

(c) communicate those policies, standards and procedures to its representatives;

(d) report to the court on the implementation of those policies, standards and procedures;

(e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;

(f) provide, in the manner specified by the court, the following information to the public, namely,

(i) the offence of which the organization was convicted,

(ii) the sentence imposed by the court, and

(iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and

(g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.¹⁸⁵

The condition set out in paragraph (f) essentially allows the court to sentence the organization to harm its own reputation by revealing its conviction to the public. This paragraph grants judges broad discretionary power with respect to the steps they may order organizations to take to inform the public. For example, a court could order that the organization broadcast an advertising message on television or post

news regarding its conviction on the home page of its website or on social media. To avoid excessive punishment of employees, courts should take into account the impact of probation orders on the economic viability of organizations, especially where a probation order is imposed along with a heavy fine. In the United Kingdom, the *Corporate Manslaughter and Corporate Homicide Act*¹⁸⁶ provides that following a conviction of an organization for murder according to the “management failure model,”¹⁸⁷ a judge may issue an order to publicize the crime in a manner similar to that provided in the *Criminal Code* of Canada. However, British law is more specific providing, *inter alia*, that the judge must balance the arguments of both sides before issuing its order, in addition to specifying a time limit for the publication.¹⁸⁸ Despite the absence of such specifications in the *Criminal Code*, a Canadian court should follow the same procedure to ensure that an order is fair under the circumstances.

III. Conclusion

The entry into force of the Bill-C-45 amendments significantly changed the face of criminal law with respect to the criminal liability of organizations. Organizations now face increased risks of being prosecuted and convicted for the criminal acts and omissions of their representatives, especially for the commission of economic crimes under the *Competition Act* and the *Criminal Code*. Moreover, a finding of guilt carries the risk of a heavy fine. In *Metron*, the Court of Appeal for Ontario held that in sentencing proceedings, courts should not automatically exclude the prospect of an organization’s bankruptcy.

The 2004 amendments demonstrated the clear intention of the legislature to expand the criminal liability of organizations beyond the board of directors and senior management, even where there is no overlap of intent and power to determine the organization’s policies. A mid-level manager may now thus engage the criminal liability of an organization. Section 22.2 CrC establishes a regime bordering on vicarious liability for subjective *mens rea* offences committed by an organization’s senior officers. While the definition of “senior officer” suffers from some uncertainty as to its scope, a successful constitutional challenge under s. 7 of the *Charter* on the grounds that it is vague would be unlikely.

Subject to the decision on appeal in *Global*, the Superior Court of Québec has confirmed that the concept of “senior officer” is broader than that of the “directing mind” developed by the identification theory, prior to the 2004 amendments. Managers responsible for managing an important aspect of the organization’s activities may now engage the criminal liability of the organization, even where such managers play no role and have no influence in the establishment of policies. It is immaterial whether or not a manager possesses significant decision-making autonomy for the establishment of an organization’s criminal liability.

To minimize the risk of committing an offence and to benefit from a reduced sentence in the event of a conviction, a diligent organization ought to take measures to prevent its representatives from committing economic offences. With respect to competition law, courts have recognized that a credible and effective compliance program, such as that recommended by the Competition Bureau, constitutes a mitigating factor in the event of a conviction. The adoption of such a program may also influence the Commissioner of Competition’s recommendation of a reduced sentence.

Endnotes

* The French version of this article follows the English.

¹ Lawyer, McMillan LLP.

² Partner, McMillan LLP. Prior to joining McMillan, Mtre Pinsonnault acted as General Counsel at the Competition Law Section of the Public Prosecution Service of Canada.

³ SC 2003, c 21.

⁴ RSC 1985, c C-46 [*CrC*].

⁵ *House of Commons Debates*, vol. 138, No. 119, 2nd Session, 37th Legislature, September 15, 2003 at 7325 (Harold Macklin) [*House of Commons Debates*].

⁶ *CrC*, *supra* note 4, ss 22.1, 217.1.

⁷ RSC 1985, c C-34 [*Competition Act*].

⁸ 2013 QCCS 4262, [2013] JQ no 11100 [*Global*].

⁹ *Pétroles Global inc. v R*, 2013 QCCA 1604, [2013] JQ no 11922.

¹⁰ *Jacobi v Griffiths*, [1999] 2 SCR 570 at para 69, 174 DLR (4th) 71.

