

Canadian Corporate Criminal Liability in
Workplace Fatalities: Evaluating Bill C-45

by

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Abstract

The purpose of this research is to examine the effectiveness of the Bill C-45 amendments to the Criminal Code in addressing workplace fatality incidents. This research involved both qualitative and quantitative research and utilized two research methods. The first method involved a secondary analysis of thirty-eight Incident Investigation Reports completed by WorkSafeBC. These were supplemented with additional case information about these incidents provided via the Freedom of Information offices in British Columbia. The second method utilized nine semi-structured interviews with respondents in the field of occupational health and safety and corporate criminality who were familiar with the Bill C-45 amendments. The study found that employers could be found liable in half of the cases examined; that there appeared to be unique characteristics of British Columbia that effect the use of criminal charges; that the criminal law is not very effective in cases of criminal negligence for workplace fatality; and that improvements could be made to the criminal law.

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Chapter One: Introduction

In 1992 the Westray coal mine in Nova Scotia, exploded, killing 26 workers. This was a landmark case that brought to light the dangerous working conditions faced by workers in the mining industry. This led to the passage of Bill C-45, in 2003. This bill was referred to as the “Westray Bill” (United Steelworkers, 2007). Bill C-45 was meant to make it easier to charge corporations for harms against their employees. Canada already had criminal legislation in place that could apply to these forms of corporate crime, but the enforcement of these laws proved to be very difficult.

This thesis will examine how often the amendments put forth in bill C-45 have been used in British Columbia. Early evidence suggests it is rarely used, so the thesis will also explore why this law has not been used more often. The research will focus on workplace fatalities because these events are the most serious.

British Columbia was chosen due to its high number of workplace deaths and injuries relative to the rest of the country. British Columbia was also selected due to its large population, as well as the high proportion of accidents causing death in comparison to death due to occupational disease and illness compared to other provinces. The cause of death is important because it is easier to attribute corporate liability to accident related deaths than to occupational disease and illness. This is because the length of time between the event and death for occupational disease and illness can make it difficult to attribute causality.

Chapter Two: Literature Review

Defining Corporate Crime

Crimes endangering employees fall under the category of *corporate crime*. There has been much discussion over the proper way to define corporate crime (Snider, 1993; McMullan, 1992; Slapper and Tombs, 1999). However, this paper will use the definition put forth by Laureen Snider (1993), as it covers the nature and complexity of these crimes the best. Snider defines corporate crime as, “the illegal acts of omission or commission by an individual or group of individuals in a legitimate formal organization in accordance with the operative goals of the organization, which have serious physical or economic impact on employees, consumers, or the general public” (Snider, 1993:15; McMullan, 1992:22). This paper focuses on crimes arising out of the employment relationship, namely crimes against employees. Examples of these crimes are failures to provide information and training, failures to provide safe plants and/or equipment, and refusal to properly carry out safety inspections (Slapper and Tombs, 1999; McMullen, 1992).

It can be a challenge to obtain reliable data in the area of corporate crime. Some of the challenges deal with conceptualizing victimization as well as with defining and recording what qualifies as corporate crime. Thus, we are left with a large “dark figure” that is not included in crime statistics (Snider, 1993: 27). The most accessible source of data concerning criminal activity comes through official agencies. However, it is argued that crime statistics gathered in this manner are products of particular agencies and entities each with ideological biases, strategic purposes, and finite resources (Friedrichs, 2004:42). In Canada, crime statistics are collected by Statistics Canada. However, these

statistics will only include criminal actions done by businesses which are charged and processed through the criminal justice system (Snider, 1993). This data is flawed due to the fact that the vast majority of corporate crimes are ignored, processed informally, or handled through civil or administrative procedures of regulatory agencies (Snider, 1993). We are then given a picture of an atypical few that are reported to the police, brought to court, and actually convicted. These offences do not adequately represent the scope of the problem. Kappeler and Potter (2005) state that “for every successful prosecution of a corporate offender, there are literally thousands of others never caught or even investigated” (Kappeler and Potter, 2005: 171). The nature of corporate crimes adds to the challenge of accurately assessing the prevalence of criminality in these areas as well. The invisibility and complexity of the offences make them difficult to detect, and prosecute (Croall, 1992:16).

Obtaining even an approximate number for corporate crime in just one category, like crimes against employees, would require a massive examination, dissection, and re-categorization of data from a wide range of bodies (Slapper and Tombs, 1999). There are those who feel that including the violations of civil and administrative data leads to an over-counting of the problem (Friedrichs, 2004). Yet this misrepresentation pales in comparison to the problems of not including those statistics, and relying solely on criminal agencies (Friedrichs, 2004).

This is particularly relevant to the discussion of fatalities in the workplace. For example, some agencies do not count deaths that occur while an employee is travelling during the course of their work either as a workplace related fatality or as the result of

employer safety failure. According to one British study, there were 877 deaths related to driving during the course of work, which gave it a higher rate of risk than working in the coal mining industry (Slapper and Tombs, 1999). It is reasonable to assume that some of these fatalities are solely the result of the worker making an error, or being the victim of someone else's error. However, the study showed that in the majority of cases, employers were failing to meet their legal duties to reasonably reduce the risks involved (Slapper and Tombs, 1999). One example of this problem comes from British Columbia in 2007. In Abbotsford, one employer allowed an improperly licensed, untrained driver of an overloaded and unsafely equipped van to transport workers (Baron, December 12, 2009). The van flipped, and three workers died in the crash. R.C.M.P. recommended 33 criminal charges, including criminal negligence causing death. However, the Crown laid charges under the Motor Vehicle Act, instead (Baron, December 12, 2009). WorkSafeBC fined the employer \$69,801 under their legislation. However, WorkSafeBC had stated they do not expect the fine to be paid, as the employer has shut down operations (Baron, December 12, 2009).

McMullen states that "the ambiguity and even manipulation regarding the cause of death, the reluctance and caution of enforcement agencies, and the general reticence of corporations combine to depress levels of recorded industrial death and injury below the level it would otherwise be" (McMullan, 1992:25). To gain a more accurate number Friedrichs (2004) discusses the need for greater standardization of definitions and recording practices; more reliable characterizations of the universe of offenders; and

better coordination among the criminal, civil, and administrative agencies which collect official statistics (Friedrichs, 2004).

The physical toll that workplace activities take on workers should be a significant issue, as it is much more likely that an individual will die as a result of accident or occupational disease/illness than homicide in Canada. In 2006, there were 658 homicides and 1048 workplace related deaths (Sharpe and Hardt, 2006; Gannon, 2006). This number does not tell us about the role that unsafe or illegal working conditions played in those fatalities. Determining the true loss of human life from workplace safety violations is difficult. However, there have been efforts to determine more realistic statistics. A Statistics Canada study in the 1980's reported that the number of fatalities due to unsafe or illegal workplace conditions was equal to the number of fatalities caused by "street" homicides (Salinger, 2005:128). This Statistics Canada figure did not include the number of deaths due to lingering illness suffered from exposure to hazardous workplace substances (Salinger, 2005:128). McMullan estimated that 50% of workplace deaths in Canada are attributable to unsafe and illegal working conditions (McMullan, 1992:25). If this ratio is still valid today, Canada's number of deaths possibly attributed to corporate crime would be around 524 in 2005.

Workplace Fatality Trends in Canada and British Columbia

Canada's record of protecting its workers is not strong, and has been getting worse since Westray. In 1993 there were 5.9 deaths per 100,000 workers, while in 2005, there were 6.8 (Sharpe and Hardt, 2006: 5). Thus, it is important to determine if the criminal law is effective enough to deal with the problem, particularly after the Bill C-45

amendments. In a study that looked at data from 1993 to 2005, Sharpe and Hardt compiled statistics taken from the Association of Workers Compensation Boards of Canada (AWCBC) (Sharpe and Hardt, 2006: 17). These data showed that while time lost due to injuries has been on the decline, the number of work related fatalities has actually increased. The most dangerous industries during this period were the mining, quarrying, and oil well sectors, at 49.9 workers injured per 100,000 (Sharpe and Hardt, 2006: 3). Fatalities were heavily concentrated in primary occupations (industries that collect and process a natural resource) (19.5 deaths per 100,000), trades, transport, and equipment operators (19 deaths per 100,000), and processing, manufacturing, and utilities (10.2 deaths per 100,000) (Sharpe and Hardt, 2006: 4). All other occupations had rates lower than 4 deaths per 100,000 workers (Sharpe and Hardt, 2006: 4).

