The Limits of Legislation as a Tool of Reform: A Study of the Westray Reform to Organizational Sentencing

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Les limites de la législation comme instrument de réforme du droit: une analyse de la réforme «Westray» du régime des peines applicables aux organisations

Los límites de la legislación como herramienta de reforma: un estudio de la reforma de Westray a las penas impuestas a organizaciones

Os limites da legislação como uma ferramenta de reforma: Um estudo da reforma Westray para sentenças organizacionais

立法作为一种改革工具的局限:
关于《Westray法案》针对法人量刑改革的研究

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Résumé

De nos jours, la réforme du droit prend souvent la forme d'une modification législative. Cette approche est certes commode sur le plan politique, mais l'idée que l'on puisse effectuer des changements concrets par le seul fait de modifier le libellé d'une disposition législative défie le bon sens. Ce constat a davantage de force lorsqu'il est question de modifier une disposition dont la mise en application pratique découle de l'exercice d'une discrétion substantielle. Dans ce texte, j'examine les limites de la modification législative comme moyen d'effectuer une véritable réforme du droit de la perspective de la loi Westray (2003) qui, en ajoutant des nouvelles dispositions à la Partie XXIII du Code criminel, cherchait à améliorer l'efficacité du régime d'imposition de la peine applicable aux organisations. Sur la foi d'une étude approfondie de l'impact des modifications sur les peines imposées depuis la réforme (2004-2019), j'arrive à la conclusion qu'en raison des qualités propres au processus d'imposition de la peine aux organisations, pour accomplir une réforme efficace dans ce domaine, il serait souhaitable d'adopter une approche modifiée. Cette approche jumellerait la modification législative à des mesures d'appui, comme des lignes directrices et de la formation, destinées à ceux qui sont, par leur pourvoir discrétionnaire, appelés à mettre en application la loi.

Abstract

These days, law reform is almost always couched in terms of new or amending legislation. While politically expedient, the notion that concrete change on the ground will naturally flow from the mere fact of making changes to the written text of a legislative provision belies common sense. This is even more true where the goals of reform efforts are directed at how legal rules that are modulated by the exercise of substantial discretion. In this paper, I consider the limits of legislation as a tool of law reform through the lens of the 2003 Westray Law, which sought to reform to organizational sentencing by adding new provisions to Part XXIII of the Criminal Code. Drawing on analysis of the impact of the reforms on organizational sentencing practice from 2004-2019, I conclude that given the characteristics of organizational sentencing practice, effective reform requires a modified approach where legislation is complemented with measures such as administrative guidance and training, to support those whose discretion is central to the application of the law.

Resumen

En nuestros tiempos, la reforma jurídica toma, con frecuencia, la forma de una modificación legislativa. Si bien este enfoque resulta políticamente conveniente,

Resumo

Em nossos dias, a reforma do direito se dá frequentemente em termos de uma nova legislação ou de uma emenda. Embora esta abordagem seja politicamente

la idea de que se pueden hacer cambios concretos simplemente cambiando el líbelo de una disposición legislativa contradice el sentido común. Este hallazgo es más contundente cuando se trata de modificar una disposición, cuya aplicación práctica se desprende del ejercicio de una discreción sustancial. En este texto, examino los límites de la modificación legislativa como un medio de efectuar una verdadera reforma del derecho desde la perspectiva de la Ley Westray (2003) que, al agregar nuevas disposiciones a la Parte XXIII del Código Penal, buscaba mejorar la eficacidad del régimen de imposición de la pena aplicable a las organizaciones. Basado en un estudio a fondo del impacto de las modificaciones en las penas impuestas desde la reforma (2004-2019), llego a la conclusión que dada las características propias al proceso de imposición de la pena a las organizaciones, para lograr una reforma eficaz en esta área, sería posible adoptar un enfoque modificado. Este enfoque combinaría la modificación legislativa con medidas de apoyo, como directrices y capacitación, destinados a aquellos que están, por su poder discrecional, llamados a hacer cumplir la ley.

cômoda, a ideia de que uma mudança concreta fluirá naturalmente do mero fato de fazer mudanças no texto escrito de um previsão legislativa arrepia o senso comum. Isso é tanto mais verdadeiro quando se trata de modificar normas legais cuja aplicação prática decorre do exercício de uma descrição substancial. Neste trabalho, examino os limites da modificação da lei como ferramenta para efetuar verdadeira reforma do direito através das lentes da Lei Westray de 2003, que acrescentando novas disposições à Parte XXIII do Código Criminal, buscou melhorar a eficácia do regime de imposição da pena aplicável às organizações. Louvando-me em estudo aprofundado do impacto das modificações nas penas impostas desde a reforma (2004-2019), chego à conclusão que, dadas as características do processo de sentenciamento, das organizações, reformas efetivas nesse domínio requerem uma abordagem modificada, pela qual a legislação é complementada com medidas administrativas tais como orientação administrativa e treinamento, para apoiar aqueles que, por seu poder discricionário, são chamados a aplicar a lei.

摘要

目前，法律改革通常采用修法的形式。如果说这种方式是政治上的权宜之举，那么仅通过修改法律条文就能做出实质性改变的想法则有违常识。由于法律条款的实际执行源自于大量自由裁量权的行使，所以这个道理更没有错。本文从《Westray法案》（2003）的角度考察了将修法作为实施真正的法律改革手段的局限性。该法案在《刑法典》第二十三编增添了新条款，目的是改善法人量刑制度的效率。根据一项改革（2004–2019年）以来关于量刑修法影响的深入研究，本文得出结论：由于法人量刑程序特有的性质，要想在该领域实现有效改革，需要对方法进行修正。修正后的方法将修法与支持措施相结合，后者包括为行使自由裁量权的执法者们提供行政指导和培训。

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Calls for law reform permeate all areas of law. They can be sweeping or targeted. They can emerge gradually after a slow accumulation of indicators that point to the need for change or they can explode into the public consciousness in reaction to a particularly compelling example of the law's failings. Sometimes, law reform has a champion and sometimes it happens through sheer serendipity.

This broad range of circumstances that generates discussion of the need for "law reform" nevertheless tends to lead to the same default conception of law reform, that of change brought about through the enactment of new or amending legislation.

The idea that legislative change is an effective means of promoting law reform rests in large part on the expectation that primary legal texts have a key role to play in translating promising ideas into concrete outcomes. Taken at face value, this is not particularly surprising or revolutionary. In a democratic system, introducing legislation is the most public means of signaling to citizens that the government is working to deliver its policy choices in a durable form.

There are plenty of circumstances where legislative reform is the best way to initiate a law reform process and plenty more where it is an important component. But increasingly, legislative reform seems to be taking up all the space in the law reform discussion. This can crowd out consideration of other reform strategies that may be more effective in some circumstances.

This paper considers the effectiveness of legislative change where the object of a reform is the modulation of discretion exercised by enforcement authorities. Through the lens of a major reform to the sentencing rules applicable to organizations, I examine the track record of enforcement practice to date against the expected outcomes of the reform.

Drawing on an analysis of a representative collection of judicial decisions rendered following the Westray amendments to Part XXIII of the Criminal Code, I show that where legislative rules are intended as parameters to inform a decision-making process, modifications to their wording and content are, at best, an indirect form of changing the way the decision-maker exercises discretion. This is even more pronounced where efforts to transform behaviour simply add new factors without providing any guidance as to how these might affect, or even displace, existing methods and

practices. My analysis also points to the crucial importance of setting goals for a reform that factors in the particular way that legislation and enforcement discretion interact in practice. Against this backdrop, a promising strategy for future reforms of this type is to combine legislative change with training and detailed administrative guidance to support those who through their decisions are expected to bring about concrete change on the ground.

I. The Westray Reforms to Organizational Sentencing

The reforms I discuss in this paper were enacted as part of Bill C-45[1], often referred to as the "Westray Law" because the impetus for the legislative reforms was the lack of criminal accountability in response to the catastrophic mine collapse at Westray Mine in 1992, which killed 26 miners. The failed prosecutions of the corporation which owned and operated the Westray Mine prompted a judicial inquiry, presided over by Justice Peter Richard.[2] Among the many recommendations Justice Richard made in his 1997 final report was for the Parliament of Canada to study how the existing rules of corporate criminal liability might be strengthened to ensure there was appropriate accountability in cases such as Westray, introducing legislation as necessary to accomplish this.[3]

Though it took 12 years, the introduction of Bill C-45 was seen as a significant effort to reform corporate criminal liability in Canada.[4] The centrepiece of Bill C-45 was modifying the existing imputation rules (called the identification doctrine) that governed how intent can be proved against

1 Bill C–45, *An Act to amend the Criminal Code (Criminal liability of organizations)*, 37th Parliament, 2nd Session, House of Commons, 2003.

2 *The Westray Story: A Predictable Path to Disaster, Report of the Westray Mine Public Inquiry*, Judicial Inquiry Report, by Peter K Richard, Judicial Inquiry Report (Halifax: Province of Nova Scotia, 1997).

3 See Recommendation 74 of the Report, *Ibid*.

4 Prior to the introduction of Bill C-45, there were three attempts to introduce legislation in Parliament to give effect to Justice Richard's recommendations, all unsuccessful. The initial attempts at reform were private members' bills: in 1999, Bills C-468 and C-259 (36th Parliament); in 2001, Bill C-284 (37th Parliament). For an account the various efforts to change corporate criminal law following the Westray disaster, including a detailed account of the proceedings in the House and the House Committee on Justice and Human Rights, see Steven Bittle, *Still Dying for a Living: Corporate Criminal Liability After the Westray Mine Disaster* (Toronto/Vancouver: UBC Press, 2012).

a corporate defendant.[5] It also expanded the ambit of liability significantly. Previously, criminal liability had been limited to legal "persons" – that is, business corporations and municipalities. Under Bill C-45, this concept was replaced by a much larger notion of "organization" intended to capture the plurality of ways that businesses are structured, not just those that are formally incorporated. It also extended to unions[6], other bodies corporate and public entities beyond municipalities. In addition to the named entities in part a) of the definition, part b) set out three generic criteria for determining when a group of individuals could be treated as "organization" under the Criminal Code.

While the primary focus of Bill C-45 was the liability ascription process, in the 16 years since the reforms were made, there has been limited enforcement against organizational offenders under the new liability ascription rules. Much of this is attributable to the inevitable lag between the enactment of substantive criminal law rules and their application to actual cases. This is further amplified in the context of organizational offenders because the type of crimes they commit – notably covert economic crimes – can occur over long periods and can take many years to investigate. Since it is the law applicable at the time of the offence that applies, this had the effect of delaying the application of the new imputation.[7] There is, however,

5 This doctrine, first developed in the early 20th century by the UK courts (the seminal case is: *Lennard's Carrying Co v Asiatic Petroleum Co*, [1915] AC 705.), is a method of imputing intent to a corporation. The approach rests on the notion that specific individuals can be identified as "alter egos" of the corporation in light of the authority and role they play in running the corporation. The doctrine was followed in Canada from the mid-20th century. The parameters of the modern version of the doctrine in Canada were set down by the Supreme Court of Canada in two seminal cases: *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662 [*Dredge & Dock*]; *Rhône (The) v Peter AB Widener (The)*, [1993] 1 RCS 497 [*Rhône v. Widener*]. The main tenets of the doctrine are summarized in par. 42-68 of Chapdelaine JCQ's reasons in *R c Pétroles Global*, 2012 QCCQ 5749 [*Pétroles Global (preliminary inquiry)*].

6 Though not included in the previous definition of "person" under the Criminal Code, unions had been recognized by the courts as having the status to be held in criminal contempt: *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 1992 CanLII 99 (SCC) [*United Nurses*].

7 The recent settlement of the charges against SNC-Lavalin Construction Inc (SCLI), which covered the period from 2001-2011, is a case in point. In the agreed statement of facts, reference is made to both the identification doctrine concept of "directing will and mind" and the concept of "senior officer", added to the Criminal Code in 2003 since the offence period straddles the legislative change: par. 6.2, *R v SNC-Lavalin*

also a sense that the new rules have not alleviated the considerable burden on enforcement authorities to gather and present the evidence needed to prove guilt beyond a reasonable doubt.[8]

Against this backdrop, it is the two important amendments the Westray law made to the sentencing provisions in Part XXIII CrC which have been applied the most often and consequently are the most visible part of the reform. This is reflective of the fact that there are few criminal trials on the merits involving organizations and more plea bargains, something that is apparent from the cases in Appendix A. In this regard, organizational criminal law is consistent with broader trends in criminal law, where most cases are resolved without the need for a trial. And as the Supreme Court of Canada has repeatedly noted, most recently in *R. v. Anthony-Cook*: "Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently."[9] However, while the proportion of cases that settle is comparable between cases involving individuals and those involving organizations, the difference in organizational criminal law is that there are, in absolute terms, extremely few cases.

Construction Inc, 2019 Court of Quebec (Criminal and Penal Division) [*R. v. SLCI (Sentence)*].

8 Many, including myself, have noted with disappointment the lack of enforcement activity since the amendments came into force. See e.g.: Jennifer Quaid, "At Cross Purposes: Abstract Individualism, Organizational Reality and the Criminal Law" in Tracy Isaacs, Kendy Hess & Violetta Igneski, ed, *Collectivity: Ontology, Ethics & Social Justice* (Lanham, MD, United States: Rowman & Littlefield, 2018) 81; Steven Bittle, "Cracking Down on Corporate Crime? The Disappearance of Corporate Criminal Liability Legislation in Canada" (2013) 11:2 Policy Pract Health Saf 47; Steven Bittle & Laureen Snider, "From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability" 28:4 Law Policy 470; Harry Glasbeek, "Missing the Targets – Bill C-45: reforming the status quo to maintain the status quo" (2013) 11:2 Policy Pract Health Saf 9. That said, there may be some signs of a greater willingness to bring criminal cases against organizations, though the numbers remain very small.