¹¹ Gerald HL Fridman, *The Law of Torts in Canada*, 1st ed, vol 2 (Toronto: Carswell, 1990) at 315-16.

¹² [1985] 1 SCR 662, [1985] SCJ No 28 [*Canadian Dredge*].

¹³ *Ibid* at para 20.

¹⁴ Albert W Alschuler, “Two Ways to Think About the Punishment of Corporations” (2009) 46 Am Crim L Rev 1359.

- ¹⁵ *Canadian Dredge*, *supra* note 12 at para 20.
- ¹⁶ *R c J.J. Beamish Construction Co*, 50 CPR 97 au para 43, 59 DLR (2d) 6.
- ¹⁷ *Lennard's Carrying Co. v Asiatic Petroleum Co.*, [1915] AC 705.
- ¹⁸ *R v St. Lawrence Corp.*, [1969] 2 OR 305, 5 DLR (3d) 263.
- ¹⁹ *Canadian Dredge*, *supra* note 12 at para 20.
- ²⁰ 212 US 481 (1909).
- ²¹ *Canadian Dredge*, *supra* note 12 at para 73.
- ²² *Ibid* at para 21.
- ²³ [1993] 1 SCR 497, 101 DLR (4th) 188 [*Rhône*].
- ²⁴ 1997 CanLII 10565, 117 CCC (3d) 71 (QCCA).
- ²⁵ *Général accident compagnie d'assurance du Canada v Miscou motel ltée*, [1999] RJQ 330, 86 ACWS (3d) 413 (QCCA).
- ²⁶ *Ibid*.
- ²⁷ 2012 QCCQ 5749, [2012] JQ no 5437.
- ²⁸ *Ibid* at para 68.
- ²⁹ *CrC*, *supra* note 4, s 2.
- ³⁰ *House of Commons Debates*, *supra* note 5 at 7326 (Harold Macklin).
- ³¹ *Civil Code of Québec* (SQ, 1991, c 64), s 2221 [*CCQ*].
- ³² *Black's Law Dictionary* defines the term "firm" as "1. The title under which one or more persons conduct business jointly"; *Black's Law Dictionary*, 9th ed, *sub verbo* "firm".
- ³³ 2004 MBCA 73, 240 DLR (4th) 178.
- ³⁴ *CrC*, *supra* note 4, s 2.
- ³⁵ *House of Commons Debates*, *supra* note 5 at 7326 (Harold Macklin).
- ³⁶ *Rhône*, *supra* note 23 at 526.
- ³⁷ *House of Commons Debates*, *supra* note 5 at 7326 (Harold Macklin).
- ³⁸ RSQ, c N-1.1.
- ³⁹ *Commission des normes du travail v Beaulieu*, [2001] RJDT 10, 102 ACWS (3d) 909 (QCCA).
- ⁴⁰ Todd Archibald, Kenneth Jull & Kent Roach, "The Changed Face of Corporate Criminal Liability" (2004) 48 CRIM LQ 367 at 377 (SSRN) [Archibald, Jull & Roach, "Corporate Criminal Liability"].
- ⁴¹ *Global*, *supra* note 8 at para 183.
- ⁴² *Ibid* at para 46.
- ⁴³ *Ibid* at para 47.
- ⁴⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
- ⁴⁵ [1992] 2 SCR 606, 93 DLR (4th) 36 [*Nova Scotia*].
- ⁴⁶ *Ibid* at 639.
- ⁴⁷ [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*].
- ⁴⁸ A corporation may, however, challenge a statutory provision where it violates the guarantees set forth in section 7 for an individual: see *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154, 84 DLR (4th) 161.
- ⁴⁹ [1996] RJQ 258, 46 CR (4th) 332 (QCCA).
- ⁵⁰ *CrC*, *supra* note 4, s 735(1).

⁵¹ *Gosselin v Québec (Procureur général)*, 2002 SCC 84, 221 DLR (4th) 257; *Irwin Toy supra* note 47.

⁵² 234 DLR (4th) 546, 180 CCC (3d) 254 (ONCA).

⁵³ *CrC, supra* note 4 at s 734.7(1)(b)(ii).