Sharpe and Hardt note some other trends in the Canadian workplace. Men die from their work at around 30 times the rate that women do, and account for roughly 97% of workplace fatalities (Sharpe and Hardt, 2006: 4). This phenomenon can be explained by the male concentration in the most dangerous occupations. Looking at another trend in Canada, death by occupational illness or disease is more likely (557 deaths), than workplace accidents (491 deaths) (Sharpe and Hardt, 2006: 4). The increase in death occurring in the workplace over the past 10 years has largely been attributed to the increase in occupational disease (Sharpe and Hardt, 2006). Occupational disease and illness rates may be explained by an increased awareness of causes of disease, as well as by changes in claims, processing, and reporting in deaths of this kind (Sharpe and Hardt, 2006: 40-43). These deaths often result from actions that took place many years prior to

death, yet are attributed to the year they were reported. Between 1996 and 2005 death from occupational disease increased from 1.5 to 3.4 per 100,000 workers (Sharpe and Hardt, 2006: 5). This phenomenon has in turn increased the age of worker deaths, as older workers and former workers are now raising the total of deaths related to disease, even though the rate of death by accident in the older age groups (50+) is going down (Sharpe and Hardt, 2006: 42-43). Another trend shows that death by accident increased slightly from 2.9 to 3.0 per 100,000 workers between 1996-2005 (Sharpe and Hardt, 2006: 5).

Looking internationally, Canada had the fifth worst record (6.8 deaths per 100,000 workers), of 29 Organization of Economic Cooperation and Development (OECD) nations in 2003 (Sharpe and Hardt, 2006: 51-60). Even when accounting for difficulties in definitions, and methodology, Canada still ranks very poorly in comparison to the other nations (Sharpe and Hardt, 2006: 51-60).

British Columbia has a poor record of protecting its workers. While British Columbia has been significantly lowering the amount of time lost due to workplace injury, consistent with the national average from 1993 to 2005, its rate of workplace injury is still high (Sharpe and Hardt, 2006). **Table 1** shows that British Columbia has the highest average rate of injury time lost of any province or territory in Canada spanning between 1993 and 2005 (Sharpe and Hardt, 2006):

Table 1: Average Injuries per 100 Workers in Canada (1993 to 2005)

NFDL	PEI	NS	NB	QC	ON	MB	SSK	AB	BC	NT /NU/ YT	CAN
2.9	3.0	2.4	1.5	3.5	1.9	3.3	3.0	2.3	3.6	3.1	2.7

However, it should be noted that British Columbia relies more on primary resource industries than many other provinces, and these industries have the highest death rates (B.C. Stats and B.C. Ministry of Advanced Education, 2008).

British Columbia had one of the highest rates of worker fatalities. Spanning between 1993 and 2005 British Columbia averaged 8 worker fatalities resulting from disease or accident per 100,000 workers; compared to the national average of 5.6 workers per 100,000 (Sharpe and Hardt, 2006: 24). While the national averages of death by accident and by occupational disease or illness were 3.1 per 100,000 and 2.5 per 100,000 respectively, British Columbia had averages of 5.3 and 2.7 deaths per 100,000 (Sharpe and Hardt, 2006: Table 12B). Thus, B.C. is an attractive region for this particular study, as it has a high rate of death caused by accident.

Bill C-45: The Westray Bill

The Westray coal mine explosion in 1992 killed 26 workers, and charges of manslaughter, and criminal negligence causing death were brought against the corporation, as well as some managers and executives of the corporation (Canadian Auto Workers, May/June 2004: 8). However, largely due to lack of evidence, these charges were dropped (Canadian Auto Workers, May/June 2004: 8).

To understand why, we must look at the roots of Canadian criminal law. Canada's criminal law has its roots in English common law (Department of Justice Canada, November 2002). This form of law means that any successful prosecution must satisfy the highest degree of proof, which is guilt beyond a reasonable doubt (Department of Justice Canada, November 2002). Corporations are legal fictions as they aren't physical beings, and thus their actions can only be carried out by individuals (Department of Justice Canada, November 2002). This makes it difficult to attribute the necessary elements of *mens rea*, and *actus reus*, central to determining criminal guilt under common law (Department of Justice Canada, November 2002). *Mens rea* refers to the mental element involved in an action, while *actus reus* refers to the prohibited conduct, whether by act or omission.

Canadian common law developed a doctrine called the "identification theory" to determine the conduct and mental state necessary to convict a corporation of a crime (Department of Justice Canada, November 2002; Department of Justice Canada, March 2002; Little and Savoline, 2003). Identification theory essentially means that corporate liability can only be applied to a person, or group of people, considered to be the *directing mind* of a corporation (Department of Justice Canada, November 2002; Department of Justice Canada, March 2002; Little and Savoline, 2003; Goetz, 2003). The directing mind is composed of those responsible for the formation of corporate policy (Department of Justice Canada, March 2002). Critics of identification theory state that this theory does not adequately reflect the modern corporate structure. Thus, it is difficult to identify the directing mind and to attribute liability (Goetz, 2003). Rarely is someone

identified as being part of the directing mind directly responsible for safety violations (Goetz, 2003; Savoline, 2003). However, they can create an environment where lower level employees feel compelled to cut corners on safety to increase profit (Goetz, 2003; Savoline, 2003). There are also criticisms that this structure of liability allows the corporation, and the so called directing mind, to purposely delegate matters such as safety to lower level employees, thus avoiding criminal liability (Goetz, 2003).

Bill C-45 dealt only with the criminal responsibility of the organization, and made no change to the law dealing with personal liability of directors, officers, and employees (Department of Justice, 2007). This paper will highlight the relevant parts of the bill as they directly relate to defining corporate criminality.

The bill amended section 2 of the Criminal Code to change to the definition of “organization”, and remove “corporation”, so as to better include all the “bodies” that can be involved in a crime such as a “firm”, “partnership”, or “trade union” (Goetz, 2003: 7; Department of Justice, 2007:4). Next, new sections of the Criminal Code (22.1 to 22.2) outline the broadening of the range of employees whose actions can result in criminal liability to the organization (Goetz, 2003: 8; Department of Justice, 2007:5). Section 22.1 of the bill defines how a corporation becomes party to an offence committed by the newly created categories of a “*representative*” and “*senior officer*”. A “representative” refers to a director, partner, employee, member, agent or contractor of the organization (Goetz, 2003: 8; Department of Justice, 2007:5). A “senior officer”, is someone who plays an important role in the establishment of an organization's policies, and/or is responsible for managing an important aspect of the organization's activities (which is

new to the Criminal Code) (Goetz, 2003: 8; Department of Justice, 2007:5). The senior officer is essentially part of the traditional idea of the directing mind (Goetz, 2003: 8; Department of Justice, 2007:5). However, this designation has been expanded in definition, and focuses more on the function of the position, rather than the actual job title (Goetz, 2003: 8; Department of Justice, 2007:5). In the case of a body corporate, this automatically includes a director, its chief executive officer and its chief financial officer (Goetz, 2003: 8; Department of Justice, 2007:5).

Archibald et al (2004) feel that the definition of senior officer presents some difficulty, and will be the subject of intense litigation in the future (Archibald et al, 2004:376). They discuss how the requirement of a senior officer playing an “important role” is vague and may be hard to prove in a court of law (Archibald et al, 2004:377). They note that “although the definition of senior officer is undoubtedly broader than the old common law definition of the directing mind, the onus remains on the Crown to prove beyond a reasonable doubt that a senior officer had an important role in either establishing an organization’s policies or managing an important aspect of its activities” (Archibald et al, 2004:377).

Section 22.1 outlines corporate liability in regards to offences in which negligence is an element (Goetz, 2003: 8). These offences include acts such as manslaughter by criminal negligence, for example, dangerous driving or things of that nature. Negligence occurs when a representative of the corporation/organization, acting within the scope of his/her authority, or where the aggregated conduct of two or more representatives (i.e. employees) makes him/her a party to an offence, and where the senior officer responsible

or senior officers collectively show a marked departure from the standard of care that could be reasonably expected in failing to prevent the offence (Goetz, 2003: 8; Department of Justice, 2007:6). This change makes it possible for the aggregation of actions to equal liability, even if it cannot be traced back to one person, so long as the senior officers showed a marked departure from the standard of care.