9 *R v Anthony-Cook*, 2016 SCC 43 at para 1.

A. Setting the reform into context – Sentencing in Canada

Canada's sentencing system is organized around the cardinal principle of proportionality.[10] Judges are given the discretion, subject to mandatory minimums and the victim surcharge[11], to craft a sentence that is appropriate and just in the circumstances.[12] The assessment of proportionality combines an evaluation of two elements: the nature and gravity of the offence and the moral blameworthiness of the offender.[13] The former ensures that the punishment is an appropriate reflection of the gravity of the offence to convey denunciation of the conduct and its effects. The latter criterion ensures that the punishment is just in relation to the individual offender, by allowing for a more nuanced appreciation their personal circumstances than the binary guilty/not guilty of the liability stage of a prosecution. Once an offender is found guilty or has pled guilty, contextual elements that are excluded from the liability stage, such as motive, lack of experience or unsuccessful defenses (such as duress, necessity or mental illness) can be taken into account to ensure that the punishment does not exceed what is necessary. The sentencing process also recognizes a certain number of factors[14] that may aggravate or mitigate the initial weighing of gravity and moral blameworthiness, though this step is often folded into the proportionality analysis under s. 718.1 CrC.

Corporate sentencing is subject to the same basic analytical architecture as sentencing of individuals. Prior to the reforms, however, there were no provisions specifically tailored to organizational offenders in Part XXIII CrC. Nevertheless, the courts adapted the general principles of sentencing to the specific context of business corporations where required, which over time provided a framework within which sentences tended to be crafted. It is important to note, however, that in several areas of law, business corporations face potential prosecution under either regulatory legislation or a criminal offence, depending on the gravity of the conduct. This reflects the view that effective regulation of business activity requires a spectrum of state responses to legal noncompliance that range from education and

10 *Criminal Code*, RSC 1985, c C-46, s 718.1 [*CrC*].

11 S. 737 CrC.

12 This principle, long established in the case law, has been frequently repeated by the Supreme Court of Canada. For a frequently cited summary of the basic structure of Canadian sentencing law, see: *R v Ipeelee*, 2012 SCC 13 at paras 35–39 [*Ipeelee*].

13 *Ibid* at para 37. This principle is also codified in 718.1 CrC.

14 Sections 718.2 and 718.3 CrC.

training at one end to full criminal prosecution at the other.[15] Because of the fluidity of the various enforcement tools on this spectrum, there are inevitably areas of overlap. This blurring of lines had an impact on pre-Westray law sentencing practice.[16] While courts clearly treated criminal offences as more serious than regulatory offences, key sentencing precedents were often relied upon in both criminal and regulatory offences to establish what factors were relevant in determining an appropriate sanction. This is not surprising when one considers that both regulatory and criminal enforcement against organizations tends to be justified primarily by reference to specific and general deterrence. This was supplemented in regulatory enforcement with rehabilitation and corrective measures, whereas criminal sentencing tended to pair deterrence with denunciation and censure. Since the main sanction was always a monetary fine, as a practical matter, differences of gravity could be reflected only in the quantum imposed.

The Westray law drew on the basic framework developed by the case law in corporate sentencing to create two organization-specific legislative provisions added to Part XXIII CrC. The first was to add an explicit enumeration of sentencing factors (s. 718.21 CrC), specially adapted to organizational defendants. The second was the addition of a provision granting a broad power to the sentencing judge to craft probation orders (s. 732.1(3.1) CrC).

Both of these provisions were codified in Part XXIII of the Criminal Code, which applies to all federal enactments, be they criminal in charac-

[15] This approach is often attributed to Fisse and Braithwaite's seminal work on corporate criminal liability. In it, they represent the concept of "responsive regulation" graphically in a now-famous pyramid of graduated responses to corporate wrongdoing, with criminal prosecution at the top tip: Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) at 142. Canada uses this model in several areas of enforcement. One that is particularly germane is the Compliance Framework used by the Competition Bureau: *Competition and Compliance Framework*, Competition Bureau Bulletin, Competition Bureau Bulletin (Ottawa: Industry Canada, 2015). For a detailed analysis of the pyramid approach to regulation, see the excellent report by Justice Rick Libman, commissioned by the Law Reform Commission of Ontario: *Sentencing Principles for Provincial Offences: The Modernization of the Provincial Offences Act*, by Justice Rick Libman (Toronto: Law Reform Commission of Ontario, 2010) at 140–164.

[16] For an excellent discussion of the ways in which the regulatory /criminal law overlap affects sentencing, see Part I of Justice Rick Libman, *supra* note 15 at 11–40.

ter or regulatory, unless otherwise noted.[17] Given the positioning of Bill C-45 as a response to the Westray Mine disaster, however, the expectation was that these changes would have their primary impact in truly criminal cases, particularly offences under the Criminal Code.

B. Establishing a benchmark: distilling the objectives of the Westray law

How do you evaluate the success of law reform efforts that are initiated via new or amending legislation? The simplest answer is to compare the stated goals of the legislation at the time of enactment with how the law is applied thereafter.

At first blush, determining the goals of reform undertaken through legislation can seem impossibly complex because the legislative process brings together many voices on pending legislation, including politicians, interested citizens, experts in the field and parties with a stake in the reform. This was certainly true of the Westray law which, as the fourth effort at legislating changes to the rules governing corporate criminal liability, addressed contentious issues that had been debated many times before.[18] Moreover, Bill C-45 was initiated following a report of the House Standing Committee on Justice and Human Rights, which recommended the tabling of legislation after a series of hearings at which numerous expert and stakeholder witnesses appeared.[19]

Without questioning the obvious merits of a process that provides the opportunity to so many to express their views about the promise new legislation may hold, the chances these will coalesce around a clear vision of the purpose of a legislative reform are slim, something expressly acknowledged by the Department of Justice in its official response to the Fifteenth Report, when it noted:

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17 Ss. 6(3) CrC "enactment"/ "disposition".

18 See note 4, supra.

19 *Bill C-45 – An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, Legislative Summary, by David Goetz, Legislative Summary LS-457E (Ottawa: Library of Parliament, 2003) at 7. To access the full legislative history of Bill C-45, see online (Parliament of Canada, LEGISInfo): <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=981232>. The Committee would hear many more witnesses in the course of the enactment process between June and November of 2003.

> The referral by the House also reflected a desire to hear from all stakeholders before proceeding to make changes to the criminal law. Achieving consensus on criminal law reforms is always difficult, especially. It is perhaps more difficult when the issue has the potential to polarize major elements of society. The application of the criminal law to the modern corporate world is one of those difficult subjects because labour, management, shareholders and other significant stakeholders can have different interests.[20]

Whether or not there is a divergence of interests in relation to a reform, however, it is ultimately the government of the day that will be answerable for allocating scarce law-making capacity to the legislative reform efforts it champions.[21] In order to convey the *raison d'être* for legislation as clearly and convincingly as possible, governments tend to frame the defense of their reform efforts by reference to a small number of tailored goals that are easily understood by the electorate. This expression of government intention has both a political and a bureaucratic component. However, as a source of information about the goals of legislation, especially that which aims to reform the law in an important way, the latter is more likely to contain the concrete explanations for what is being changed and why, and to outline how it is expected that the legislative changes will promote the public interest. By contrast, the political rhetoric, while aligned to the bureaucratic descriptions of law reform, is by its nature less precise and more focused on transmitting the highlights of the reform in telegenic sound bites.

In order to distill this legal-bureaucratic perspective of the goals of the Westray bill, I have looked primarily to three documents prepared immediately prior to and during the enactment process. The first is the official *Government Response*[22] to the Fifteenth Report, prepared by the Depart-

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

21 Here I make a distinction with the process of determining "legislative intent" for the purposes of giving meaning to a legislative enactment. Statutory interpretation is focused on ascertaining the bounds of legal rules and as a consequence circumscribes carefully the extent to which declarations of political and bureaucratic objectives are relevant to understanding the scope and ambit of legislation. By contrast, I refer here to stated goals as indications of what outcomes the government hoped the legislation would achieve through the application of the rules, which is independent of their precise legal ambit.

22 Department of Justice, *supra* note 20.

ment of Justice, which endorsed the recommendation of the Standing Committee on Justice and Human Rights to table legislation on criminal liability of corporations. The second is an explanatory memo prepared by the Department of Justice (*Bill C-45 Plain Language Guide*[23]) that describes the content of Bill C-45. The third is the *Legislative Summary* document prepared by the Parliamentary Research Branch of the Library of Parliament.[24] Though this latter document was prepared before the bill was in final form, the summary is a helpful explanation of the legislation that also documents the evolution of Canadian corporate criminal liability and information about law reform initiatives in other jurisdictions. All are concise memos, but they clearly rest on a foundation informed by the scholarly and policy-related commentary[25] to situate the Bill C-45 legislative changes within the larger context of how the criminal law had been applied to corporations in Canada and to explain what the changes to the Criminal Code were expected to achieve. Since the coming into force of the Westray law, scholars have consistently relied on these memos to describe the objectives of this reform effort.[26]

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23 *A Plain Language Guide: Bill C-45 – Amendments to the Criminal Code Affecting the Criminal Liability of Organizations* (Department of Justice, 2003). I have also drawn from the Legislative Summary of the Bill, which synthesizes the essence of the reform

24 David Goetz, *supra* note 19.

25 An early study of key issues raised by corporate criminal liability prepared by the Law Reform Commission in 1976 is often credited as creating the roadmap from which all subsequent policy and reform efforts emerged: *Criminal Responsibility for Group Action*, Working Paper, by Law Reform Commission of Canada, Working Paper 16 (Ottawa: Minister of Supply and Services, 1976). Much of the scholarship prior to Bill C-45 also draw on the LRCC conclusions when recommending reforms. See for e.g. E G Ewaschuk, "Corporate Criminal Liability and Related Matters" (1975) 29 CR-ART 44; LH Leigh, "The Criminal Liability of Corporations and Other Groups" (1977) 9 Ottawa L Rev 247; Marcel Lizée, "De la capacité organique et des responsabilités détictuelle et pénale des personne morales" (1996) 41:1 McGill LJ 131; Jennifer A Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43:1 McGill LJ 67.

26 Todd Archibald, Kenneth Jull & Kent Roach, "The Changed Face of Corporate Criminal Liability" (2003) 48 CLQ 367; Darcy L MacPherson, "Extending Corporate Criminal Liability: Some Thoughts on Bill C-45" (2003) 30 Man LJ 253; Paul Dusome, "Criminal Liability under Bill C-45: Paradigms, Prosecutors, Predicaments" (2007) 53 CLQ 98; Norm Keith, *Corporate Crime and Accountability in Canada: From Prosecutions to Corporate Social Responsibility* (Markham: Lexis-Nexis, 2011); Todd Archibald, Kenneth Jull & Kent Roach, "Critical Developments in Corporate Criminal Liability" (2013) 60 CLQ 92; Jennifer Quaid, "La responsabilité de l'organisation" in *Droit pénal général* Jurisclasseur Québec (Montreal: Lexis-Nexis, 2018) 91; Todd Archibald &

Given that the impetus for Bill C-45 was very much tied to the lack of prosecution in the Westray Mine case, all the memos devote far less space to the sentencing portion of the reforms than to the provisions dealing with the liability ascription process, which was identified as the area most in need of modernization. Of the three documents, the *Government Response* offers the best overview of the high-level objectives of the sentencing reform. The other two documents are more squarely focused on explaining how the two new sentencing provisions ultimately added to the Criminal Code were expected to be applied: (1) s. 718.21, and (2) s. 732.1(3.1) CrC.

All three documents make it clear that the sentencing reform had been designed to respond to a need to provide "more guidance to the courts when imposing sentences on corporations".[27] The obvious question is: guidance to what end(s)? Digging a little deeper, we can distill two more precise aims, each one connected primarily to one of the provisions to be added to Criminal Code. I briefly discuss each in turn.

1. S. 718.21 CrC – Guidance to bring greater consistency and transparency to the sentencing process

There is no doubt that s. 718.21 is intended to serve the first objective of the reform. It sets out a list of organization-specific sentencing factors, analogous to those developed for individual offenders, to be considered when determining what is a proportionate penalty. As fines are the primary punishment used against organizations, it is taken for granted that these factors are intended primarily as the means of calibrating the quantum of the fine.[28]

The discussion of sentencing factors in 718.21 in the *Plain Language Guide* explains that the list of factors draws together principles already applied in the case law as well as some new factors and sets out how these are expected to inform the individualized process of determining an appropriate and just sentence.[29] However, the objective of the reform seemed to

Kenneth Jull, *Profiting From Risk Management & Compliance* (Toronto: Canada Law Book, 2018).

27 Department of Justice, *supra* note 20 "Corporate Liability – Summary"; *supra* note 23 at 8; David Goetz, *supra* note 19 at 12.