⁵⁴ *London (City) v Polewsky*, (2005), 202 CCC (3d) 257, 138 CRR (2d) 208 (ONCA); *R v Asante-Mensah*, 204 DLR (4th) 51, 157 CCC (3d) 481 (ONCA), rejected on appeal: 2003 SCC 38, 227 DLR (4th) 75; *Schnaiberg v Métallurgistes unis d'Amérique, section locale 8990*, [1993] RJQ 55, 36 ACWS (3d) 972 (QCCA); *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481.

⁵⁵ *Nova Scotia, supra* note 45.

⁵⁶ *Ibid* at 640.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ [1995] 2 SCR 1031, 125 DLR (4th) 385.

⁶⁰ *Ibid* at para 47.

⁶¹ *R v Levkovic*, 2013 SCC 25 at para 48, 359 DLR (4th) 197.

⁶² *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

⁶³ *House of Commons Debates, supra* note 5 at 7326 (Harold Macklin).

⁶⁴ Todd Archibald, Kenneth Jull & Kent Roach, "Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer" (2013) 50(3) CRIM LQ at 4 (SSRN).

⁶⁵ Department of Justice Canada, "Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights", online: <<http://www.justice.gc.ca>>.

⁶⁶ *Global, supra* note 8 at para 183.

⁶⁷ Todd Archibald, Kenneth Jull & Kent Roach, "Critical Developments in Corporate Criminal Liability: Senior Officers, Wilful Blindness, and Agents in Foreign Jurisdictions" (2013) 60 CRIM LQ 92, 98 (SSRN) [Archibald, Jull & Roach, "Critical Developments in Corporate Criminal Liability"].

⁶⁸ 2011 SCC 23, 331 DLR (4th) 1.

⁶⁹ 2007 SCC 44, 286 DLR (4th) 601.

⁷⁰ *Ibid* at para 49.

⁷¹ Archibald, Jull & Roach, "Critical Developments in Corporate Criminal Liability", *supra* note 67 at 100.

⁷² RSC 1985, c C-44 [CBCA].

⁷³ *Global, supra* note 8 at para 202.

⁷⁴ *Ibid* at paras 202-208.

⁷⁵ *Ibid* at para 210.

⁷⁶ *Ibid* at para 211.

⁷⁷ *Ibid* at para 44.

⁷⁸ *Ibid* at para 42.

⁷⁹ *Ibid* at para 185.

⁸⁰ *Ibid* at para 183.

⁸¹ *Ibid* at para 186.

⁸² *Ibid* at para 46.

⁸³ 2013 ONCA 541, 300 CCC (3d) 212 [*Metron*].

⁸⁴ *R v Metron Construction Corporation*, 2012 ONCJ 506, 1 CCEL (4th) 266.

⁸⁵ *CrC*, *supra* note 4, s 217.1.

⁸⁶ *Metron*, *supra* note 83 at para 28.

⁸⁷ *Competition Act*, *supra* note 7, s 45.

⁸⁸ *R v TFE Industries Inc*, 2009 NBCA 39 at para 3, 2009 CarswellNB 275; *R v Atlantic Technologist Ltd*, [2009] 2 CTC 42 at para 15, 2008 CarswellNfld 267, [2008] GSTC 175; *R v ACS Public Sector Solutions Inc*, 2007 ABPC 315 at para 148, 2007 CarswellAlta 1588; *R v Tri-Tex Sales & Services Ltd.*, 70 WCB (2d) 512 at para 43, 2006 CarswellNfld 226, 2006 GTC 1252 (Eng.), [2006] GSTC 102.

⁸⁹ The Court of Appeal for British Columbia has clearly stated that the identification theory does not apply to strict liability offences: *R v Motor Vessel Glenshiel*, 2001 BCCA 417 at para 28, 90 BCLR (3d) 289.

⁹⁰ *Canadian Dredge*, *supra* note 12 at para 12.

⁹¹ *City of Toronto v Zanzibar Tavern Inc*, 2007 ONCJ 401 at para 190, 37 MPLR (4th) 216, citing *R v Pellegrini*, 2006 ONCJ 297, 70 WCB (2d) 551.

⁹² RSQ c C-25.1.

⁹³ RSO 1990, c P.33.

⁹⁴ *R v Sault Ste. Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

⁹⁵ *CrC*, *supra* note 4, s 22.2.

⁹⁶ *Canadian Dredge*, *supra* note 12 at para 57.

⁹⁷ *Ibid* at para 73.

⁹⁸ *Ibid* at para 66.