Section 22.2 outlines corporate liability in regards to intent, recklessness, or wilful blindness causing bodily harm or death (Goetz, 2003: 9; Macpherson, 2003-2004:259). This provision requires a senior officer acting at least partially with the intent to benefit the corporation (Goetz, 2003: 9; Department of Justice, 2007:7). This is when a senior officer is acting within the scope of his/her authority, is a party to the offence, while having the necessary intent to commit the offence, or directs the work of other representatives so that they do the act or make the omission (Goetz, 2003; Department of Justice, 2007). It can also be applied if a senior officer knows that a representative is, or is about to be, a party to an offence, and does not take reasonable steps to stop that representative from committing the act (Goetz, 2003; Department of Justice, 2007).

The wording of section 22.2 has raised debate concerning its practicality. Macpherson believes that the amendments make it easier for organizations to avoid criminal liability; as they now only have to prove within reasonable doubt that an action of a senior officer(s) did not benefit the corporation in some way; whereas before the amendments, a corporation had to prove that the action of the directing mind was to the detriment of the organization (Macpherson, 2003-2004). Conversely, Archibald et al note that extending the notion of the directing mind to management at the operational level is

“better suited to crimes of criminal negligence than subjective intent crimes that require some element of “thinking” (Archibald et al, 2004). They feel it is unjust that a corporation could be held responsible for the rogue action of senior officers at lower levels; who may be acting in part to benefit the organization, but not as part of board policy (Archibald et al, 2004).

Bill C-45 further amended the Criminal Code by adding section 217.1, which creates a new statutory duty to require that everyone who undertakes, or has the authority, to direct how another person does work or performs a task takes reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task (Goetz, 2003: 9). This provision does not create a new offence. However, by clarifying the existence of such legal duty, this section facilitates the conviction of corporations for offences such as criminal negligence causing bodily harm or death that can be committed by omission to fulfill a legal duty (Goetz, 2003: 9).

Keith and Ferguson (2005) feel that the requirement to take reasonable steps may be difficult to determine consistently, as it will likely rely on occupational health and safety (O.H.S.) statutes to be the standard for comparison, yet these vary from jurisdiction to jurisdiction (Keith and Ferguson, 2005). The lack of a national O.H.S. statute makes the interpretation of “reasonable steps” under section 217.1 more problematic; as there is no standard definition of what this entails (Keith and Ferguson, 2005:173).

In terms of punishment, in the case of summary convictions (less serious offences), Bill C-45 increases the maximum fine from \$25,000 to \$100,000 (Department

of Justice, 2007:7). For more serious indictable offences the maximum fine is limitless, as the Criminal Code provides no maximum fine that can be imposed on a corporation (Department of Justice, 2007:7). Judges are given a set of guidelines to determine the sanction, which is outlined in section 718.21 of the Criminal Code. These guidelines revolve around factors such as moral blameworthiness, public interest, and prospects of rehabilitation (Department of Justice, 2007:8). Corporations can be sentenced to probation, in which the corporation would have to meet a criterion of accommodation, and supervision specified to the court's requests (Goetz, 2003: 10-11; Department of Justice, 2007:9). This includes measures such as providing restitution, making offences known to the public, and implementing effective approved policies found in section 732.1 (3.1). The court is not well equipped to oversee these measures, and most likely would defer monitoring to more informed agencies such as regulatory bodies (Goetz, 2003: 9).

In addition to the criticisms already noted, others take issue with Bill C-45. Bittle and Snider (2006) feel that, unlike Bill C-284 which preceded it and never became law, Bill C-45 lacks the appropriate acknowledgement that corporate culture plays in events such as workplace fatality (Bittle and Snider, 2006:477). Instead, Bill C-45 is said to better reflect individual liability familiar to common law, and the directing mind concept (Bittle and Snider, 2006). A corporate culture legal concept was pioneered by the Australian federal government in 1995. It stated that senior management could be held criminally liable if their corporate culture, defined as an attitude, policy, rule, course of conduct or practice, existing within the body in general or where the relevant activities take place, allowed or encouraged law violation or avoidance (Bittle and Snider,

2006:477; Canada Department of Justice March 2002). Bittle and Snider note that the concept of corporate culture is important as, in addition to implying a collective responsibility for allowing criminogenic conditions to become dominant, corporate culture signifies an official recognition that there will always be ample motivation for any profit making organization to justify or ignore unsafe working conditions (Bittle and Snider, 2006:477). In comparison, Bill C-45 fixes liability on the newly created designations of senior officer and representative (Bittle and Snider, 2006). Although these definitions widen the scope of the law and increase its flexibility, they remain focused on establishing individual fault (Bittle and Snider, 2006). Bittle and Snider note that many Parliamentary committee members felt that sufficient laws were already in place, and that it was the failure of the law enforcement, and not the law itself that was the problem (Bittle and Snider, 2006:482). Thus, although individuals charged with its implementation are imperfect, the law itself is not flawed (Bittle and Snider, 2006). This belief is said to “transform social conflicts into individual legal problems, and abstracts individuals out of their life experiences and social context, thus allowing the law’s gendered, racialized, and class based origins and impacts to be ignored” (Comack quoted in Bittle and Snider, 2006:481). The failure to consider an element of corporate culture and stick with traditional ideas of mens rea “ruled out any consideration of the structural causes of workplace death, any examination of the roots of corporate power or of the privileged legal status and extensive rights conferred by limited liability” (Bittle and Snider, 2006:482).

One further criticism comes from Gray (2006) who explains that legislation such as Bill C-45 is typically in response to major accidents, which serves to justify the punishment model approach (Gray, 2006:885). However, he argues that these laws do little to change the day to day local culture of health and safety, and that the neo-liberal discourse of individual responsibility (essentially placed on the low level employee) dominates the regulation of corporate violations (Gray, 2006).

Historically, it appears the application of criminal sanctions to workplace fatality has been minimal, and this has not changed since the passage of Bill C-45. There have been only a few known charges associated with Bill C-45, although it must be stated that it is very difficult to find every instance a particular law has been used, so there could be other instances. It is very difficult to find every instance as there is no central database or record of charges, and one would have to search every court registry in the entire country, which is not feasible. In addition, many charges are dropped through plea bargaining. Based on media report searches through the internet, to date there appears to have been only 2 convictions since the amendments were enacted. The first person charged after the amendment was a supervisor of a landscaping business in Ontario, who allegedly did not take reasonable steps to prevent bodily harm (Melnitzer, 2006). This fell under section 217.1 of the Criminal Code, which deals with an omission to take reasonable steps to prevent an accident, and the legal duty to do so. However, these charges were dropped in favour of occupational health and safety fines (Melnitzer, 2006). The first charges to be laid against a company were placed against a paving stone producer in Quebec (Melnitzer, 2006). Transpave was convicted of criminal negligence in March 2008, and

was ordered to pay \$100,000 (Emond and Harnden, 2011). The second conviction involved the owner of a landscaping company. Pasquale Scrocca was operating a back hoe when the brakes failed, it then rolled backwards, pinning and killing an employee (Thewindsorsquare.ca, February 19, 2011). Scrocca was convicted under section 217.1 of the Criminal Code, and sentenced to two years less a day for failing to maintain his equipment in February 2011 (Thewindsorsquare.ca, February 19, 2011).

Structural Marxism

Structural Marxism will be used as a theoretical explanation of why Bill C-45 was enacted, and how it could account for the new law's lack of use. A Marxist approach was selected, because this paper is examining workplace fatalities, which occur within the larger context of a capitalist economic system. Thus, this study will explore how the capitalist system may influence the application of anti-business law, such as the amendments put forth in bill C-45. Structural Marxism was chosen because it accounts for anti-business laws better than instrumental Marxism (Snider, 1993).