28 Department of Justice, *supra* note 20; *supra* note 23 at 9.

29 *Supra* note 23 at 9.

extend beyond the content of the factors individually to the fact of codification itself:

> Canadian law does not provide a mechanical process where the punishment is predetermined. There are few minimum sentences and judges have a great deal of latitude to craft the appropriate sentence. Bill C-45 proposes factors that a court should consider in fining an organization, which are in addition to those factors already in the Code that are applicable to both individuals and corporations (such as an abuse of a position of trust). The gravity of the crime, including the extent of injury caused or whether death results, is already considered when determining sentencing. Under the proposed reforms in Bill C-45 to s. 718.21 of the Criminal Code, new factors would reflect for organizations the considerations that govern sentencing individuals. Judges already apply many of these factors but *it is expected that providing a list will result in judges having a more complete picture of the organization*.[30] (emphasis added)

While the text is not explicit, the final sentence of this introductory paragraph points to an expectation of the sentencing process where judges will be able to draw on more information when deciding what sanction is appropriate in the circumstances because the list makes it easier to compile that information. The text does not explicitly state that courts must systematically go through the list, but this can be inferred from the suggestion that the existence of the list will ensure that as complete a picture as possible is drawn from the consideration of all relevant factors.

While perfect consistency among sentences was not an aim of the reform[31], providing judges with a coherent list of factors was expected to guide them as they engaged in the weighing process needed to arrive at a proportionate and just sentence. While sentencing would still be an individualized process, there is little doubt that the enumeration of the factors was designed to prompt greater coherence and transparency in the way sentences were determined, taken as a whole, even if each case was unique.

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30 *Supra* note 23 at 8.

31 In Canadian sentencing, the principle of parity (s. 718.2(b) CrC), while a relevant consideration, is subordinate to the cardinal principle of proportionality in 718.1 CrC. The Government Response notes the importance of discretion in Canadian sentencing, as distinct from the most systematized approach used in the US: Department of Justice, *supra* note 20 "Sentencing".

2. S. 732.1(3.1) CrC – Guidance to support innovations in sentencing of organizations

The second part of the reform clearly aimed to encourage, where possible, recourse to other forms of sanction than fines, in particular those that could foster greater future compliance with law by addressing the source of the underlying conduct through corrective measures. There is little doubt that the discretionary probation power in 732.1(3.1), which identifies a series of optional conditions that might be imposed on an organization, is the primary vehicle through which this goal was to be realized, though its application was expected to be modulated by some of the factors in 718.21.[32]

Despite some reservations about potential overlap with regulatory regimes where there had already been a shift to more "creative" responses to noncompliance with legal rules, the government saw an opening for a broad and flexible power to impose probation orders. It was expected that probation orders would provide support for judicial creativity in developing alternate measures to traditional fines better suited to promoting objectives of sentencing such as rehabilitation and reparation of harm, objectives which had historically received less attention than deterrence and denunciation.[33]

Based on the above, we can see that at enactment, providing "guidance" to judges, though obviously intended to assist them in individual cases, was also expected to enhance the overall capacity of the organizational sentencing process to generate punishments commensurate with the gravity of the offence and the blameworthiness of the organization: first by bringing greater consistency and transparency to the organizational sentencing process (by consolidating relevant criteria into a clear list[34]), and then by creating space for sanctions other than monetary fines where fines would not be sufficient to respond effectively to organizational wrongdoing.[35] Taken together, these two amendments sought to bring about change that would enhance the legitimacy of organizational sentencing

32 *Ibid*; note 23 at 8–9; David Goetz, *supra* note 19 at 12.
33 note 23 at 10.
34 Department of Justice, *supra* note 20; note 23 at 8–9.
35 Department of Justice, *supra* note 20; note 23 at 8–9; David Goetz, *supra* note 19 at 12.

taken as a whole and thus were a key part of the central promise of the Westray law – to take crimes committed by organizations seriously.

Before assessing the concrete impact of the Westray amendments on the sentencing of organizations against these objectives, I describe the details of the study used to build the collection of cases on which my analysis is based.

II. Description of the Study

A. Scope

The study was designed to document the impact of the Westray law on sentencing practice against organizations in Canada by collecting and analysing a representative sample of judicial decisions that either determined an organizational sentence or endorsed a joint submission by the Crown and defense.

The focus on reported decisions was pragmatic. Reported cases can be identified through public and commercial databases by using key word searches. Copies of the decisions are easily downloaded as digital copies, something which facilitates collecting cases from across the country and across areas of law. While most decisions collected are written reasons for judgment, we have included some decisions which are recorded as transcripts of oral submissions[36] or handwritten judicial endorsements of joint submissions, not otherwise publicly available.[37] These latter decisions were

[36] *R v Watts*, [2005] AJ No 568 (AB QB) [*Watts*]; *R v Domfoam Inc and Vallefaom Inc*, 2012 CarswellOnt 17498 (WL Can) (ON SCJ) [*Domfoam*]; *R v Griffiths Energy International*, [2013] [2013] AJ No 412 (AB QB) [*Griffiths Energy*]; *R v Furukawa Electric Co Ltd*, 2013 CarswellOnt 18744 (WL Can) [*Furukawa*]; *R v Detour Gold Corp*, [2017] OJ No 5290 (ON CJ) [*Detour Gold*].

[37] *R c Dessau inc*, 2019 QCCS [*Dessau (prohibition order)*]; *R c Genivar inc (maintenant WSP Canada Inc)*, 2019 QCCS [*Genivar (prohibition order)*]; *R. v. SLCI (Sentence)*, *supra* note 7.

obtained through the counsel working on the case.[38] We also included one case where the oral decision was reported only in the media.[39]

Before describing the collection in detail, it is important to note that limiting the study to cases where there was judicial consideration of organizational sentencing factors does not provide a complete picture of the impact of the Westray law on sentencing practice. Focusing only on cases that reached the sentencing stage does not capture the possible and indeed plausible impact the sentencing factors may have on earlier phases of the criminal process, such as the exercise of prosecutorial discretion by Crown counsel as they weigh the merits of laying charges, proceeding to trial, negotiating a plea or otherwise resolving a case.[40] Moreover, it also does not account for how the factors may influence the choices the accused (and their counsel) make when evaluating whether to contest or negotiate a resolution of charges. The sentencing factors may also have a broader impact on organizations and their willingness to proactively adopt compliance measures aimed at preventing the commission of offences. That said, finding a way to evaluate these more subtle effects would require a very different study than what we undertook here.

A significant contribution of our study lies in the creation of the collection of cases itself. Taken together, these cases provide highly relevant and concrete data about how the sentencing reforms played out in the

[38] Most cases involving organizations charged with crimes are resolved through joint submissions on sentence and guilty pleas. When these decisions are oral, they are not always transcribed into writing. Judicial endorsement of joint sentences can be limited to a handwritten note on a document prepared by the parties. Even in significant cases where a written document is submitted to the court, such as the SNC-Lavalin Construction Inc. guilty plea, it is not uncommon for the document to be available only in paper form on request to the relevant court registry. We obtained a copy of the SLCI plea from counsel as well as the s. 34 prohibition orders in the Dessau and Genivar cases.

[39] *R v Century Mining*, 2017 Court of Quebec, Criminal and Penal Division; Myriam Grenier, "Century Mining devra payer 200000 $pour négligence", *Le Citoyen* (21 July 2017), online: <https://www.lecitoyenvaldoramos.com/article/2017/07/21/century-mining-devra-payer-200-000---pour-negligence>.

[40] In previous work, I have discussed the outsized importance of prosecutorial discretion in the areas of economic crime, which accounts for a substantial portion of the crimes for which organizations are charged, in Jennifer Quaid, "Negotiated Justice and Economic Crime: Lessons from the Canadian Experience" in Stefano Manacorda & Francesco Centonze, ed, *Criminalità d'impresa e giustizia negoziata: esperienze a confronto* (Milan: Guiffrè, 2017) 123.

specific context at which they were directed – the process of determining appropriate sanctions for organizational wrongdoing.[41] It fills an informational gap in an area of law where sources are scattered and not always easily accessible. To our knowledge, no comparable collection has been assembled.[42]

B. Data collection method

To assemble the collection of cases, we performed the same searches on three different legal databases: Lexis Advance Quicklaw, CanLII, and SOQUIJ-Recherche juridique (Azimut). First, we reviewed all cases that specifically mention s. 718.21 Cr.C. or the sentencing factors set out therein. We then looked for cases that included one or a combination of the following keywords: sentence, sentencing, factors, principles, purposes, considerations, organisation, corporation, partnership, aggravating, mitigating, deterrence, and denunciation. We repeated these searches using the French translation of each keyword. Once the base collection was assembled, we assessed the cases for relevance. We also added new cases as they were reported.[43]

The 2004 amendments to the Criminal Code apply only to federal enactments.[44] There is no comparable codification of relevant sentencing

41 The findings from this study have laid the groundwork for a broader study, currently in progress, that considers how the sentencing process might be enhanced by drawing on the experience of investigators, prosecutors, defense counsel and judges in applying the sentencing factors in new and creative ways.

42 Collecting cases relevant to *organizational* sentencing presents several challenges since the cases arise in areas of law where there is an enforcement overlap between regulatory agencies, which may be provincial or federal, and traditional criminal law actors like police and prosecutors, which are also divided jurisdictionally into distinct federal and provincial services. There are, however, some notable efforts are assembling decisions in specific subject areas, such as environmental law or workplace health and safety. See, for e.g., the excellent on-line collection curated by a group of researchers from the journalism department at Mount Royal University, Calgary, Alberta, which tracks use of "creative sentencing" tools (alternatives to traditional fines) in environmental law: Janice Paskey & James Wilt, "Sentencing Judgements and Orders", online: *Alberta Creative Sentencing* <https://albertacreativesentencing.wordpress.com/home/>.

43 The base collection was assembled progressively over the period 2016-2018, with further updates made in 2019. The collection is current to the end of 2019.

44 Lower courts in Ontario have specifically ruled that the Criminal Code sentencing provisions do not apply to provincial offences. Courts in other provinces have referred

principles and factors applicable to provincial offences for which organizations many be charged; the basic principles applied are gleaned from key judicial decisions in the relevant area of regulatory law and some statutes, where applicable.[45] In collecting samples, we discovered that in some cases brought under provincial enactments, the sentencing decision nevertheless referred to some or all the organization-specific sentencing provisions in the Criminal Code. Upon closer inspection, however, references to the Criminal Code factors were uneven and inconsistent, and tended to be treated as secondary to the case law. For this reason, we decided to exclude sentencing decisions in provincial regulatory matters.[46]

C. Description of the collection

In building the collection, we used two selection criteria: (1) that there is some record of the reasons for the sentence, be they oral or written and (2) that they refer, at least in passing, to the sentencing provisions added by the Westray law, namely s. 718.21 and s. 732.1 (3.1). I have, however, included three cases that meet only one criterion because they nevertheless shed light on the overall evolution of sentencing against organizations over the past 15 years.

In the end, we have assembled a collection of 22 cases where a sentence that has been imposed on an organization has made at least some reference to the organization-specific factors set out in the Westray law.

to the Criminal Code factors sporadically. This is not entirely surprising since the Criminal Code provisions were inspired in large part by case law principles that did not distinguish between federal and provincial offences, nor between criminal and regulatory offences. In substance, there is a lot of overlap between the factors set out in the Code and the factors is applied in provincial regulatory offences.

45 Norm Keith, *supra* note 26 at 218–222. Two seminal cases that are applied frequently are: *R v Cotton Felts Ltd*, [1982] OJ No 178 (ONCA) . (Occupational health and safety) and *R v Terroco Industries Limited*, 2005 ABCA 141 [*Terroco Industries*] (environmental law).

46 While there are some points of convergence between the federal and provincial cases, the provincial cases do not provide as clear a picture on sentencing factors (718.21) in large part because sentencing practices vary by province and by area of law. That said, sentencing decisions for provincial offences in some provinces in some areas of regulatory enforcement, in particular environmental law in Alberta, have, to date, made far greater use of creative sentencing practices like those identified in s. 732.1(3.1). See for e.g. *R v Suncor Energy Inc*, 2017 Provincial Court of Alberta (Criminal Division).

Basic information about the cases is presented in tabular form in Appendix A.[47]

In order to set up the detailed analysis of the sentencing decisions and the trends that can be distilled from them, it is helpful to describe some basic features of the decisions in the collection.

1. Size of the collection

The first observation to make about the collection is that it is small. There have been few prosecutions of organizations since the 2004 reforms and even fewer that have culminated in a finding a guilt and the imposing of a criminal sanction. While it is always difficult to ascertain how the number of cases where charges are laid compares to cases where there was a plausible basis to investigate and a reasonable prospect of conviction but the Crown did not proceed, crimes involving organizations add a layer of complexity to the analysis. This is because organizations are typically subject to extensive regulation in their areas of operation. Regulatory regimes impose obligations and duties on organizations and provide for sanctions in the event of noncompliance. In areas such as workplace health and safety and environmental or wildlife protection, it is possible that prosecutions under these regulations overlap with certain criminal offences, such as criminal negligence. Though it is hard to know precisely how many provincial regulatory prosecutions could have plausibly been prosecuted as criminal negligence cases, there is some anecdotal evidence that suggests the existence of the Westray law, in particular the duty added in s. 217.1 CrC (imposed on those who oversee or direct the work of other to take all necessary measures to protect health and safety) has provided some leverage to enforcement authorities to obtain guilty pleas to regulatory offences where criminal negligence charges are taken off the table.[48] This practice contributes to the relatively small number of criminal negligence prosecutions, compared to economic crime prosecutions, though there are certainly other factors at play as well, in particular undeveloped enforcement

47 See Appendix 1.

48 For example, I discuss this phenomenon in relation to the Bruneau case in Jennifer Quaid, "What's Good for the Goose is Good for the Gander: Considering the Merits of a Presumption of Organizational Capacity in Canadian Criminal Law" in Marie-Ève Sylvestre, Julie Desrosiers & Margarida Garcia, ed, *Réformer le droit criminel : défis et possibilités / Criminal Law Reform in Canada: Challenges and Possibilities* (Cowansville: Les Éditions Yvons Blais, 2017) 93 at 113–114.

practices tailored to the special circumstances that characterize suspected cases of criminal negligence involving business organizations.