⁹⁹ Archibald, Jull & Roach, "Corporate Criminal Liability", *supra* note 40 at 381.

¹⁰⁰ *House of Commons Debates*, *supra* note 5 at 7326 (Harold Macklin).

¹⁰¹ For instance, a prudent organization might choose to set up a compliance program following the model suggested by the Competition Bureau.

¹⁰² *CrC*, *supra* note 4, s 718.21(j).

¹⁰³ Nevertheless, a defence based on due diligence appears possible for paragraph (c) of s. 22.2 *CrC*, which provides that a senior officer must take "reasonable measures" in the event that he is aware that a representative is or is about to be a party to an offence. However, merely adopting compliance policies is not a "reasonable measure" if the representative is or is about to be a party to an offence. In such a case, the senior officer must immediately take direct measures against the representative to prevent or stop the offence.

¹⁰⁴ *Canadian Dredge*, *supra* note 12.

¹⁰⁵ *Ibid* at para 21.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Sansregret v the Queen*, [1985] 1 SCR 570, 17 DLR (4th) 577.

¹⁰⁸ Archibald, Jull & Roach, "Corporate Criminal Liability", *supra* note 40 at 383.

¹⁰⁹ *Ibid* at 384.

¹¹⁰ *CrC*, *supra* note 4, s 735(1).

¹¹¹ *Ibid* at s 732.1(3.1).

¹¹² *R v Nasogaluak*, 2010 SCC 6 at para 40, [2010] 1 SCR 206.

¹¹³ *CrC*, *supra* note 4, s 718.1.

¹¹⁴ *R v Maxzone Auto Parts (Canada) Corp*, 2012 CF 1117 at para 61 [*Maxzone*].
¹¹⁵ [1977] 2 SCR 654, 75 DLR (3d) 273.

¹¹⁶ *Maxzone*, *supra* note 114 at para 67.

¹¹⁷ 2012 QCCS 4755, [2012] JQ no 9667 [*Constructions GTRL*].

¹¹⁸ *Ibid* at para 63.

¹¹⁹ *CrC*, *supra* note 4, s 718.21(d).

¹²⁰ *Ibid*, s 718.21(b).

¹²¹ *Autorité des marchés financiers v Lacroix*, 2008 QCCQ 234, 57 CR (6th) 333; *Lévesque v Québec (Procureur général)*, 2007 QCCA 494, [2007] JQ no 2793 (QCCA); *R v Dubreuil* (1992) 49 QAC 61, 16 WCB (2d) 486 (CA); *R v Black*, (1993) BCJ No 964, 24 BCAC 232 (CA); *Durand v R*, J.E. 92-740, 1992 CanLII 3072 (CA); *R v Harpman*, (1990), 63 Man R (2d) 78, 9 WCB (2d) 392 (CA); *R v Tucker*, April 2, 1991, Doc CA 011752 (Ont CA).

¹²² Canada, Department of Justice, *A Plain Language Guide Bill C-45 - Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*, online: Department of Justice <<http://justice.gc.ca>> [Department of Justice, *Criminal Liability of Organizations*].

¹²³ *CrC*, *supra* note 4, s 718.21(c).

¹²⁴ *R v Lear*, 2001 CarswellMan 647 (WL Can) at para 7 (MB QB).

¹²⁵ *R v Carter*, 1990 CarswellOnt 1032 (WL Can) at para 14 (Ont Gen Div).

¹²⁶ *Canadian Sporting Goods Assn. of Canada Inc. v Karabetian*, 2004 CanLII 48008 (QC CS).

¹²⁷ *CrC*, *supra* note 4, s 718.21(d).

¹²⁸ *R v Ueno Fine Chemicals Industry Ltd*, 2001 CarswellQue 2916 (SC) at para 17 [*Ueno Fine Chemicals*]; *R v Ciment Québec Inc*, [1996] JQ no 2580, JE-96-1798 at 12-13; *R. v Les Constructions Bé-Con Inc.*, [1999] JQ No 176, No 200-73-003401-992 (SC) at 11 [*Constructions Bé-Con*].

¹²⁹ *Metron*, *supra* note 83 at para 103.

¹³⁰ *Constructions GTRL*, *supra* note 117 at para 53.

¹³¹ 2008 QCCQ 1598, [2008] RJDT 742.

¹³² *R v R.L. Thorpe Sales Ltd.*, [1983] 49 AR 354, AJ No 999 (CA) [*RL Thorpe Sales*].