Structural Marxism holds that the state is faced with a choice between protecting the benefits of capitalists on one hand, and the inherited responsibility of protecting its populace on the other (Comack, 1999). Thus, the state must do whatever it can to attract, encourage, and promote profit among capitalist members, while at the same time trying to maintain a social order which approves of these actions (Snider, 1993; Comack, 1999). Comack (1999) refers to this as the process of *accumulation* and *legitimization* (Comack, 1999:40). In this manner, the state plays a crucial role in constructing a society where people believe that the system, and or society that they live and work under is in place for

their own benefit (Snider, 1993; Comack, 1999). Structural Marxists believe that the state acts as a mediator between the interests of a fractioned capitalist class with divergent interests in order to help perpetuate capitalism (Smandych, 1985). This is in contrast to instrumental Marxism, which believes that the state is a tool of a unified capitalist class and its demands (Smandych, 1985). Proponents of structural Marxism believe that it is important that the state is afforded some autonomy from capitalist pressures (Comack, 1999). The reason for this is to transcend capitalist interests to maintain social order by quelling social unrest, as well as the legitimacy of capitalism and the state (Comack, 1999). The end goal of this process is to establish a hegemonic order that seeks to instil a set of beliefs and opinions that support a status quo, resulting in social stability that favours capitalists (Snider, 1993). The state helps support and reproduces capitalist ideals by securing the social, political, and economic environment needed for capitalism to thrive (Snider, 1993). This also includes ensuring that major social institutions, such as laws and educational systems reinforce capitalist values, and serve their needs (Snider, 1993).

Mass public consent for this hegemonic order is crucial to social control, as the majority of people must accept their place in the class structure (Snider, 1993). Often consensus is gained through nationalistic ideals that become widely accepted (Snider, 1993). For example, in Canada, people accept their level of inequality as long as they have a high standard of living, and things such as quality universal health care for the majority of its populace (Snider, 1993). These services are backed by the widespread belief that there is no effective alternative to the current mode of capitalism, which gets

reinforced by the notorious failures of prominent socialist economies such as the former Soviet Union (Snider, 1993). If public consent is perceived to be in jeopardy, the state will put measures in place to save capitalism from itself (Snider, 1993). Bill C-45 could be seen as one of these reforms, as it attempts to show that the state is doing something to protect workers from employers' actions or omissions. Structural Marxists view consent as a structurally engineered and deceptive instrument that manipulates the blue collar and middle class workers and oppresses them (Snider, 1993). Through this process, the state provides a superficial fix, as opposed to addressing the inherent problems in the conflict between labour and capital. This allows the larger issue at hand to recede into the background (Smandych, 1985).

Returning to the topic of this proposal, the lack of workplace safety was putting consent in jeopardy. The state response to this came through amendment of the criminal law. Comack explains that, "the shape and structure of law under capitalism provides the appearance of equality" (Comack, 1999: 42). The rule of law becomes one where the nature of the law is unchallenged (Comack, 1999). This helps to instil the ideals of the capitalist class through the same process that claims to be equal for all, while ignoring the partisan interest that influences it (Comack, 1999). Thus laws are likely to result in ineffective symbolic change that placates the masses into believing justice will be served.

Some criticisms of structural Marxism need to be mentioned. As mentioned earlier, Marxist structuralism criticizes instrumental Marxism for over-emphasizing the power of the capitalist class to use the state as a tool (Comack, 1999). However, structural Marxism can be criticized for not fully accounting for the power of human

agency, putting too much faith in the structure itself to direct society (Comack, 1999). In addition, the theory does not adequately describe the factors that precipitate the autonomy that the state has from capital, and economic relations (Comack, 1999).

Potential Factors Affecting the Application of Bill C-45

This paper will explore four different potential factors that can be used to explain why the amendments put forth in Bill C-45 are not used more often. These factors are: pro-business ideology; criminal versus regulatory sanction; resources and training in investigation and prosecution; social construction of risk around workplace fatality. Choice of these factors is linked to the idea of structural Marxism, as they represent structural factors that might decrease the attribution of corporate criminality to organizations.

Pro-Business Ideology

Capitalism and the market are held in high esteem in industrialized nations. Capitalist ideologies become seen as the only true route towards prosperity (Gladbeck, 2002). Corporations are said to be inherently adept at fulfilling these ideals, arguably making them the most valuable tool of contemporary capitalism (Glasbeek, 2002). These beliefs are dispersed by the capitalist class through hegemony. In this sense, social relations of production are led by a small dominant class who have convinced the other members of society to accept it, and to contribute to its mode of governance (Pearce and Tombs, 1999). The dominant class understandings of the world and historical possibilities evolve into a form of “common sense” where the subordinate class will shape its interests to match that of the dominant class (Pearce and Tombs, 1999: 36). This

dominant way of thinking can make it hard to for people to believe that corporations are capable of committing crimes (Bittle and Snider, 2006:486). Society knows that when the capitalist class engages in the economy, it is to make a profit, and profit-making is highly valued for its contribution to society (Glasbeek, 2002). Bittle and Snider explain that, although they believe the Westray bill is doomed to failure due to the class interests that went into the creation of the bill, counter-hegemonic voices were heard and recognized during the process (Bittle and Snider, 2006:488). The success of counter-hegemonic voices can be shown in the existence of the Westray bill itself.

Snider (1993) discusses how the culture of competition is at the centre of capitalism (Snider, 1993:86). This culture influences “every part of society, the family, socialization patterns, religion, education, mass media, and the criminal justice system” (Snider, 1993:86). Development of the culture is a process that occurs over many years, whereby people become sympathetic, even protective, of pro-market behaviour. Essentially a paradox has been created in which the perceived positives of business activity vastly outweigh any negatives. People know that they will have to accept some level of negative impact from business operations in exchange for a higher standard of living, and affordable consumer goods, which come at the expense of something (potentially worker safety) during the creation process (Snider, 1993). However, this may allow the breach in the most basic of protections in some cases, as well as providing a breeding ground for corporate crime (Snider, 1993). Coleman et al state that neo-liberalism has “raised the naked pursuit of profits to the status to almost moral exigency, which has the effect of legitimating virtually any activity because it is engaged in

business, and de-legitimizing any opposition resistance-the bases of pro regulatory forces-for its very “anti-business” rhetoric and practice” (Coleman et al, 2005:2522).

In capitalist economies, a state’s revenue, social welfare, educational and military programs are all dependent on the profitability of the private sector (Snider, 1993). The state has a need to attract capital and to stop it from leaving, thus, it goes beyond simply agreeing with the ideologies of capitalism (Snider, 1993). The state is often heavily involved in trying to lure capital investment by creating the most appealing environment (Snider, 1993). Some common enticements include billions of dollars in grants, tax loopholes, infrastructure, and forgivable loans to create jobs and wealth (Snider, 1993). Thus, it may be seen as contradictory or even hypocritical to discourage business by actively creating and enforcing anti-market laws. There is a belief that free (global) markets and minimal state interference are required to reach the economy’s potential (Pearce and Tombs, 2002). This ideology has become overwhelmingly accepted, despite the fact it has been shown to create inequalities within and among nations (O’Riain, 2000). The increasing interconnectedness of global business enterprises puts pressure on the state to adopt a hands-off approach towards business to ensure that business does not choose to move somewhere else.

This recognition is not meant to imply that the interests of capital are homogeneous, or that the state has little power in which to deal with capital. The state yields power by providing residential and commercial property markets, different kinds of human capital, as well as the regulation of the market, and general infrastructure (Pearce and Tombs, 2002). Regulation does not merely protect the general public from

actors within the market, but also controls behaviour among capital enterprises (Pearce and Tombs, 2002). This understanding explains why regulation is seen by some as a necessary function of the state, even in an ideal market economy (Pearce and Tombs, 2002). It should also be noted that there are differences within states in regards to their preferences in dealing with capital (Snider, 1993). The state is not simply a tool for the capitalist class; points of struggle create sources of conflict, rather than being a monolithic entity with only business interests at its heart. However, the autonomy of the state can also serve to reinforce hegemonic ideology by organizing competing capitalist forces in a way that benefits the capitalist as a whole for its replication (Pearce and Tombs, 2002).

The media plays a large role in the perception of crime because the mass media both reflects, and in turn reinforces, dominant social constructions of what constitutes the crime problem (Slapper and Tombs, 1999). The terminology used to represent corporate crimes also plays a part in downplaying their severity. Terms such as “scandal” are used, which conveys a message of immorality as opposed to criminality (Slapper and Tombs, 1999:94). Further, exposés or scandals serve to reinforce the rarity of these crimes, and often stress the role of rogue individuals as opposed to the structures and systems which produce these crimes (Slapper and Tombs, 1999). Another example is the use of the word “accident” when describing occupational health and safety crimes (Slapper and Tombs, 1999:95). The term “accident” evokes notions of discrete, isolated, random events which are unforeseeable; despite the reality many incidents prove these factors to

be lacking (Slapper and Tombs, 1999). This term also implies victim liability via carelessness or apathy (Slapper and Tombs, 1999).