2. Geographic distribution

With one exception heard in the Federal Court[49], the sentences were handed down or endorsed in courts of criminal jurisdiction in the following provinces: Quebec (11[50]), Ontario (5), Alberta (3), British Columbia (1) and New Brunswick (1). While for the most part cases were heard in the provinces where the criminal conduct occurred, in those cases involving foreign corruption or fraud committed overseas, the cases were heard in the province where the organization was incorporated or had its head office.

3. Types of offences

Almost all the cases (20/22) involve criminal offences[51] under the Criminal Code[52], the Competition Act[53] or the Corruption of Foreign Public Officials Act[54]. There are two cases that involve regulatory offences under federal statutes.[55]

In terms of the type of conduct sanctioned by the offence, the cases can be grouped into three categories: (1) corruption[56], bribery[57] and fraud[58]

49 *R v Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117 [*Maxzone*].

50 This number includes the Genivar and Dessau cases, which were prohibition orders issued pursuant to s. 34 of the Competition Act.

51 By criminal, I mean that the prohibition would be characterized as falling within the federal power over criminal law in s. 91(27) of the Constitution Act 1867. While I acknowledge that the malum in se – mala prohibita distinction is contentious and fraught with challenges, the types of conduct targeted by the offences in the cases in the federal collection are well within the boundaries of what is considered truly criminal. For a more detailed discussion of the distinction, see: Marie Eve-Sylvestre and Richard Libman.

52 *Supra* note 10

53 *Competition Act*, RSC 1985, c C-34.

54 *Corruption of Foreign Public Officials Act*, SC 1998, c 34. [*CFPOA*]

55 One case involves non-compliance with the *Health of Animals Act*, SC 1990, c 21. The other relates to charges under the *Canada Labour Code*, RSC, 1985, c L-2.

56 These cases involve charges under s. 3(1)a) and 3(1)b) of the *CFPOA*, *supra* note 54.

57 In particular s. 123(1)b) CrC (influencing municipal official)

58 For the most part, these cases involved charges of fraud under s. 380 CrC. One case also involves charges of producing and using false documents.

offences; (2) competition offences[59] and; (3) criminal negligence[60] offences. Two of these categories concern what is generally called economic crime, because the prohibited conduct is aimed at sanctioning dishonest or fraudulent activities that cause economic loss or undermine the effectiveness of free markets or the integrity of public procurement processes.[61] It is common that these activities occur under cover of otherwise legitimate and legal business activity, making them hard to detect by outside observers or investigators without access to internal documents and personnel. The third category is different than the other two because the cases almost always arise following death or injury to a worker on the job.[62] Since these cases lie at the intersection of the criminal law and occupational health and safety law, depending on the gravity of the failure to protect safety, they can plausibly be prosecuted as criminal or regulatory offences. Since regulatory offences in this area are overwhelmingly structured as strict liability offences, it is not surprising that there are far fewer cases that end in a conviction for criminal negligence than a conviction under a provincial or federal regulatory offence. In addition, most regulatory offences have broader imputation rules than those applicable to criminal offences and federal enactments.[63]

The two regulatory offences cover different conduct, but one of them, the RCMP case[64], is connected to the criminal negligence category because

59 The cases relate to charges under s. 45 (conspiracy), s. 46 (foreign directive) and s. 47 (bid-rigging) under the *Competition Act*, *supra* note 53.

60 These cases involved charges under ss. 220 CrC (criminal negligence causing death) and 221 CrC (criminal negligence causing bodily harm).

61 See Jennifer Quaid, *supra* note 40.

62 It is possible for criminal negligence charges to be laid where there is death or bodily harm to others, such as the general public. This was the case in the charges brought against the Montreal, Maine & Atlantic Railway following the catastrophic train derailment in the town of Lac-Mégantic in July 2013. Those charges were ultimately dropped following the acquittal of three rail employees prosecuted individually. The insolvent company did plead guilty to a charge under the *Fisheries Act*, R.S.C. 1985, c. F-14. The company was order to pay a fine of $1 million, though only $400,000 was paid. See: Simon Nakonechny Alison Brunette, "Former MMA bosses plead guilty to federal charges in Lac-Mégantic tragedy", *CBC News* (5 February 2018), online: <https://www.cbc.ca/news/canada/montreal/lac-megantic-mma-federal-charges-plea-deal-1.4519119>. For a scholarly discussion of this case, which is not included in the collection of cases used for my sentencing study, see: Jennifer Quaid, *supra* note 8.

63 See s. 22.1 and 22.2 of the *CrC*, *supra* note 52.

64 *R v The Royal Canadian Mounted Police*, 2018 NBPC 01 [*R. v. RCMP*].

it is a case that involves workplace deaths attributable to inadequate safety measures to protect front-line police officers.[65]

Taken together, the above categories cover much of the wrongdoing for which corporate accountability is typically expected. That said, aside from the second regulatory case[66], which involves offences prohibiting inhumane treatment of animals ultimately destined to be slaughtered, there are no cases in the collection that fall within the broad area loosely labelled as environmental protection. The bulk of enforcement against organizations for environmental offences is brought under provincial regulatory regimes, where noncompliance with environmental laws is assured through strict liability offences. To date, the federal government has not seen fit to create a criminal offence prohibiting environmentally harmful conduct. The federal government has, however, created regulatory offences related to environmental protection under other valid powers[67] since protection of the environment is not a specific head of power exclusively attributed to one level of government.

4. Form of resolution

In keeping with broad trends in the general criminal law, 14 of 22 cases were preceded by the entering of a guilty plea. Of these, 10 were accompanied by a joint submission on sentence.[68] The four remaining cases were either fully or partially contested at the sentencing stage requiring the court to determine the appropriate and just sanction to be imposed.

In five cases, the organization accused was convicted after a fully contested trial on the merits. The sixth was a conviction of an organization that had been wound up and which did not appear in court to defend the charges.[69] We note that in one of the remaining five cases, however, two

65 *Ibid*.

66 *R v Maple Lodge Farms*, 2014 ONCJ 212 [*Maple Lodge Farms (sentence)*].

67 Federal regulatory enforcement tends to occur under the auspices of the *Fisheries Act*, *supra* note 62. or the *Canadian Environmental Protection Act*, SC 1999, c 33.

68 In some cases, the submissions also included an agreed statement of facts that was appended to the reasons of the courts or integrated into the compliance order. However, it was not always clear from the reasons themselves when the court had simply integrated the facts provided by the parties in the reasons as opposed to synthesizing what the parties had jointly submitted.

69 *R. v. Century Mining*, *supra* note 39.

charges were tried as test charges on the understanding that the remaining charges would be resolved in a manner consistent with the verdict after the trial. Since the judge found the organization guilty on the first two charges[70], the organization plead guilty to most of the remaining charges. There was also a detailed joint submission on sentence to resolve the charges.[71]

There are two cases, *Genivar*[72] and *Dessau*[73], which merit further explanation as they are neither a plea nor a conviction following a trial. We have included these cases in the collection because they signal a new trend in resolving cases that is poised to become much more prominent in the future. In each case, charges of bid-rigging were resolved through the issuing of a prohibition order pursuant to ss. 34(2) of the *Competition Act*. Though the s. 34 prohibition order provision has existed for many years, the two cases in the collection are the first examples of it being used to settle charges where there is no formal finding of guilt; the organizations admitted only to the factual occurrence of the underlying conduct for the purposes of arriving at the settlement.[74] They are noteworthy because they are the first examples of use of a non-trial mechanism that imposes criminal sanctions without a conviction. This is seen as an attractive and pragmatic middle ground where the effects of a conviction, most significantly debarment from bidding on public contracts, can be avoided while nonetheless ensuring organizations are subject to consequences for their illegal conduct. Over the past 5-7 years, other countries are increasingly making use of this type of settlement, typically called a "deferred prosecution agreement" or "DPA." In 2018, Canada enacted a DPA-style regime of its own under the name "Remediation Agreement" in Part XXII.1 CrC.[75] However, while it is

70 *R v Maple Lodge Farms*, 2013 ONCJ 535 [*Maple Lodge Farms (conviction)*].

71 *Maple Lodge Farms (sentence)*, *supra* note 66 at paras 2–4 & Appendix A.

72 *Genivar (prohibition order)*, *supra* note 37.

73 *Dessau (prohibition order)*, *supra* note 37.

74 *R c Genivar inc (maintenant WSP Canada Inc)*, 2019 QCCS at 5 [*Genivar (agreed statement of facts)*]; *R c Dessau inc*, 2019 QCCS at 5 [*Dessau (agreed statement of facts)*].

75 The regime was enacted as Part 20 of the 1st 2018 omnibus budget bill: Bill C–74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 42nd Parliament, 1st session, House of Commons, 2018. The regime was amended shortly after coming into force to address ambiguities in the provisions governing non-publication orders: Bill C–86, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 42 Parliament, 1st session, House of Commons, 2018. For a detailed discussion of the regime, see: Jennifer Quaid, *supra* note 26 at paras 97–120; Todd Archibald & Kenneth Jull, *supra* note 26 c 22.

expected that remediation agreements will become an integral part of enforcement against organizations going forward, they were not available to Dessau and Genivar because *Competition Act* offences are ineligible for remediation agreements.[76] Nevertheless, the terms of these *sui generis* settlements of criminal charges will undoubtably influence expectations as to what constitutes an appropriate and just sanction in both traditional sentences and remediation agreements.[77] They are also evidence of the ability of actors on the ground to develop innovative solutions in response to gaps in the law.

5. Form of communication of the reasons

Six decisions were rendered orally[78]; the remainder were issued as written judicial reasons, though in some cases, the agreed statement of facts and the text of the order was drafted by the parties and simply endorsed by the court. Even in those cases where sentencing decisions are issued under a judge's name, courts frequently repeat or rephrase the submissions of the parties. In a worrying development, the most recent decision in the collection *R v SNC-Lavalin Construction International Ltd*, the court opted not to choose between the very different factual and legal bases put forth by the Crown and the defense in support of the jointly submitted sentence. The court considered it necessary only to endorse the amount of the fine and the terms of the probation order jointly agreed to by the Crown and the defense.[79]

The ease with which one can distinguish the court's substantiation of the appropriate and just nature of a sentence from that offered by the parties, especially where there is a joint submission, is a critically important factor in assessing the effectiveness of the Westray reforms. We discuss this in the next section.

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76 S. 715.3 (1) CrC "offence". Only offences that are listed in Schedule 1.1 – Part XXII.1 CrC are eligible.

77 At the time of writing, a third case was resolved in the same manner. The organization in question was the third and final participant charged in the same bid-rigging scheme as Dessau and Genivar. See "Third engineering firm to pay $750,000 in settlement for Quebec bid-rigging", (5 March 2020), online: *Competition Bureau* <https://www.canada.ca/en/competition-bureau/news/2020/03/third-engineering-firm-to-pay-750000-in-settlement-for-quebec-bid-rigging.html>.

78 Though oral decisions, a transcript was available in all but one case: *R. v. Century Mining*, *supra* note 39.

79 *R. v. SLCI (Sentence)*, *supra* note 7 at para 14.

III. Analysis of the cases

In Part II, I distilled two key objectives of the sentencing reforms contained in the Westray law, each of which tracked one of the legislative provisions added to the Criminal Code. Using these two objectives as the lens through which to examine what has been happening in organizational sentencing since the enactment of the Westray law, I first provide an analysis of the treatment of s. 718.21 and 732.1(3.1) CrC individually before discussing more general trends that transcend them.

A. Section 718.21

The objective of s. 718.21 CrC was to bring consistency and transparency to the process of determining an appropriate and just sentence through the consolidation of a list of mitigating and aggravating factors tailored to organizations. This objective was not merely laudable, it was a critically important component of the larger design of ensuring there is meaningful accountability when organizations commit crimes. Since imprisonment is unavailable as a sanction, the real and perceived legitimacy of organizational punishment depends keenly on the process by which the "appropriate and just" level of a fine is determined. Even allowing for the more limited range of offences for which organizations are typically charged, there are still significant differences in the nature and extent of organizational wrongdoing, from tax fraud to criminal negligence causing death. How is the already difficult balance of objective gravity and subjective blameworthiness to be quantified when the offender is an intangible collectivity? Is the quantum calibrated by reference to clear, intelligible criteria that capture the relevant nuances to be made? More critically, does the manner in which those criteria are applied give comfort to a sceptical public that sentencing principles are applied to organizations consistently and in the public interest?

1. 718.21(a) – Advantage realized

The basic principle of par. 718.21(a) is that the organization should not profit from its crimes[80] and it has been applied relatively consistently.

[80] *Supra* note 23 at 9.

Evidence that the organization realized an advantage through the commission of the offence has been treated as unequivocally aggravating, its weight generally a function of the magnitude of the gain or advantage realized. With one exception noted below, the cases where advantage realized was a factor were economic crimes, which is not surprising.