¹³³ *Ibid*; *R v Darby*, 2012 QCCS 26, [2012] JQ no 45; *Constructions GTRL*, *supra* note 117.

¹³⁴ *R v Terroco Industries Limited*, 2005 ABCA 141 at para 60, 196 CCC (3d) 293.

¹³⁵ *Metron*, *supra* note 83.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* at para 108.

¹³⁸ *Ibid*.

¹³⁹ Ontario Superior Court, December 12, 2009 (Justice Nordheimer) [*Datacom*].

¹⁴⁰ *Ibid* at para 29.

¹⁴¹ *CrC*, *supra* note 4, s 718.21 (e).

¹⁴² *Ueno Fine Chemicals*, *supra* note 128.

¹⁴³ *Maxzone*, *supra* note 114 at para 98.

¹⁴⁴ Canada, Competition Bureau, *Leniency Program*, Ottawa, online: Competition Bureau < <http://www.competitionbureau.gc.ca> >.

¹⁴⁵ *Maxzone*, *supra* note 114 at para 98.

¹⁴⁶ *Ibid.*

¹⁴⁷ Huy A Do, Paul J Martin & Mark D. Magro, “2006 Year in Review: Cartels and other Criminal Matters, Class Actions and Private Access” (March 2007), online: Fasken < <http://www.fasken.com> >.

¹⁴⁸ *CrC*, *supra* note 4, s 718.21 (f).

¹⁴⁹ Department of Justice, *Criminal Liability of Organizations*, *supra* note 122.

¹⁵⁰ *Datacom*, *supra* note 139 at para 30.

¹⁵¹ Archibald, Jull & Roach, “Corporate Criminal Liability”, *supra* note 40 at 390.

¹⁵² *Maxzone*, *supra* note 114.

¹⁵³ *CrC*, *supra* note 4, s 718.21(h).

¹⁵⁴ *Constructions Bé-Con*, *supra* note 128.

¹⁵⁵ *CrC*, *supra* note 4, s 718.21(i).

¹⁵⁶ *Ibid* at s 718.21(j).

¹⁵⁷ Canada, Competition Bureau, *Corporate Compliance Programs* (Ottawa, 2010), online: Competition Bureau < <http://www.competitionbureau.gc.ca> > [Competition Bureau, *Corporate Compliance Programs*].

¹⁵⁸ *Ibid* at 15.

¹⁵⁹ *Ibid* at 10.

¹⁶⁰ *An Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, s 21.2.

¹⁶¹ Competition Bureau, *Corporate Compliance Programs*, *supra* note 157 at 6.

¹⁶² *Ibid* at 8.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid* at 9.

¹⁶⁵ *Ibid* at 9

¹⁶⁶ *Ibid* at 10.

¹⁶⁷ *Ibid* at 11.

¹⁶⁸ *Ibid* at 13.

¹⁶⁹ *Ibid* at 13.

¹⁷⁰ *Maxzone*, *supra* note 114.

¹⁷¹ *Ibid* at para 31.

¹⁷² *Ibid* at para 113.

¹⁷³ *Ibid* at para 41.

¹⁷⁴ *Ibid* at para 43.

¹⁷⁵ *R v Les pétroles Global inc.* (5 December 2013), St-François 450-73-000533-085 (002) (Qc Sup Ct).

¹⁷⁶ *Maxzone*, *supra* note 114 at para 57.

¹⁷⁷ *Ibid* at para 96.

¹⁷⁸ *Ibid* at para 102.

¹⁷⁹ *Ibid* at para 105.

¹⁸⁰ *Ibid* at para 108.

¹⁸¹ *Ibid* at para 108.

¹⁸² *Ibid* at para 56.

¹⁸³ *R. v Dubreuil*, 2009 QCCS 5816, [2009] JQ no 15752.

¹⁸⁴ *CrC*, *supra* note 4, s 732.1(3.2).

¹⁸⁵ *Ibid* at s 732.1(3.1).

¹⁸⁶ 2007 c 19 [*Corporate Manslaughter and Corporate Homicide Act*].

¹⁸⁷ *R v Cotswold Geotechnical (Holdings) Ltd* [2011] All ER (D) 100.

¹⁸⁸ *Corporate Manslaughter and Corporate Homicide Act*, *supra* note 186, s 10.