However, all is not negative in the media's portrayal of corporate crime. The media is responsible for exposing some forms of corporate crime which otherwise may not receive any attention at all. Media exposés and investigative reporting play an important part in bringing corporate criminality to the forefront (Punch, 1996).

Snider believes that corporate crime as a category is disappearing (Snider, 2000). The root of the problem is that intellectual claims have legitimized the disappearance of corporate crime in Canada (Snider, 2000). The basis for pro-business ideology originates in the think tanks, research laboratories, and classrooms of institutions, largely in the industrialized West (Snider, 2000). Attitudes accepting of corporate crime come to be seen as a "truth" that makes society run more effectively (Snider, 2000:180). This is not the only truth; however, it is promoted as the preferred truth because its views represent the dominant interests in society and are more strongly advocated (Snider, 2000). Dominant interests are more typically rooted in science, such as economics, and these truths are seen as more legitimate than many counter claims (Snider, 2000). Counter claims often originate from less mainstream scientific sources such as sociology, and are thus discounted (Snider, 2000). Dominant interests often provide the "truth" needed to back regulatory models that favour capitalism and economic formulae that support unimpeded operation of market forces from the state to meet its full potential (Snider, 2000:182). Despite the popularity of this "truth", we have seen the significant impact "unimpeded operation" has had on workplace safety in British Columbia. In the early

years following the provincial Liberal government coming into power in 2001, there was a direct and dramatic drop in workplace safety enforcement (British Columbia Federation of Labour, 2006:4). Between 2001 and 2004 inspection reports decreased by 44%, enforcement orders fell by 46%, penalties recommended dropped by 45%, and penalty amounts decreased by 57% (from \$4.27 million to \$1.8 million) (British Columbia Federation of Labour, 2006:4). As the British Columbia Federation of Labour explains, “falling levels of enforcement didn’t reflect a growing compliance with health and safety regulation, they were directly tied to staff cuts, weakened standards, and a new environment of employer self regulation” (British Columbia Federation of Labour, 2006:4).

Criminal Sanction versus Regulatory Sanction

Compared to more traditional offenders, corporations present a unique challenge when deciding which method of enforcement towards dangerous activity or inactivity is most effective. Currently, there is debate over the best way to control and punish harmful corporate activity via criminalization or regulatory methods. This section will explore some of the arguments on each side of this debate.

Those who advocate increased criminal liability believe that there is a need for harsher sanctions, and feel that regulatory responses are often too soft on corporate crimes such as workplace safety (Snider, 1993). They argue that the criminal justice system has the unique ability to communicate core values, allowing for a uniform, clear, and public voice to be say that something is wrong (Bucy, 1996). Proponents of criminal sanctions believe that criminality is the heaviest form of moral sanction a society can

impose, and the only one that the corporate sector will take seriously (Snider, 1993; Weissmann and Newman, 2007). Corporate crimes need to be taken seriously as “real” crimes, and not simply as accidents that could not be avoided. An essential part of making this transition in the way society thinks is to strive for a system which includes more adversarial, punitive, and interventionist style of regulation against corporate criminals (Tombs, 2002).

White collar crime, and particularly corporate crime, is often seen as quintessentially instrumental (or rational) (Friedrichs, 2004). Braithwaite and Geiss (2001) state that, “corporate crimes are almost never crimes of passion” (Braithwaite and Geiss, 2001:369). They, and others, believe that corporate criminals are people who reason and plan strategically, adapt to particular circumstances, and weigh the cost and benefit in their potential actions (Friedrichs, 2004; Braithwaite and Geiss, 2001). This kind of thinking generally minimizes the influence of the cultural, moral, and psychological factors that shape criminality (Friedrichs, 2004). However, proponents of a “rational choice” perspective do not necessarily deny that other factors limit rationality and play a role in criminal behaviour, rather, they feel that rational choice is the dominant characteristic in criminal conduct (Friedrichs, 2004). Corporations, and actors on their behalf, become what are termed “amoral calculators” (Slapper and Tombs, 1999, 170). Amoral calculators are “motivated entirely by profit seeking, and carefully and competently assess opportunities and risk” (Slapper and Tombs, 1999, 170). Critics of this belief argue that corporations are not amoral calculators; instead, that they are “political citizens who may indeed sometimes err but more because of organizational

incompetence than deliberate wrong doing” (Pearce and Tombs, 1999:230). In addition, “although some corporations sometimes act as if they are amoral calculators, this is neither necessary nor typical” (Pearce and Tombs, 1999:230). Pearce and Tombs go on to note that, “when regulations are violated, they are usually the result of factors other than pure economic calculation” (Pearce and Tombs, 1999:230). Criminal law is seen as blunt, statutory, often inflexible, and not well suited to deal with corporations (Meeks, 2006-2007). Belbot discusses how the common law was designed for individual criminals, and that fitting corporations into this scheme is difficult (Belbot, 1995:232). Corporate criminality raises issues such as the validity in holding a corporation liable for situations of vicarious liability, and if it is reasonable for corporations to be capable of monitoring and controlling the actions of all their employees all the time (Belbot, 1995). Additional problems are presented by the structure of corporations, which can make it difficult to identify who exactly is at fault (Belbot, 1995). The burden of proving guilt beyond a reasonable doubt also causes difficulty, as this is the highest level of proof, and required by criminal law (Belbot, 1995). In addition to advantages that the corporation itself provides, like corporate structure, corporations enjoy the same legal protections as individual citizens, such as due process (Belbot, 1995). Ironically the protections put into law to protect the weak and powerless from a strong state help to excuse corporate wrong doing which has shown to disproportionately harm them (Belbot, 1995). Corporate criminals also benefit from the way laws are written. Laws that are written to deter specific activities can leave enforcement difficult with the inevitable development of activity which does not fall within the specific terms of legislation (Croall, 1992).

Conversely, general prohibitions are inclusive but are often ambiguous and open to interpretation (Croall, 1992). This creates an environment with legal gaps or loopholes which can be exploited, either by planned law evasion or developing practices which fall outside the scope of the law (Croall, 1992). It has also been argued that other issues, such as ignorance of the law, lack of technical competence required for compliance, or unintentional organizational failures might result in criminal charges, and this is seen as unjust (Snider, 1993; Snider, 1990). These are important things to consider, especially when accounting for the belief that involvement of criminal law destroys corporations instead of rehabilitating them, hurting innocent third parties, such as shareholders, consumers, employees and their families; essentially, the community as a whole (Meeks, 2006-2007; Anderson and Jackson, 2006; Belbot, 1995).

The use of criminal law to address corporate crime is also accused of increasing the damage done. Criminal sanctions are inherently reactive as opposed to proactive, and sufficient evidence of wrong doing must be established before legal action is taken (Snider, 1993; Snider, 1990). The criminal justice process is also very costly, which affects both the criminal justice system, and the corporations themselves, as cases are much more difficult to investigate and prosecute than conventional crime (Snider, 1993; Snider, 1990). With this in mind, it is not surprising that the criminal law has been accused of lacking the speed and certainty necessary to be an effective deterrent (Stevens and Payne, 1999).

It is clear that Canada has preferred to use a regulatory approach to workplace fatalities as criminal charges have been used very rarely. Regulatory agencies see

themselves as having the greatest array of powers and sanctions to deal with corporate actors. As opposed to the stigmatizing goals of criminalization, regulatory laws can generally be seen as an attempt to be more inviting to economic activities (Glasbeek, 2002). Regulation is meant to be quicker, less costly, and without the many legal protections to circumvent compliance (Snider, 1993). Regulatory law is also aided by a lower level in the burden of proof necessary for conviction (Glasbeek, 2002). Regulatory inspectors also have more access to information relating to workplace accidents, and require employers to facilitate investigation or risk punishment (Melnitzer, 2006). Some characteristics of regulatory bodies draw criticism. For example, there is the accusation that regulators focus on the smallest and weakest individuals and organizations (Snider, 1993). As opposed to larger companies, small ones are seen as “ideal targets” politically; they do not have the complexity and resources to conceal crimes well; and they are unlikely to have the political clout to bring political repercussions back upon the agency or its staff (Snider, 1993:122). This situation is made even more unequal if you accept the belief that many small to medium sized companies lack the resources and sophistication to meet legal standards while in competition with larger corporations (Gunningham, 1998).