Until just recently, the notion of advantage focused on actual material gain that could be quantified as profits realized, overcharge or another economic measure. It did not extend to business decisions about how to allocate finite resources among competing priorities, such as how much to invest in the prevention of known operational risks versus paying creditors.[81] In the CFG case, the court found that sustained underinvestment in worker health and safety did amount to an advantage within the meaning of par 718.21(a) because the organization saved money and thus was able to stay solvent. By operating in an unsafe way, the organization extracted an improper gain from workers, one of whom paid with his life.[82] This development is a significant shift from the traditional view of illegal gain, but in CFG, the court had the benefit of a substantial trial record detailing significant safety lapses that continued long after the offence. It is unclear whether this interpretation of gain would be possible where there is a plea. Moreover, it seems highly unlikely that the defense would agree to such a highly prejudicial characterization of its conduct in a joint submission of sentencing (JSS) unless the evidence were overwhelming. Nevertheless, there is evidence from provincial regulatory cases in occupational health and safety that attitudes are hardening about the objective gravity of choosing, for financial reasons, to not comply with important mandatory safety measures and that sentences need to reflect that.[83] This may spill over into sentencing of organizations for criminal negligence.

This generally consistent characterization of illegal gain as aggravating, however, masks some difficult, largely unresolved questions that lie beneath the surface. Par 718.21(a) is silent on important elements that inform how the factor is applied: such as how to calculate economic gain

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81 The sentencing judge expressly declined to characterize 718.21(a) in this way in *Detour Gold*, *supra* note 36 at para 32.

82 *R c CFG Construction inc*, 2019 QCCQ 7449 at paras 86–91 [*CFG Construction (sentence)*]. It is important to note that the organization has sought leave to appeal its conviction and sentence: *CFG Construction inc c R*, 2019 QCCA 514.

83 *Ontario (Ministry of Labour) v Lafarge Canada Inc*, 2019 ONCJ 478 [*Lafarge*]; *Ontario (Ministry of Labour) v Vixman Construction Ltd*, 2020 ONCJ 64.

or advantage, and what financial measures best capture the magnitude of the gain, issues that appear only when sentencing is contested.[84] Moreover, even where there might be an obvious measure of illegal gain that is appropriate, providing actual proof of it is dependent on the quality of financial information available, which can be difficult to obtain independently from the organization as the relevant information, if documented at all, is unlikely to be reported in public financial statements.[85] There is also debate about whether it is proper to consider expected rather than actual gain.[86] Where the parties submit a joint submission on sentence (JSS), the agreement typically provides little if any information on the actual method of calculation of gain.[87] This matters because factors that can be quantified tend to have a more visible impact on the magnitude of any financial penalty than qualitative factors.[88] Beyond this, where a fine amount is arrived at without a clear method of calculation, this can contribute to the perception that fines are determined arbitrarily, rather than through a rational and verifiable process.[89]

[84] See for e.g. the considerable debate and conflicting expert testimony offered in *R c Pétroles Global*, 2015 QCCS 1618 at paras 52–70 [*Pétroles Global (sentence)*].

[85] This was certainly the case in *R. v. SLCI (Sentence)*, *supra* note 7. Without financial information provided by the organization, it would have been very difficult for the Crown to establish the gain made from what was an illegal scheme not recorded in official company documents.

[86] This was one of several points of disagreement between the Crown and defense submissions on the determination of the illegal gain by SLCI in *Ibid*.

[87] *Watts*, *supra* note 36; *Niko Resources*, *supra* note 4; *Griffiths Energy*, *supra* note 4. In Maxzone, Justice Crampton was critical of the lack of evidence provided to the Court in support the amount of illegal gain used to calculate a jointly agreed fine, where a JSS was negotiated the Competition Bureau's Leniency Program: *Maxzone*, *supra* note 49 at para 102.

[88] *Watts*, *supra* note 36; *Niko Resources*, *supra* note 4; *Griffiths Energy*, *supra* note 4; *R c Constructions GTRL (1990) inc*, 2012 QCCS 4755 [*Constructions GTRL*]; *Pétroles Global (sentence)*, *supra* note 5.

[89] An example of the dangers of a lack of precision can be seen in Pétroles Global (sentence), where the judge concluded that the neat and round figure of $1 million was the correct level of fine. Even allowing for the fact that the judge notes, correctly, that calculating an appropriate fine is not a mere mechanical exercise, it is not at all clear how he arrived at the final figure, since it was not directly connected to the financial evidence adduced: *Pétroles Global (sentence)*, *supra* note 84 at 70, 106.

2. 718.21(b) Complexity, planning and duration

The basic principle behind this factor has been applied in a consistent manner; the presence of complexity, planning or duration is treated as an aggravating factor. Often, though not always, all three components are present, particularly in competition, corruption and fraud cases. As with par 718.21(a), the CFG case stands out, since criminal negligence cases have typically been characterized as discrete events caused by culpable mistakes rather than the product of planning and complexity executed over time.[90] In CFG, the court considered the long-standing lax culture on safety that pervaded the organization's operation, as well as the 6-month period that preceded the offence, during which numerous safety warnings were issued, as aggravating.[91] The absence of evidence of planning is taken as neutral or not relevant, rather than mitigating.

3. 718.21(c) Concealing of assets

Even more than par 718.21 (a) and (b), 718.21(c) leaves little ambiguity as to how it should factor into the sentencing analysis. Attempts to shelter assets from the reach of the sentencing court are an aggravating factor, otherwise this factor is simply not relevant rather than mitigating. However, this appearance of clarity is muddied when one looks at the two cases that have considered this paragraph. In each one, there was insufficient evidence to establish any concealing of assets beyond a reasonable doubt. In each case, the Crown was hampered in its ability to prove this factor because the relevant financial information was either non-existent or not made available, something the sentencing court noted with concern.[92] Given that financial information is usually within the control of the convicted organization, it seems unlikely this factor will ever be taken into account absent a voluntary disclosure from the organization. Though there is no example in the collection of cases, this only seems plausible where the admission is made following a change of management and the organi-

90 *R c Transpavé inc*, 2008 QCCQ 1598 at para 13 [*Transpavé*]; *R v Metron Construction Corporation*, 2013 ONCA 541 at para 117 [*Metron (ON CA)*]; *R v Stave Lake Quarries Inc*, 2016 BCPC 377 at para 49 [*Stave Lake Quarries*].

91 *CFG Construction (sentence)*, *supra* note 82 at paras 92–94.

92 *Metron (ON CA)*, *supra* note 90; *CFG Construction (sentence)*, *supra* note 82.

zation expects the cooperation with authorities will offset this aggravating factor.[93]

4. 718.21(d) Economic viability

When enacted, par 718.21(d) was not singled out as more important than the other factors, but it was a codification of a principle long recognized by the case law prior to the Westray amendments that fines should ideally be set at a level between a "slap on the wrist" and a "fatal blow". In the early cases decided under the new sentencing factors, however, paragraph (d) was relied upon to justify fine amounts and payment conditions that were within the organization's ability to pay, where its resources were limited.[94] In the Metron case, the precise effect of this factor was directly considered. In deciding to increase the fine imposed on the organization, the Court found that while the impact of a penalty on the survival of the organization had to be considered, s. 718.21(d) did not foreclose the possibility of imposing a fine that pushed an organization into bankruptcy.[95]

With regard to the application of this factor, there is a very clear divide in the cases between economic crimes and criminal negligence offences. In cases of criminal negligence, the financial situation of the organization is almost always a factor that is considered, though it does not always have a mitigating effect. In economic crime cases for the most part, there is little discussion of economic viability, if at all. Part of this is attributable to the generally larger size and financial clout of the organizations in the economic crime cases (to date, the criminal negligence cases have tended to involve small and medium-sized firms). For competition offences, the existence of the Immunity and Leniency Program[96] also influences how s. 718.21(d) is applied. This is because the Program places limits on the amount by which

93 While there are no cases in the collection where that offset is seen, we see in the cases that changes in management, as well as corporate reorganizations or changes in control, are often precipitators of voluntary disclosure. See for eg: *R. v. SLCI (Sentence)*, *supra* note 7; *R c BPR Triax inc*, 2017 QCCQ 4191 [*BPR Triax*].

94 *R c Transpavé inc*, 2008 QCCQ 1598 [*Transpavé*]; *Watts*, *supra* note 36

95 *Metron (ON CA)*, *supra* note 90 at paras 109–110.

96 The Program has existed in some form or another for nearly 20 years. It was recently updated in March 2019: Competition Bureau, "Immunity and Leniency Programs under the Competition Act", (15 March 2019), online: *Competition Bureau* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>. For a discussion of how the program works, see: Jennifer Quaid, *supra* note 40 at 150–153.

a financial penalty can be discounted. In the Domefoam case, the organization agreed to a fine it could not realistically pay based on its financial situation, because there was no scope under the Leniency Program to accept a lesser amount; the court nonetheless endorsed the full amount of the agreed fine.[97] This is a curious result that underscores the secondary position the 718.21 factors played in the early years following the Westray amendments and the tensions these created with the more detailed pre-existing rules applicable to sentences in competition cases where leniency was granted.[98]

Attention to the impact of financial penalties on economic viability has been raised in two contexts that fall outside the scope of the cases in the collection, but which may very well colour the way this factor is applied going forward. The first is a provincial regulatory matter where an organization argued that a substantial mandatory minimum penalty, applicable only to corporations, which threatened its economic viability and by extension the livelihood of its employees, could constitute cruel and unusual punishment contrary under s. 12 of the *Canadian Charter of Rights and Freedoms*.[99] In agreeing that the organization could make a s. 12 argument, the majority of the Quebec Court of Appeal disagreed with the Ontario Court of Appeal decision in Metron that 718.21(d) does not prohibit fines that threaten financial viability.[100] The case was recently heard by the Supreme Court of Canada, which reserved judgment.[101] The second context in which par. 718.21(d) may be relevant is in relation to the new remediation agreement regime (Part XXII.1 CrC), which states that one of the objectives of RAs is to protect third parties from suffering the negative economic

97 *Domfoam*, *supra* note 36 at paras 14, 21.

98 Justice Crampton notes the lack of effort by both the Crown and the defense to show how the sentence agreed under the Leniency Program was informed by the weighing of the factors in s. 718.21 CrC *Maxzone*, *supra* note 49 at paras 93–100.

99 *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 [the *Charter*]

100 *9147-0732 Québec inc c Directeur des poursuites criminelles et pénales*, 2019 QCCA 373 at para 130.

101 "Docket, Case file 38613, Attorney General of Quebec, et al. v. 9147-0732 Québec inc.", online: *Supreme Court of Canada* <https://www.scc-csc.ca/case-dossier/info/dock-regieng.aspx?cas=38613>. For a summary discussion of this case see: Jennifer Quaid, "Supreme Court: Can a corporation be subjected to cruel and unusual punishment?", (26 January 2020), online: *The Conversation* <https://theconversation.com/supreme-court-can-a-corporation-be-subjected-to-cruel-and-unusual-punishment-130147>.

impacts of a criminal conviction and sanction.[102] This latter regime could alter the interpretation of the scope of the economic viability factor going forward by setting expectations around what level of collateral economic impact on third parties is acceptable when a penalty imperils the financial health of an organization and by extension its employees.

5. 718.21(e) Costs to authorities

Par 718.21(e) requires that the cost incurred by public authorities responsible for the investigation and prosecution of the offence be accounted for in setting the level of fine. Organizational criminal liability cases tend to be complex and require substantial investigation unless there is early voluntary disclosure. Since investigation costs can be so high, early and full cooperation with authorities, particularly before formal charges are laid, is considered mitigating under this factor.[103] Similarly, in the rare cases where there is a full trial and conviction, there is usually no meaningful cooperation and the factor is treated as clearly aggravating.[104] However for those cases in between, where there is a plea at some point after some investigation has commenced, the cases have appeared to give credit for the plea under par 718.21(e) as evidence of cooperation and reduction of costs, even though a guilty plea is already a mitigating factor under general sentencing principles.[105] This creates a real risk of double counting[106] which is further amplified by the fact that a guilty plea imposes no obligation on the defense to provide evidence of the plausible costs avoided by a trial

102 S. 715.30(f) CrC. For a critical overview of the RA regime, see: Todd Archibald & Kenneth Jull, *supra* note 26 c 22; Jennifer Quaid, *supra* note 26 at paras 97–120.

103 *R v Niko Resources*, [2011] AJ No 1586 [*Niko Resources*]; *Griffiths Energy*, *supra* note 36.

104 *R c Technique Acoustique (LR) inc*, 2012 QCCQ 2250 [*Technique Acoustique*]; *Pétroles Global (sentence)*, *supra* note 84; *CFG Construction (sentence)*, *supra* note 82.

105 *Metron (ON CA)*, *supra* note 90 at para 119; *Stave Lake Quarries*, *supra* note 90 at para 52.