Regulators often prefer a compliance strategy which argues that the nature of corporate illegality calls for different forms of regulations than other criminal sanctions (Slapper and Tombs, 1999). Thus, businesses need advice rather than punishment and need regulators to act as consultants rather than policemen (Slapper and Tombs, 1999). Compliance oriented regulation is aimed at providing incentives and encouragement to

voluntary compliance and nurturing the ability for private actors to secure compliance through measures such as self regulation where possible (Parker, 2000). Ultimately, this view believes that corporations have a primary commitment to act in a socially responsible manner; are not inherently criminogenic; and will not cease to commit violations because of attempts at deterrence (Slapper and Tombs, 1999).

Some are critical of compliance oriented strategies. For example, some believe that they are weaker, and less aggressive than other styles of regulatory enforcement (Parker, 2000). The setting and maintenance of industry standards pose another problem in regulating corporations through compliance oriented strategies.

Cooperative/compliance strategies have been accused of setting the bar for standards too low (Snider, 1993). Industry standards can be problematic in that they may encourage compliance to only the minimal standards, with little reason to go beyond them (Gunningham, 1999). This behaviour is referred to as the “compliance mentality”, and while it helps to make compliance for smaller companies with less expertise and resources attainable, larger companies who are capable of going beyond the minimum requirements also adopt this practice (Gunningham, 1999:197).

Compliance and deterrence oriented strategies are unlikely to be found in their pure form, and the optimal regulatory solution includes a mixture of both compliance and deterrence (Gunningham, 1998). Braithwaite’s pyramidal enforcement scheme, also known as the “accountability model”, is a popular method which tries to achieve this balance (Fisse and Braithwaite, 1993). Within this model, regulators start at the bottom of the pyramid, with the assumption that a business is willing to comply voluntarily (self-

regulation) (Fisse and Braithwaite, 1993; Gunningham, 1998; Tombs, 2002; Parker, 2000). However, this model also makes provision for circumstances where this assumption will be disappointed, by being prepared to move up the enforcement pyramid to increasingly deterrence oriented strategies (Fisse and Braithwaite, 1999; Gunningham, 1998; Tombs, 2002; Parker, 2000). The more serious the violation, the higher up the pyramid the enforcement would start. Minor violations could result in things such as small fines, or a warning; while serious offences, including repeated non-compliance, offenders would be subject to criminal liability (Fisse and Braithwaite, 1993). Criticism of enforcement pyramids can certainly be found as well. For example, Pearce and Tombs discuss how the speed in which regulators are willing to escalate a situation to the upper levels of the enforcement pyramid can be problematic (Pearce and Tombs, 1999:298). Without a means of escalating sanctions against corporations in certain events, it is feared that these models become representative of the most lax form of compliance strategy (Pearce and Tombs, 1999).

Resources and Training in Investigation and Prosecution

Generally speaking, the amount of resources put towards white collar crime enforcement and prosecution pales in comparison to the amount allocated towards conventional crimes (Salinger, 2005). This creates a reverse dynamic to street crime where the state goes from having an advantage in resources, to one where corporations, particularly large ones, are well equipped to match or even exceed the state's resources (Brown, 2004). As Coleman notes "one of the most fundamental reasons for the failure of the enforcement effort is a chronic shortage of personnel and resources (Coleman,

1989:189). White collar crime cases can be quite time consuming and resource intensive (Salinger, 2005). The difficulties in investigating and prosecuting corporate criminals make it hard for the state to invest scarce resources into these cases (Benson, 2001:382). However, the availability of more resources leads to a more aggressive approach in dealing with corporate criminals. For example, the United States increased resources between 1985 and 1995, and this enabled prosecutors to be more aggressive against corporations (Shover and Hochstetler, 2006). In the Westray mine explosion, a lack of resources was evident as well. Jobb (1998) notes how the failure to provide proper staff and funding fatally flawed the prosecution (Jobb, 1998:174). Prosecutors who were originally assigned to the case did not have the budget needed to catalogue more than one million pages of documents, and the prosecution was compromised by fiscal restraints (Jobb, 1998).

One potential advantage that corporations may have over the state is the quality of legal counsel. McMullan states that “corporations can hire the best defence: first rate lawyers, many support staff for appeals, private investigators, and respondent witnesses” (McMullan, 1992:92). This can create a situation where there is rapid turnover in the state’s legal staff, as they lose much of their best talent to the better paying world of representing corporations (Coleman, 1989). Thus, the state may have to fight long legal battles against some of the nation’s best attorneys and staff, while making do with a constantly changing team of young inexperienced lawyers (Coleman, 1989). Many defendants have openly admitted that their ability to hire the best defence was the deciding factor in their cases (McMullan, 1992).

Another advantage corporations may hold is the inability of the prosecutors to build a case with strong evidence. Persuasive evidence of crime and culpability can be difficult to produce in these crimes. These crimes are less visible than street crimes, as they occur within seemingly legitimate operations (Brown, 2004). Documents can be falsified, or designed to mislead and cause deception, hindering the ability to build a strong case (Brown, 2004). Simply gaining access to documents can be an exhaustive process. This is highlighted by a particularly effective technique corporations employ in which they try to drain the resources of the investigating body, as well as the desire to prosecute. Coleman refers to this process as “the delaying game”, and what McMullen refers to as “adversarial information control” (Coleman, 1989:192; McMullen, 1992:92). In this technique, a corporation will often refuse to turn over data and documents requested by the government (Coleman, 1989). In cases where prosecutors can gain access to information, Coleman explains a tactic he refers to as “over-compliance” (Coleman, 1989:192). This is where the corporation will overload prosecutors with endless documents, sometimes numbering in the millions of pages, which will drown any prosecutorial process in a sea of paper (Coleman, 1989). Defence lawyers in the Westray trial successfully slowed down the trial and testimony was repeatedly disrupted while they fought for access to crown and R.C.M.P. files (Jobb, 1998). As a result, only 23 witnesses made it to the stand over the course of 44 hearing days (Jobb, 1998). Corporations can also use their vast and deep resources to continue to drain government resources via lengthy appeals. This wears down the desire and resiliency of the state to continue prosecution (Friedrichs, 2004).

Large corporations are better able to do this than small corporations. Larger corporations do not just benefit from more financial resources than smaller ones, but, inherently, they add to the complexity of investigation by their more complex structures (Brown, 2004). Smaller companies have fewer resources to optimize privacy, litigate, and generally raise the government's cost in enforcement (Brown, 2004).

This study is also interested in any advantages corporations may have compared to the training and expertise in the backgrounds of those enforcing the law. It is worth exploring how those charged with enforcing the law on behalf of the public gain the building blocks of knowledge, as well as identifying the roadblocks, to becoming proficient in this area.

Alvesalo discusses how most of the training and investigatory procedures for police are rooted in traditional forms of crime (Alvesalo, 2002:156). Successful prosecution relies on the effective collection, categorization and presentation of evidence to construct the crime. Police are so under-trained in white collar criminality, that investigation is hardly possible without using the expertise and powers of individuals outside their departments (Alvesalo, 2002; Benson, 2001). The evidence in these cases may be little more than an elusive paper trail of memoranda and files (Benson, 2001) and issues such as the likelihood of an employee becoming ill or dying from exposure to workplace substances are very complex.

Prosecutors can also be faced with the task of educating courts. Prosecutors may be required to translate highly technical testimony and evidence into lay language for

jurors to understand, and for judges to comprehend and appreciate (McMullan, 1992; Friedrichs, 2004).

Risk

A reason that workplace safety deaths may not reach the level of criminality involves issues of perceived consent of the worker. Glasbeek notes that the state will always have difficulty applying criminal law in workplace accidents, because this would be in conflict with the fundamental starting point of capital-labour relations, and to its legitimization as a scheme which is based on freedom of contract (Glasbeek, 2002). This fundamental starting point of capitalism states that when workers enter into a social contract with employers, they are consenting to a certain level of risk for wage, and that the materialization of risk should not be seen as criminal (Glasbeek, 2002; Friedrichs, 2004). Expanding on this view, Viscusi argues that occupational health and safety is best seen as a marketized good, bought and sold as a part of the wage bargain, and best regulated by labour, other markets, and civil courts (Viscusi quoted in Pearce and Tombs, 1999:267). Thus, the employees will dictate what an acceptable level for occupational risks is, and this will be reflected in the form of a wage, with disputes playing out in civil court. Cousineau et al (1992) conducted a study of manual labour workers in Quebec, which verified that wage compensation differential does exist for both fatal and non-fatal risks (Cousineau et al, 1992).