106 In Stave Lake Quarries, the plea is mentioned as a mitigating factor on its own and as part of the assessment of s. 718.21(e): *Stave Lake Quarries*, *supra* note 90 at paras 42 and 52. By contrast Justice Crampton was alert o the danger of double-counting in *Maxzone*, *supra* note 49 at para 98. He concluded that the guilty plea without more cooperation was a neutral factor for Maxzone because credit for the plea had already been counted as part of the leniency granted to it by the Crown under the Competition Bureau's Leniency Program.

whereas the Crown is expected to quantify its costs of investigation.[107] This latent ambiguity as to where the guilty plea is "counted" in the assessment of a sentence is apparent in the most recent JSS in the collection: SNC-Lavalin. In that case, the Crown highlighted the significant costs of the investigation and the prosecution and made no mention of the plea in relation to par 718.21(e).[108] By contrast, the defense considered that the plea, even a few weeks before a trial and after nearly 7 years of investigation, was a significant mitigating factor under 718.21(e) that would result in substantial savings; it also took the view that it had generated significant savings through cooperation with the RCMP and voluntary disclosures, including providing assistance in the identification of privileged documents.[109] In refusing to endorse the assessment of either party, the sentencing judge left the contrasting characterizations unresolved.[110]

A further consideration in the context of par 718.21(e) is the weight to be afforded to an organization that agrees to plead guilty where there are possible grounds for a *Charter* challenge under the unreasonable delay framework established by the Jordan[111] case. This factor was expressly noted as a mitigating factor in Stave Lake Quarries[112] and could become more common. Indeed, until the structural causes of court delays are addressed, it is entirely plausible that organizations will argue they deserve credit where complex prosecutions, especially in cases of fraud and corruption, have exceeded the applicable Jordan thresholds.[113]

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107 *Stave Lake Quarries*, *supra* note 90 at para 52. The judge states that he is unaware of the costs of the investigation but considers that the plea has saved substantial costs to the public by avoiding an 8-9 week trial.

108 *R. v. SLCI (Sentence)*, *supra* note 7 at para 9.33.

109 *Ibid* at para 10.51 to 10.56.

110 *Ibid* at paras 14, clause 5.

111 *R v Jordan*, 2016 SCC 27 [*Jordan*].

112 *Stave Lake Quarries*, *supra* note 90 at para 62.

113 Economic crimes prosecutions are increasingly vulnerable to Jordan applications because of the substantial length of time needed to build a case. Though SNC-Lavalin never presented such an application, it was certainly possible, especially after some of the key individual executives involved in the Libyan fraud successfully obtained stays of their charges because of unreasonable delay: *R c Kyres*, 2019 QCCS 454 [*Kyres*]; *R c Roy*, 2019 QCCQ 895 [*Roy*].

6. 718.21(f), Consideration of other penalties for the same conduct

Par 718.21(f), requires that regulatory penalties imposed on the organization or its representatives *for the same underlying conduct* be considered in determining the criminal sanction. The manner in which this factor has been reflected in the sentences varies by offense category. In competition and corruption cases, the absence of regulatory sanctions on the organization is treated as neutral or not relevant, likely because there is no obvious regulatory regime under which these offences can be sanctioned.[114] By contrast, in criminal negligence matters, where proceedings under labour standards and occupational health and safety are possible, the imposing of regulatory sanctions is treated as mitigating.[115] Criminal or other sanctions imposed on individual representatives or related corporate entities involved in the offence are usually treated as irrelevant or neutral.[116] In the Maxzone case, Justice Crampton warned specifically against allowing organizations to benefit from the sentences imposed on related entities or individuals for the same conduct, particularly where those sanctions were imposed by foreign jurisdictions.[117]

7. 718.21 (g) Prior convictions and sanctions imposed for similar conduct

Par 718.21 (g) is analogous to the criminal record factor for individuals and looks at previous convictions or regulatory sanctions imposed on

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114 Under the Competition Act, though anticompetitive collaboration among competitors may also be sanctioned civilly under section 90.1, this avenue is foreclosed where there is a proceeding brought under the criminal provision of s. 45.

115 In Metron, the fact that the president and sole shareholder of the organization had pleaded guilty to charges under the relevant occupational health and safety legislation was treated as a mitigating factor: *Metron (ON CA)*, *supra* note 90 at para 117. In CFG, the Court considered that a pending penal regulatory proceeding brought against the organization to be relevant factor. It considered the payment of an automatic and mandatory compensation amount under the applicable health and safety regime (CNESST) to be mitigating: *CFG Construction (sentence)*, *supra* note 82 at paras 119, 153.

116 *Maxzone*, *supra* note 49 at paras 108–109; *Pétroles Global (sentence)*, *supra* note 84 at para 72; *Stave Lake Quarries*, *supra* note 90. Though in Metron, the Court treated a regulatory sanction on an individual as mitigating, the individual was the sole shareholder of the organization, not simply an executive, making it much more analogous to a sanction imposed on the organization.

117 *Maxzone*, *supra* note 49 at para 108.

the organization or its representatives *for similar conduct*. Only two cases discuss this factor in any detail and in each case, the organization had many prior convictions for similar offences. Unsurprisingly the court in both cases treated this fact as aggravating.[118] In most cases, there was no evidence led on prior convictions and this factor was treated as not relevant. Five cases made specific reference to the fact the organization had no prior convictions, a factor that was treated as mitigating in three cases (2 criminal negligence and 1 foreign corruption)[119] and neutral in two competition cases.[120]

Unlike the other cases, the unreconciled submissions in the SNC plea provide a window into how far apart parties can be not only concerning the characterization of the facts but also on what facts to consider under these two heads. The Crown submitted that an agreement concluded between SNC and the World Bank to address allegations of corruption in Bangladesh (there was never a criminal charge or a conviction) was a relevant aggravating fact under par 718.21(h).[121] The defense countered that the World Bank debarment was not relevant because the Bank is not a regulatory body.[122] With regard to par 718.21(h), it submitted that neither SLCI nor any other SNC entity had been previously convicted of an offence, drawing a distinction between the corporate entities and an individual executive (Ben Aïssa), whom it characterizes as the instigator of the corruption scheme in Libya. Ben Aïssa pleaded guilty to corruption offences in Switzerland in 2014 (based on the same underlying conduct for which the company was pleading guilty to fraud) and use of forged documents in Quebec in 2018.[123] It is unclear why the defense chose to present this argument in relation to par 718.21(h) rather than (g).[124]

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118 *Maple Lodge Farms (sentence)*, *supra* note 66 at paras 30, 34; *CFG Construction (sentence)*, *supra* note 82 at paras 121–133.

119 *Metron (ON CA)*, *supra* note 90 at para 117; *Niko Resources*, *supra* note 103 at 64 (probation order); *Detour Gold*, *supra* note 36 at 49.

120 *Maxzone*, *supra* note 49; *Pétroles Global (sentence)*, *supra* note 84.

121 *R. v. SLCI (Sentence)*, *supra* note 7 at 9.35.

122 *Ibid* at 10.111.

123 *Ibid* at 10.59-10.63.

124 It is interesting to note that in discussing this factor no reference is made to Sami Bebawi, the SNC executive convicted by a jury of fraud, foreign corruption, money laundering and possession of illegal property only 3 days before the SCLI plea was entered in court. Bebwai was sentenced in early 2020: *R v Bebawi*, [2020] 2020 QCCS 22 [*Bebawi (sentencing)*]. though he has appealed both his conviction and his sentence: *Bebawi c R*, 2020 QCCA 20 [*Bebawi (leave to appeal)*].

The SNC plea deal raises two questions that may become more important if anti-corruption enforcement increases. First, it remains to be seen whether debarment from public tendering, not a criminal sanction but an administrative sanction imposed by government procurement agencies where an organization is convicted of a serious economic crime, will be weighed as a factor in future pleas. A further question arises now that Canada has enacted remediation agreements as a form of non-trial resolution of certain economic crimes (mainly corruption and fraud). Since it is expected that organizations will have the benefit of such a settlement only once[125], where an organization enters such a settlement and subsequently reoffends, will the settlement be considered a sanction for similar conduct under par (h)? Second, the defense's efforts to claim that the conduct of individuals convicted for conduct related to the offence for which the organization has been found guilty is not relevant to the determination of the organization's offence is unusual and is at odds with the text of the provision. Unlike Justice Crampton's insistence that the organization not *benefit* from sanctions imposed in individuals, the argument of the defense in SLCI is that the company should not be tarred with the same brush as culpable individuals who worked for it and whose participation in the criminal conduct provides the legal basis for finding the organizational guilty (and hence why it is being sanctioned).

8. 718.21 (h) Internal discipline imposed by the organization

Par 718.21 (h) is slightly different from par (f) and (g) because it considers the impact of measures taken *by the organization* against its representatives for their role in the commission of the offence. This factor examines what internal disciplinary action has been taken against individuals, regardless of level, where they have contributed to the occurrence of the offence. While on its face this factor has potential overlap with par 718.21(k), the cases show that this factor has focused more narrowly on whether these individuals are still with the organization or whether they have been forced out. Termination of employees and executives involved in the offence is

[125] White, Madeleine, "'Politics Briefing: Prosecutor Kathleen Roussel on her reasoning for no deal in the SNC-Lavalin case'", (28 February 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/politics/article-politics-briefing-prosecutor-kathleen-roussel-on-her-reasoning-for-no/.>.

treated as mitigating.[126] Failure to terminate or otherwise discipline employees is aggravating.[127] In the SNC case, the Crown and the defense disagreed on how to characterize the fact that the entire senior management and board was changed following the commission of the offence. The Crown did not consider the departures as mitigating because they were not imposed as a penalty[128]; the defense claimed the fact that none of the employees involved in the offence were still with company combined with a complete turnover of the senior leadership team, however accomplished, was worthy of credit.[129]

9. 718.21 (i) Restitution paid

Over the past few years, especially since the enactment of the *Canadian Victims' Bill of Rights*[130] in 2015, there is increased attention on being responsive to the concerns of victims in criminal justice matters. For the moment, however, few organizations voluntarily pay formal restitution to victims for harm caused or loss incurred. Par 718.21(i) has been applied to the determination of a sentence in two cases to date.[131] It should be noted that par (i) is intended to credit organizations who have already paid restitution prior to being sentenced. It obviously does not extend to restitution that is ordered as part of a sentence being imposed (usually under par. 732.1(3.1)a) CrC). This paragraph only applies to amounts paid or payable.[132] Contingent liabilities under, for example, pending class action lawsuits, are not considered.[133] In Dessau and Genivar cases, credit was given to each company for the payments they made as part of Quebec's *Voluntary Reimbursement Program*, a temporary mechanism set up in the autumn of

126 *Griffiths Energy*, *supra* note 36 at para 15; *Pétroles Global (sentence)*, *supra* note 84 at para 72; *BPR Triax*, *supra* note 93 at para 51.

127 *CFG Construction (sentence)*, *supra* note 82 at paras 134–136.

128 *R. v. SLCI (Sentence)*, *supra* note 7 at para 9.36.

129 *Ibid* at paras 10.65-10.66. The defense concedes that a key executive involved in the offence, Ben Aïssa, had already left the company when it discovered the corruption scheme in Libya.

130 *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

131 *Detour Gold*, *supra* note 36 at paras 35–36; 50–51; *CFG Construction (sentence)*, *supra* note 82 at 137; 153.

132 In Griffiths Energy, the sentence did not take into account an application for a forfeiture order by the Crown, which was to be decided at a later date: *Griffiths Energy*, *supra* note 36 at paras 34, 38.

133 *Pétroles Global (sentence)*, *supra* note 84 at para 72.

2015 to enable companies to pay back to municipalities and other public entities that suffered losses through bribery and fraud.[134] It is interesting to note, however, that the amounts paid by individual companies to the VRP were never made public and thus neither settlement indicates the actual amount paid, though it would have certainly factored into the calculation of the fine.

10. 718.21 (j) Post-offence corrective and compliance measures

One of the most surprising findings of the study was the frequency with which par 718.21(j) was considered. It was applied in 11 cases, tied with par 718.21(b) for the most applied factor. More interestingly, it was the most significant mitigating factor, applied in 8 cases[135] (9 including the SNC plea, since both parties agreed this factor was mitigating, though differed as to the weight to be accorded to it[136]). In the remaining two cases, the factor was treated once as an aggravating factor, where there was a sustained and marked failure to adopt meaningful corrective policies[137] and once as a neutral factor where the court noted that though the organization had taken measures to discuss compliance in meetings and with staff, it had not adopted any written compliance policies or code of ethical conduct.[138] In addition, the Genivar case gave credit for compliance measures already taken.[139]

This prevalence of this factor is, of course, a reflection of the typical length of time between the discovery of the offence and the imposing of a sentence on an organization. However, it is also noteworthy that in every case except SNC-Lavalin and CFG, whether through a JSS or a decision of the court, post-offence measures taken by the organization were considered a

134 *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, L.R.Q. R-2.2.0.0.3. The program was terminated on 15 December 2017.

135 *Transpavé*, *supra* note 90; *Niko Resources*, *supra* note 103; *Griffiths Energy*, *supra* note 36; *Maple Lodge Farms (sentence)*, *supra* note 66; *Stave Lake Quarries*, *supra* note 90; *BPR Triax*, *supra* note 93; *Detour Gold*, *supra* note 36; *R. v. RCMP*, *supra* note 64.

136 *R. v. SLCI (Sentence)*, *supra* note 7 at paras 9.38-9.40; 10.70-10.78.

137 *CFG Construction (sentence)*, *supra* note 82 at paras 138–146.

138 *Pétroles Global (sentence)*, *supra* note 84 at para 72.