Adding to the conversation of perceived consent is the trend to view risk information, risk detection, and risk management as a matter of private responsibility and personal security (Elliot, 2002). Elliot notes that “risk is de-socialized; risk exposure and

risk avoidance is a matter of individual responsibility and navigation” (Elliot, 2002:305). O’Malley discusses how the responsibility for risk has devolved (O’Malley, 2004). The bearers of risk become individuals who are provided with “choices” as to which risks they are willing to engage in, and are forced to live with these consequences (O’Malley, 2004). People are expected to become rational decision makers. Individuals are aware of the risks involved, and choose the options that offers the best reward for the level of risk they are willing to accept (Wilde, 1998). Victims of crime are viewed by some as rational choice actors, as responsible and free individuals (O’Malley, 2004). In a similar way to how some believe that corporate criminals plan strategically, adapt to particular circumstances, and weigh the cost and benefit in their potential actions (Friedrichs, 2004; Braithwaite and Geiss, 2001). As such, prevention increasingly becomes the responsibility of the potential victim (O’Malley, 2004). Thus, some will look at the individual killed or injured at work as a function of their acceptance to the risk based on a rational decision, and less social regulation should be available to act as a safety net. Some may view this as a product of the individual’s personal failure to negotiate risk; which assumes the individual could or should truly appreciate the risk presented to them.

When considering notions of risk in the workplace, it is important to acknowledge the strong power imbalance that exists. Glasbeek notes that “the knowledge possessed by entrepreneurs and employers is vastly greater than the knowledge held by the public or the government” within a given field of business activity (Glasbeek, 2002:162). In our political economy, private investors have the power to assess and control the risks presented to workers (Glasbeek, 2002). Employers decide what kinds of materials and

technologies to employ, and what kind of skills and workers are required (Glasbeek, 2002). According to Glasbeek, “employers set the agenda and frame the debate for decision making, and standards that ought to be maintained” (Glasbeek, 2002:162). He goes on to state that “elected officials who are charged with the task of defining the goals and methods of regulation face the same information challenges as citizens who are exposed to the risk” (Glasbeek, 2000:162).

The ability of workers to effect change is compromised, as they come into the workforce out of necessity, find an agenda of power imbalance already set out, and try to alter what already exists (Glasbeek, 2002). A fundamental principle of neo-liberal capitalism is thought to be displaced, as those who are most exposed to risk (the workers) have the least control over it (Glasbeek, 2002). Liberal capitalism believes that those with the most amount of risk should get to make the decisions (Glasbeek, 2002). As such, it reasons that workers would get similar recognition when it comes to their bodily well-being. Instead, the needs of the capitalist are privileged over all else (Glasbeek, 2002). Glasbeek feels that this “oft ignored truth”, could be brought out through the use of criminal charges against corporations (Glasbeek, 2002:163). In that, efforts in pursuing criminal charges may have little chance for success, but do illustrate the contradiction of privileging corporate capital in a liberal democratic society (Glasbeek, 2002).

The transformation of the job market has contributed to the power imbalance enjoyed by employers. In a Canadian study, Breslin et al (2007) note that “over the past two decades, there have been major shifts in the employment patterns from permanent and full time work to contingent work arrangement characterized by part time or

temporary employment and job insecurity” (Breslin et al, 2007:783). This shift becomes a problem, as contingent workers may feel intimidated by the possibility of losing their job if they raise health and safety concerns (Johnstone et al, 2005). Contingent work is also said to compromise the health and safety of all employees at a place of employment, as it is associated with workload intensification and inadequate training (Breslin et al, 2007). Contingent workers may not be sufficiently well-versed and confident in their rights to know about changes made to safety regulation, the right to raise concerns with an employer, or the right to refuse dangerous work (Johnstone et al, 2005). Therefore, it cannot be a given that all (if any) workers come from a sound and rational knowledge base when consenting to risks in the workplace. If contingent workers are becoming more and more common, the issues of risk in the workplace increase at the same rate.

Some groups in society are more likely to be contingent workers than others. Young workers constitute a substantial percentage of this group, and are particularly likely to suffer from the negative factors associated with contingent work (Breslin et al, 2007). Breslin et al show how young workers feel helpless, powerless, subordinate, and lacking in control over risk, which dampens their potential to influence change in workplace safety (Breslin et al, 2007). This study also showed that, rather than feeling invincible, or lacking the capacity to assess risk, young workers are constrained by power relations (Breslin et al, 2007). It should also be noted that the study found this same dynamic in older workers as well (Breslin et al, 2007).

The perception of risk associated with a given occupation may vary from worker to worker. Wilde (1998) discusses workers’ perception of risks presented to them at the

Westray coal mine, and how they felt pressure to accept those risks, even though they were assumed to be highly likely to occur, and serious in consequence (Wilde in McCormick, 1998). The main reason for workers to take on a level of risk higher than what they were comfortable with was the pressure to provide for themselves and their families (Wilde, 1998). Nova Scotia was an area which, historically, had been economically depressed, and offered little in the way of alternative employment (Wilde, 1998). Exercising their power over employees in a more overt way, Westray workers were often the victims of fear and intimidation tactics (Wilde, 1998). Workers feared the denial of overtime opportunity, and worse, being fired for raising safety concerns (Wilde, 1998). This was compounded by the employees not having the necessary data to confront management or take Westray to court (Wilde, 1998). There was also the palpable feeling of powerlessness that the government had invested heavily in the mine and supported its operation (Wilde, 1998). Many workers feared that complaints to inspectors would be ignored and or have repercussions, and that quitting may disqualify a worker from employment insurance benefits (Wilde, 1998).

Socialization also puts pressure on workers to de-prioritize risk to bodily harm in other ways as well. In their study, Breslin et al found that males were more likely to stifle their complaints at work in order to “prove oneself and accept some things as part of the job” (Breslin et al, 2007:789). Workers who feel pressure to conform to these stereotypes do not want to be seen as a weak male, essentially a lesser man, for raising concerns when others manage the risk as part of their job (Breslin et al, 2007).

Of course, a major factor in the willingness to consent to risk is the understanding of what risks are presented to you directly at work. This comes back to how well employees are trained in safety by their employers to the risk they will encounter on the job site. Smith and Mustard (2007) conducted a study of Statistics Canada survey data, and found that only 21 percent of workers had received safety training in their first year with a new employer (Smith and Mustard, 2007). If workers are not being trained in the risk presented to them, it is hard to believe that they are consenting to those risks when they are on the job. However, efforts have been made by employers to increase worker information about risks to their health. Pearce and Tombs note that “partly through reluctant recognition of their own limitations, partly through new legal requirements regarding right to know and hazard communication” a new form of risk governance has been partially constructed in a way that is inclusive of (some) outside groups (Pearce and Tombs, 1999:273). Some examples of this include an increased union presence, joint health and safety committees, and worker participation in decision making (Johnstone et al, 2005).

Chapter Three: The Study

Research Questions

The research questions that I will address in this study have been designed to contribute to the sociological understanding of corporate liability in workplace fatalities as well as to assess the capability of criminal law to deal with these incidents. This study will address the following questions:

- (1) *How often can workplace fatalities be attributed to the violation of legal duties of the employer?*
- (2) *Are there any factors that make British Columbia unique to the rest of Canada in regards to workplace fatality and criminal liability?*
- (3) *How effective is the Criminal Code in dealing with workplace fatalities?*
- (4) *Is there anything that could be done to improve the criminal law so it would be more useful in dealing with workplace fatality cases?*

Research Methods

The research will use two methods. The first method focuses on secondary analysis of Incident Investigation Reports regarding workplace fatalities completed by WorkSafeBC. These reports will be supplemented with additional case information about these incidents provided via the Freedom of Information offices (F.O.I.) in British Columbia. The second method employs semi-structured interviews with respondents in the field of occupational health and safety and corporate criminality, and who are familiar with the Bill C-45 amendments.