139 *R c Genivar inc (maintenant WSP Canada Inc)*, 2019 QCCS at para 5 [*Genivar (agreed statement of facts)*]. There is no mention of compliance in Dessau because the company was in the process of being wound up and had ceased all operations.

sufficient response to the wrongdoing, thereby obviating the need for a probation order under par 732.1(3.1) CrC. While there is little doubt that it is socially desirable for organizations to proactively correct deficiencies or weaknesses in the organization's practices that may have contributed to the commission of the offence, mitigating credit is supposed to be reserved for post-offence measures that go beyond compliance with the law. As such, courts are expected to be attentive to the danger of rewarding organizations for merely complying with legally mandated norms with which they should have complied at the time of the offence. In the RCMP case, a mostly joint submission on which the Crown and defense nevertheless disagreed on the consideration of this factor, the court held that post-offence conduct meets the threshold where an organization does something voluntarily in response to the offence; the celerity of the response is relevant too, particularly if it happens prior to the laying of charges.[140] In general, credit is given for the totality of post-offence conduct and is taken as mitigating, even where the organization's compliance level was below the legal standard at the time of the offence.[141]

B. Section 732.1(3.1)

The objective of s 732.1(3.1) CrC was to encourage innovation in sentencing given the recognized limitations of monetary penalties, especially in fostering meaningful rehabilitation. The addition of a flexible, probation order power therefore sought to expand the range of measures available to respond to organizational wrongdoing in ways that promote compliance and encourage the organization to address the root causes of blameworthy conduct. There was also an expectation that this power would promote greater efforts at restitution for harm done or loss incurred through the organization's wrongdoing.

So far, this provision has been used comparatively little. Probation orders were issued in six cases: Niko Resources, Technique Acoustique, Maple Lodge Farms, RCMP, CFG and SLCI. Of these, three were targeted

140 *R. v. RCMP*, *supra* note 64 at paras 28–30.

141 In some cases, the post-offence response measures were considerable and reached a superior standard to what was legally required, for eg *Detour Gold*, *supra* note 36. In others, it is not clear how the organization had, through the mere elimination of inherently dangerous practices, exceeded the legal requirements for a safe workplace: *Stave Lake Quarries*, *supra* note 90.

in scope. In Niko Resources, the jointly proposed 3-year probation order provided for audits to ensure the company maintained its anti-corruption measures put in place prior to sentencing.[142] In Technique Acoustique, an organization convicted of fraud for its role in a false-invoicing scheme was subject to a one-year probation order during which it had to provide to the Quebec building regulator a list of its worksites and sub-contractors.[143] In the RCMP case, the probation order set out the jointly agreed details of financial contributions to be made by the RCMP to educational trust funds established for the children of the officers killed, as well as to a scholarship fund and two charities.[144]

Until 2019, the Maple Lodge Farms case stood out as the only detailed probation order setting out a comprehensive set of corrective measures to be undertaken by the organization, under the supervision of a monitor, for a three-year period.[145] As a sentence imposed in a regulatory proceeding, it was unclear whether it was an outlier that was the product of an unusual set of facts: a company with a poor compliance track record and many previous convictions that readily acknowledged its responsibility and cooperated extensively with the Crown to craft a joint submission on sentence.[146]

In 2019, two very different cases also culminated in probation orders containing significant compliance obligations to be completed under the supervision of an independent monitor. In CFG, the organization was found guilty of criminal negligence causing death following a trial and was sentenced by the court.[147] The probation order imposed was designed to address serious and persistent shortcomings in managing workplace safety that the organization had not addressed in any meaningful way despite many warnings and previous regulatory convictions.[148] In setting out the terms of the compliance order, the court drew on the detailed trial record as the sentence was contested. In SLCI, a wholly owned subsidiary of

142 *Niko Resources*, *supra* note 103 at para 64 (JSS).
143 *Technique Acoustique*, *supra* note 104 at para 25.
144 *R. v. RCMP*, *supra* note 64 at paras 39(b)(i)-(iii).
145 *Maple Lodge Farms (sentence)*, *supra* note 66 Appendix C.
146 *Ibid* at 37–46, 53.
147 *R c CFG Construction inc*, 2019 QCCQ 1244 [*CFG Construction (condamnation)*]; *CFG Construction (sentence)*, *supra* note 82. Leave to appeal both decisions is pending: *CFG Construction inc. c. R.*, *supra* note 82.
148 *CFG Construction (sentence)*, *supra* note 82 at para 190.

SNC-Lavalin Group, pleaded guilty to one count of fraud.[149] The jointly submitted sentence consisted of a monetary penalty of CDN $280 million dollars and a three-year probation order during which SCLI was subject to the obligation to comply with a number of specific conditions related to corporate compliance, internal controls and the appointment of an independent monitor, but with an unusual twist.[150] Legally, only SLCI is subject to the probation order and the threat of sanction from the court in the event it breaches the order. However, because as a matter of internal governance, it is SNC-Lavalin Group that manages and controls corporate compliance, including anti-corruption policies, procedures and training, the order enjoins SLCI to "cause SNC-Lavalin Group" to do the items in the probation order.[151]

At it stands, it is not clear whether these two most recent cases are a sign that probation orders will become more common or an unusual blip. For the moment, however, the existing probation orders have provided a very limited window into the range of possible corrective measures, making it hard to draw any conclusions, save one. The development of non-fine sanctions is happening indirectly under par. 718.21(j). This matters because the recognition of pre-sentencing measures means that as a practical matter, what constitutes adequate compliance and corrective measures is dictated by the choices individual organizations make. While some of the measures may be the product of cooperation between the Crown and the defence, they do not need to be.

C. Reflecting on the larger picture: the limits using legislation to reform sentencing practice

The Westray reform to sentencing was based on the belief that legislation could provide the guidance needed to bring consistency, transparency and creativity into sentencing practice. The discussion in the previous two sections indicates that the guidance for courts set out in s. 718.21 and 732.1(3.1) has advanced the goals of the reform in a limited and uneven way. The question is why did it turn out this way? In exploring the answer to this question, I look beyond the substantive content of the provisions

149 *R. v. SLCI (Sentence)*, *supra* note 7 at paras 6, 14.
150 *Ibid* at 14.
151 *Ibid* at paras 14, Appendix A.

taken individually and consider factors that influenced the impact of the reform as a whole. Two themes emerge. Both point to the inherent limits of using legislation to bring about the effects sought by the reform.

1. The limits of legislation as effective guidance for organizational sentencing

As a general proposition, legislation is drafted in a style adapted to its function of informing citizens of the principles and rules that structure different areas of human activity. Though the precise written form that legislation takes can vary, the aim is to be as clear and as concise as possible. That said, the need to shorten and simplify sometimes complex concepts means that legislative rules are almost never operational on their own because it is impractical to provide explicitly for the nuances and details needed to give them concrete effect on the ground. This is certainly the case in Canadian sentencing where the principles codified in Part XXIII CrC are given concrete expression through the exercise of judicial discretion, which determines their appropriate weight and applicability in a given case.

At the heart of the Westray law was the sense that the general principles in Part XXIII were not adequate in the specific context of organizational sentencing because they did little to assist judges in assembling a picture of the organizational offender. It was believed that consolidation of organization-specific sentencing factors would equip courts with what they needed to assess proportionality by reference to what was most relevant in an organizational context.

What the cases show, however, is the effort at guidance provides only high-level direction, mostly as to what factors ought to be taken as mitigating and which ought to be taken as aggravating. Below the surface, the provisions raise more questions than they answer because they lend themselves to multiple interpretations where there is no obvious "correct" choice. Even allowing for the fact that the provisions are meant to allow for application to a plurality of facts and circumstances, many of the them cannot be applied without first resolving how the factor is to be delineated, calculated or evaluated, leaving gaps to be filled, somewhat unevenly, on a case by case basis. This underscores something the reform appears to have overlooked, that giving effect to "organizational" sentencing factors requires at least some knowledge and analytical tools adapted to the organizational context and these are not usually analogous to the intuitions about human

behaviour that we assume every judge is qualified to make. Without an independent understanding how business decisions are made and the basic characteristics of different organizational structures, it is difficult to assess the relative merits of competing methods of assessing the facts of a case. This suggests that reliance on legislative provisions alone to develop a consistent and transparent process for organizational sentencing was ill-advised since the level of detail that could be provided through this means was extremely limited relative to the extent of knowledge that the cases indicate is required.

2. The limits of legislation in reaching the relevant decision-makers

As we noted in the description of the collection, of the 20 cases that led to a conviction, 14 were guilty pleas. This is not particularly surprising in and of itself as it is consistent with wider trends in criminal justice. What is more significant is the high number of those cases (71%) where the plea was accompanied by a joint submission on sentence (JSS). This is significant because sentencing judges are required to afford a high degree of deference to a negotiated settlement of a case to encourage the Crown and the defence to resolve cases by agreement rather than through contested proceedings. The Supreme Court of Canada recently underscored the critical importance of trial judges exercising restraint before disturbing these settlements, without which the criminal justice system would be rapidly overwhelmed.[152] In clarifying the appropriate test to apply when considering whether or not to depart from a JSS, the court elected to adopt the so-called "public interest" test:

> Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. [...]
>
> Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. *This is an undeniably high threshold* — and for good reason [...] [My emphasis].[153]

[152] *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 SCR 204, par 25, 35.
[153] *Ibid*, at par 32, 34.

As is readily acknowledged in Anthony-Cook, applying this test makes it entirely possible and indeed probable that a sentencing judge could arrive at a different opinion as to what constitutes an appropriate and fit sentence than the one jointly agreed by parties, without the joint sentence reaching the threshold of bringing the administration of justice into disrepute. For criminal cases involving individuals, the existence of this gap is tolerable. Even with the prevalence of joint submissions, the total volume of cases is more than sufficient to generate a critical mass of judicial decisions to establish robust interpretations and applications of the general sentencing principles and factors set out in Part XXIII CrC.

The same cannot be said of the organization-specific sentencing principles given the small number of cases that end up in the courts. Even allowing for the fact that the precise standard set out in Anthony-Cook was not evenly applied across Canada prior to 2016[154], the objective sought in codifying organization-specific aggravating and mitigating factors in s. 718.21 CrC – that the existence of a coherent list of factors would encourage a more systematic and transparent evaluation of relevant factors than would otherwise be the case – seems hopelessly optimistic given the prevalence of JSS in organizational sentencing.

A cursory analysis of the collection confirms that the interpretation of the 718.21 factors and the weight to be accorded to them has, with few exceptions, been driven by what the *parties* have seen fit, not the court. The failure to recognize the prevalence of JSS in organizational sentencing and consequently, the outsized importance of the Crown and the defence in giving meaning to the 718.21 factors and the options for non-fine measures under s. 732.1(3.1) has produced a sentencing process where the guiding principles evolve largely outside judicial control. Seen in this light, the reform was ill-suited to its objectives since it provided direction to only one group – judges, when the success of the reform would in fact depend far more on the exercise of discretion by prosecutors and their negotiating power vis-à-vis defense counsel. Even allowing for the fact that sentencing is intended to be a particularized process and thus highly dependent on

[154] In the major jurisdictions where most of the decisions in our collection of cases were decided (Quebec, Ontario, Federal Court), the degree of deference afforded to a JSS was already very high. Since 2016, courts tend to make specific reference to Anthony-Cook where there is a JSS: *Stave Lake Quarries*, *supra* note 90; *R. v. SLCI (Sentence)*, *supra* note 7.

the facts of the case, the prevalence of JSS in organizational sentencing has produced subtle impacts that undermine the goals of consistency and transparency sought through the Westray reforms.

There is a further worrying trend on the part of sentencing courts endorsing JSS, particularly where they render decisions orally, to summarize the joint position of the parties without indicating clearly whether the court is formally adopting the position of the parties or whether it is simply relating those positions for the record on the basis that they are entitled to deference where they do not bring the administration of justice into disrepute. This is particularly problematic where the parties have submitted a joint sentence but have made separate submissions on sentence. In these cases, it is difficult for those reading the decision to distill the precise basis on which the sentence was justified. This undermines confidence that determination of the sentence by the parties is a process that, even if not perfect, should be expected to lead to a sentence that is appropriate and just in most cases.[155]

D. Moving forward: some thoughts on how to fill the guidance gap

In trying to make sense of the limited impact the reform had in the cases in this study, we can see that the design of the reform failed to account for how enforcement reality would interact with the new rules in the Criminal Code. First, legislation alone is an inadequate means of providing guidance because it cannot provide the detail required to operationalize discretionary decision-making, especially where it alters established practices and is expected to promote creativity and innovation. Second, in targeting judges and courts, the reform failed to account for the significant and often determinative role that prosecutors and defense counsel play in crafting the vast majority of sentences. With an ambit this narrowly focused, the concrete impact of the reform was destined to be very limited.

That said, just because s. 718.21 and 732.1(3.1) fell short of their mark does not mean that the objectives of the reform are unattainable, only that they will require a different approach. While the development of this

[155] The Supreme Court observes in Anthony-Cook that most joint submissions are "unexceptional" and are readily approved by the sentencing court: *R. v. Anthony-Cook*, *supra* note 9 at para 25.

approach will take time and analysis, the results of this study suggest that the key to developing a consistent, transparent and innovative sentencing practice lies in our ability to fill the current "guidance gap" in organizational sentencing. Without foreclosing any future lines of inquiry, here are two measures that show considerable promise.

Training and education of judges and prosecutors: Since organizations are different from individuals, meaningful implementation of the reforms depends on the ability of judges and prosecutors to make appropriate assessments of the facts in a manner that is informed by organization structure, business decision-making and organization culture. While some may already be well-versed in these matters, training would expand the pool of judges and prosecutors who can undertake a sophisticated analysis of organizational sentencing factors. Greater knowledge and understanding of organization dynamics would also position them to make greater use of the probation order power, where appropriate.

Publication of specialized enforcement guidelines: Guidance directed solely at judicial discretion can take us only so far in altering sentencing practice when negotiations between prosecutors and the defense matter just as much, if not more in the determination of a sentence. Making use of non-binding administrative guidelines, already used in areas such as tax and competition law, is a means of injecting more consistency and transparency into what is currently, an opaque process. Providing in-depth explanations of how enforcement authorities expect to interpret and apply general factors, including examples of how the factors might apply in a range of different circumstances, also contributes to public confidence that organizational sentencing is fair and guided by the public interest. Guidelines could also be used to establish in advance the accepted methods of calculation of fines and set standards for the nature and quality of financial information required to substantiate claims made in relation to the factors. Enforcement guidelines could also set out expectations for what constitutes sufficient cooperation with authorities, and identify best practices and standards against which post-offence conduct would be measured and which could, where required, be used to craft the terms of a probation order.

*
* *

Governments have always been motivated to claim that the legislation they table will bring about the reforms they champion. The impetus to characterize a legislative enactment as the culmination of a successful "law reform" process has only increased now that political polarization has made the legislative process more fraught and uncertain.

Once the political battle of enactment is won, however, it is largely taken for granted that the accomplishment of the objectives prompting the reform will occur as a matter of course. The details of implementation are all too often an afterthought to which little public attention is paid beyond vague references to "such rules and regulations as may be required". And yet, the prospect of new legislation on its own inexorably producing tangible effects on the ground belies common sense. Legislative texts rarely contain all the information and guidance to be fully operational. This is particularly true where law reform alters rules whose application is modulated by the exercise of enforcement discretion and the conduct of those subject to the law.

The observations from the study indicate that for this kind of reform to be successful, it must be attentive to enforcement reality. This calls for a modified approach where the top-down adoption of rules is complemented by more detailed guidance to support those expected to bring about concrete change on the ground.

Appendix A – Consolidated Summary Overview of Federal Sentencing Decisions (2004-2019) (*Federal Collection*)

Case name	year	offence type	trial	Plea	ASF	JSS	jud. Sentence	oral / written	viability not issue	insolvent / wound up	fine	base fine	surcharge	restitution	probation	pre-sentence correction	duration	monitor	charitable donation
Watts	2005	CFPOA		1		1		oral	1		1	$25,000.00							
Transpavé	2008	Crim neg		1		1		written	1		1	$100,000.00	1			1			
Construction Exekut	2011	Fraud, false documents		1			1	written		1	1	$2,730,840.00							
Niko	2011	CFPOA		1	1	1		written	1		1	$8,260,000.00	1		1	1	3		
Technique Acoustique	2012	tax fraud	1				1	written	1		1	$190,256.00			1		1		
Domfoam	2012	45 CA		1	1	1		oral		1	1	$6,000,000.00				1			
Vallefoam								idem				$6,500,000.00							
Maxzone	2012	46 CA		1		1		written	1		1	$1,500,000.00							
Constructions GTRL	2012	47 CA		1			1	written			1	$50,000.00							
Entreprises de Construction OPC												$25,000.00							
Acoustique JCG												$25,000.00							
Griffiths	2013	CFPOA		1		1		oral	1		1	$9,000,000.00	1			1			
Furukawa	2013	45 CA		1				oral	1		1	$5,000,000.00				1			
Metron	2013	crim neg		1			1	written	1		1	$750,000.00							
Maple Lodge Farms	2014	fed reg	1			1		written	1		1	$80,000.00	1		1	1	3	1	

Case name	year	offence type	trial	Plea	ASF	JSS	jud. Sentence	oral / written	viability not issue	insolvent / wound up	fine	base fine	surcharge	restitution	probation	pre-sentence correction	duration	monitor	charitable donation
Pétroles Global	2015	45 CA	1				1	written	1		1	$1,000,000.00							
Stave Lake	2016	crim neg		1	1	1		written	1		1	$100,000.00	1			1			
BPX-Triax	2017	Influencing a municipal official		1	1		1	written	1		1	$100,000.00				1			
Century Mining	2017	crim neg	1				1	oral		1	1	$200,000.00				0			
Detour Gold	2017	crim neg		1	1	1		oral	1		1	$1,400,000.00	1	1		1			1
RCMP	2018	CLC	1				1	written	1		1	$100,000.00			1	1			1
Dessau	2019	47 CA				1		endorse		1	1	$1,900,000.00		1					
Genivar	2019	47 CA				1		endorse	1		1	$4,000,000.00		1		1			
CFG Construction	2019	crim neg	1				1	written	1		1	$300,000.00	1		1		3	1	
SNC Construction Limited	2019	fraud		1	1	1		written but basically endorse	1		1	$280,000,000.00			1	1	3	1	
TOTALS			**6**	**14**	**6**	**12**	**9**	**0**	**17**	**4**	**22**	**$13,173,443.84***	**7**	**3**	**6**	**12**	**2.6**	**3**	**2**

* The fine column is an average, not a total.

Appendix B – Sentencing Decisions by Category of Offence

Table B1 – CFPOA and fraud offence category

Case name	year	offence type	trial	Plea	ASF	JSS	jud. Sentence	oral / written	viability not issue	insolvent / wound up	fine	base fine	surcharge	restitution	probation	pre-sentence correction	duration	monitor	charitable donation
Watts	2005	CFPOA		1		1		oral	1		1	$25,000.00							
Construction Exekut	2011	Fraud, false documents		1			1	written		1	1	$2,730,840.00	0	0	0	0			
Niko	2011	CFPOA		1	1	1		written	1		1	$8,260,000.00	1		1	1	3		
Technique Acoustique	2012	tax fraud	1				1	written	1		1	$190,256.00			1		1		
Griffiths	2013	CFPOA		1		1		oral	1		1	$9,000,000.00	1			1			
BPX-Triax	2017	Influencing a municipal official		1	1		1	written	1		1	$100,000.00	0	0	0	1			
SNC	2019	fraud		1	1	1		written but basically endorse	1		1	$280,000,000.00			1	1	3	1	
TOTALS			**1**	**6**	**3**	**4**	**3**	**0**	**6**	**1**	**7**	**$42,900,870.86***	**2**	**0**	**3**	**4**	**2.333**	**1**	**0**

* The fine column is an average, not a total.

Table B2 – Competition offence category

Case name	year	offence type	trial	Plea	ASF	JSS	jud. Sentence	oral / written	viability not issue	insolvent / wound up	fine	base fine	surcharge	restitution	probation	pre-sentence correction	duration	monitor	charitable donation
Maxzone	2012	46 CA		1		1		written	1		1	$1,500,000.00	0	0	0	0			
Domfoam	2012	45 CA		1	1	1		oral		1	1	$6,000,000.00	0	0	0	1			
Vallefoam												$6,500,000.00							
Constructions GTRL	2012	47 CA		1			1	written			1	$50,000.00	0	0	0	0			
Entreprises de Construction OPC												$25,000.00							
Acoustique JCG												$25,000.00							
Furukawa	2013	45 CA		1				oral	1		1	$5,000,000.00	0	0	0	1			
Pétroles Global	2015	45 CA	1				1	written	1		1	$1,000,000.00							
Genivar	2019	47 CA				1		endorse	1		1	$4,000,000.00		1		1			
Dessau	2019	47 CA				1		endorse		1	1	$1,900,000.00		1					
TOTALS			**1**	**4**	**1**	**4**	**2**	**0**	**4**	**2**	**7**	**$2,600,000.00**	**0**	**2**	**0**	**3**	#####	**0**	**0**

* The fine column is an average, not a total.

Table B3 – Criminal negligence offence category

Case name	year	offence type	trial	Plea	ASF	JSS	jud. Sentence	oral / written	viability not issue	insolvent / wound up	fine	base fine	surcharge	restitution	probation	pre-sentence correction	duration	monitor	charitable donation
Transpavé	2008	Crim neg		1		1		written	1		1	$100,000.00	1	0	0	1			
Metron	2013	crim neg		1			1	written	1		1	$750,000.00							
Stave Lake	2016	crim neg		1	1	1		written	1		1	$100,000.00	1	0	0	1			0
Century Mining	2017	crim neg	1				1	oral		1	1	$200,000.00	0	0	0	0			
Detour Gold	2017	crim neg		1	1	1		oral	1		1	$1,400,000.00	1	1	0	1	0		1
CFG Construction	2019	crim neg	1				1	written	1		1	$300,000.00	1		1		3	1	
TOTALS			**2**	**4**	**2**	**3**	**3**	**0**	**5**	**1**	**6**	**$475,000.00***	**4**	**1**	**1**	**3**	**1.5**	**1**	**1**

* The fine column is an average, not a total.

Table B4 – Federal regulatory offence category

Case name	year	offence type	trial	Plea	ASF	JSS	jud. Sentence	oral / written	viability not issue	insolvent / wound up	fine	base fine	surcharge	restitution	probation	pre-sentence correction	duration	monitor	charitable donation
Maple Lodge Farms	2014	fed reg	1			1		written	1		1	$80,000.00	1		1	1	3	1	
RCMP	2018	CLC	1				1	written	1		1	$100,000.00			1	1			1
TOTALS			**2**	**0**	**0**	**1**	**1**	**0**	**2**	**0**	**2**	**$90,000.00***	**1**	**0**	**2**	**2**	**3**	**1**	**1**

* The fine column is an average, not a total.

Appendix C – Analysis of s. 718.21 factors

Case name	offence type	a – advantage realized					b – planning, complexity					c – attempt to conceal assets					d – econ viability & employment					e – cost to public authorities					f – reg or other penalty for offence					g – past conviction or reg sanction					h – internal penalty by org on reps					i – restitution paid (order or voluntary)					j – measures taken since offence				
		C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR	C	A	N	M	NR
Watts	CFPOA																				1						1				1																				
Transpavé	Crim neg	1			1		1			1		1				1	1			1						1					1								1					1	1			1		
Construction Exekut	Fraud	1		1			1	1				1					1				1	1	1			1																								
Niko	CFPOA						1	1				1				1	1				1	1			1					1	1			1											1			1		
Technique Acoustique	tax fraud	1	1				1	1									1				1	1	1			1					1								1											
Domfoam	45 CA	1	1				1	1									1		1																														
Vallefoam																																																		
Maxzone	46 CA	1					1	1				1									1	1		1			1		1			1									1				1					
Constructions GTRL	47 CA	1	1				1	1									1			1		1	1								1														1					
Entreprises de Construction OPC																																																		
Acoustique JCG																																																		
Griffiths	CFPOA	1															1				1	1			1											1			1		1			1			1			
Furukawa	45 CA	1		1			1	1									1				1																												
Metron	crim neg	1					1					1					1				1	1			1		1			1	1			1		1		1							1				
Maple Lodge Farms	fed reg																														1	1												1			1		
Pétroles Global	45 CA	1	1				1	1								1	1				1	1	1			1		1						1	1			1		1			1		1			1		
Stave Lake	crim neg	1				1	1				1	1				1	1				1	1			1		1			1				1									1	1			1		
BPX-Triax	Influence – municipal official	1					1	1								1	1				1	1			1		1			1	1			1		1			1				1	1			1		
Century Mining	crim neg																1				1																												
Detour Gold	crim neg					1					1	1				1	1				1	1			1		1			1				1				1	1			1	1			1		
RCMP	CLC																1				1																								1			1		

Case name	offence type	a – advantage realized					b – planning, complexity					c – attempt to conceal assets					d – econ viability & employment					e – cost to public authorities					f – reg or other penalty for offence					g – past conviction or reg sanction					h – internal penalty by org on reps					i – restitution paid (order or voluntary)					j – measures taken since offence				
CFG Construction	crim neg	1	1				1	1				1		1			1				1	1	1				1	1				1	1				1	1				1			1		1	1			
SNC Construction Limited*	fraud																																																	
	Crown	1	1				1	1				1				1	1				1	1	1		0		1		1			1	1		0		1		1			1			1			1		
	Defence	1	1				1	1				1				1	1			1	0	1	0		1		1		0		1	1	0		1		1		0	1	1			1	0	1			1		
	Average	1	1				1	1				1				1	1			1	1	1	1		1		1		1		1	1	1		1		1	1		1	1			1	1	1			1		
TOTALS (without SNC)		**13**	**5**	**2**	**1**	**2**	**13**	**10**	**0**	**1**	**2**	**8**	**0**	**1**	**0**	**6**	**16**	**0**	**1**	**2**	**15**	**12**	**5**	**1**	**5**	**0**	**11**	**1**	**2**	**1**	**4**	**10**	**2**	**1**	**3**	**3**	**5**	**1**	**1**	**3**	**4**	**5**	**0**	**1**	**3**	**5**	**11**	**1**	**1**	**8**	**0**
TOTALS (with SNC average)		**14**	**6**	**2**	**1**	**2**	**14**	**11**	**0**	**1**	**2**	**9**	**0**	**1**	**0**	**7**	**17**	**0**	**1**	**3**	**16**	**13**	**6**	**1**	**6**	**0**	**12**	**1**	**3**	**1**	**5**	**11**	**3**	**1**	**4**	**3**	**6**	**1**	**2**	**4**	**4**	**6**	**0**	**2**	**4**	**5**	**12**	**1**	**1**	**9**	**0**
percentages (without SNC)		65	25	10	5	10	65	50	0	5	10	40	0	5	0	30	80	0	5	10	75	60	25	5	25	0	55	5	10	5	20	50	10	5	15	15	25	5	5	15	20	25	0	5	15	25	55	5	5	40	0
percentages (with SNC)		70	30	10	5	10	70	55	0	5	10	45	0	5	0	35	85	0	5	15	78	65	28	5	28	0	60	5	13	5	25	55	13	5	18	15	30	5	8	20	20	30	0	8	20	25	60	5	5	45	0

LEGEND:
C = Considered
A = Aggravating
N = Neutral
M = Mitigating
NR = Not relevant