Data Sampling

Incident Investigation Reports

This study examined 38 WorkSafeBC Incident Investigation Reports (I.I.R.) from the lower mainland area in British Columbia between 2005 and 2006, which deal with traumatic fatalities, excluding deaths from occupational health and disease. These reports were made available to the researcher free of charge due to the fact they had been

accessed by other individuals (including members of the media) and edited to exclude any identifying personal information about the deceased. The reports have been released under the Freedom of Information Act. However, some information has been severed under different sections of the Act, including all information that has been determined by Freedom of Information officers to unreasonably invade the personal privacy of third parties (section 22) or cause harm to intergovernmental relations (section 16). These redactions include information that belongs to the Coroner's Office, and does not belong to WorkSafeBC. In more general terms, the I.I.R. were chosen because they gave a more detailed and rich explanation of the factors and parties involved in the fatalities than simply looking at statistical information. This approach allowed for a more comprehensive understanding of the kinds of factors involved, and why they played a role in the fatality. The typical I.I.R. makes note of the incident investigation number; the year; employers, firms, and individuals involved in the case; a synopsis of how the fatality occurred; factual information about the case; analysis of the factual information and potential factors leading to a fatality; conclusions about the causes and underlying factors of the fatality; and notes about specific health and safety directives given by WorkSafeBC (which does not include enforcement actions performed under the Worker's Compensation Act, or Occupational Health and Safety Legislation).

As mentioned, this information was supplemented with information from the F.O.I. offices, which provided details that the reports did not contain. This information included the penalty amount imposed on any employer or firm; regulations cited as the basis of any penalty; as well as other regulations cited during the investigation. This last

category of information referred to the citation of any work orders placed on the company, while the previous two were in regards to any fines, and or jail term received by the employer or the firm. The employee assigned to this file at the F.O.I. offices was extremely helpful in clarifying and providing updated information as it became available to her. The information about the fines and enforcement action taken was particularly critical to determining how often employers were at fault in a worker's death. This is because fines and or jail sentences were used as a benchmark for establishing a more concrete relationship between a death and employer action or inaction. Although 38 I.I.R. are examined, the supplemental information provided by the F.O.I. offices only included data for 33 cases, as 5 were not included in file at the time it was completed. However, I was able to learn that there were no penalties given in the form of fines and or jail terms for the 5 missing cases. Thus, they would not have been included in the total number of cases which fell into that group.

Semi- Structured Interviews

This study also employed nine semi-structured interviews with respondents in the field of occupational health and safety, and corporate criminal liability. All nine of the respondents are considered experts in the area of criminal liability in workplace fatality. The respondents were selected on the basis of their experience with the Bill C-45 amendments to the Criminal Code, either in applying the law, or in analyzing its use. They were also selected for their knowledge in the areas of occupational health and safety and corporate crime. The questions for the semi- structured interviews allowed me ask how well the criminal law works in regards to workplace fatalities; to gain opinion on the

amendments put forth in Bill C-45; to gain insight into the pervasiveness of worker death as a result of employer liability; and to examine the accuracy of official statistics from those who are experienced in the areas of occupational health and safety, criminal law, and corporate crime. Some questions were changed for different groups to better suit their backgrounds. However, the majority of questions were the same for all respondents. Semi-structured interviews also provided the flexibility to engage the respondents in additional topics and to probe responses.

All interviews were conducted via telephone from Winnipeg to respondents in British Columbia, and were recorded and transcribed. Written consent was granted in each case for the recording of interviews, which ran from just under 30 minutes to just over one hour. Interviews were conducted between March and November of 2009. Due to the rather unique knowledge required to comment on the law, it was difficult to find qualified respondents who also had the time to participate in the study. This is not an area of law that is widely practiced, and identifying informed participants took significant time and effort. For example, over 30 private law firms were contacted after researching their areas of specialization, namely issues dealing with corporate law, employment law, and occupational health and safety. Due to the nature of the subject, obvious places to start looking included Crown prosecutor's offices, WorkSafeBC (Formally the Worker's Compensation Board of B.C.), the British Columbia Federation of Labour, and private law firms. I was able to find qualified people to interview from these groups. This method of cold-calling different agencies and individuals also led to participants being identified through snowball sampling. For example, I contacted WorkSafeBC via email

inquiring about who I could contact that may have a background in this area. A contact at WorkSafeBC referred me to three other people who volunteered to be part of my study.

The majority of respondents interviewed consented to their name, and or job title and organization being included in the study. However, I have chosen to use pseudonyms for all respondents to ensure a higher level of confidentiality. Some respondents have backgrounds in corporate law, specifically in the area of occupational health and safety, while others work for WorkSafeBC, and the British Columbia Federation of Labour. The final two respondents were an RCMP officer and a university professor. All respondents have knowledge of the Bill C-45 amendments, occupational health and safety, and or corporate criminality. The respondents were assigned pseudonyms ranging from Respondent one to nine (R1- R9).

Data Collection and Analysis

Incident Investigation Report Process

The information gathered from the Incident Investigation Reports centres primarily on the causes and underlying factors sections of the report. A great deal of time was given to reading, coding the factors, and making notes about the cases. This, in conjunction with the information provided by the Freedom of Information offices, was systematically categorized and placed into a spread sheet. Each Incident was broken down by year; the nature of the industries involved; the penalties applied; the regulations cited as a basis for any penalties; other regulations cited during the investigation; and casual and underlying factors for each incident. A separate spreadsheet was also created which included a brief synopsis of each incident, as well as any points of interest that

might be uncovered but were not viewed as a causal or underlying factor of the incident. From there, similar causal factors were grouped together into themes. This process allowed me to see which themes were the most prevalent in worker fatalities, which may allow regulators or law makers to address these issues. These themes are presented in the results section, identifying the types of factors included in each, as well as an example of each for illustrative purposes. In addition, from this spreadsheet, I was able to note how many incidents resulted in more serious sanctions, as well as the amount and type of penalties involved.

Semi-Structured Interview Process

The semi-structured interview process allowed me to get specific answers to questions, but also the flexibility to deviate into areas of discussion brought up by the respondent. Participants were sent a copy of the interview questions I intended to ask ahead of time to familiarize themselves with the content. I felt this would shorten the time length of the interviews. The interviews were read and re-read several times, then coded into themes.

The following section will discuss the results of analyzing the Incident Investigation Report data, as well as the semi-structured interviews, as they relate to answering the research questions of this study.

Chapter Four: Findings

In this section, I will present my findings as they relate to my research questions, and discuss how they contribute to the literature in this area. The goal of this research is

to create a greater understanding of corporate criminal liability in workplace fatalities within Canada.

The amendments included in Bill C-45 were intended to address a problem with the previous legislation. Essentially, the amendments aimed to make it easier to attribute liability to an employer for, among other things, workplace fatalities resulting from their direct actions or negligence. It might be expected that there would be an increase in the number of criminal charges being laid against employers and their actors as a result of the amendments. However, while there has been recent use of criminal charges against corporations, it remains rare. Thus, we must look at other sources to see whether this truly reflects how seriously government authorities are treating workplace safety, or if problems with the law remain. I attempt to answer this question by identifying evidence which shows how often employee fatalities are the result of employer failure, and whether the legislation, the administration of the legislation, or both is flawed, as well as what, if anything, can be done to fix it.

Addressing the “Dark Figure” of Employer Liability in Workplace Fatality

Corporate crime involves a large “dark figure” of unreported crime that cannot be included in crime statistics (Snider, 1993: 27). This study will attempt to estimate how often workplace fatalities are the result of employer liability. Very few employers have been charged and convicted of criminal offences, but the literature suggests that there are incidents which were not being dealt with under the old law.

Incident investigation reports from WorkSafeBC have been chosen to assess how often workplace fatalities were due, at least in part, to employer failure. The reports also

indicate what sorts of actions were taken against corporations which were deemed to be at fault in workplace fatalities.

Employer Liability in Workplace Fatalities

The literature has provided estimates of how often employers are at fault in workplace deaths. McMullan estimated that 50% of workplace deaths in Canada are attributable to unsafe and illegal working conditions (McMullan, 1992:25). One of the aims of my research was to identify how often workplace fatalities in British Columbia were attributable to employer wrongdoing or negligence. Although my study focuses on British Columbia, and the statistic provided by McMullan looks at Canada as a whole, it is interesting to see how British Columbia compares to estimates of the national average.

To accomplish this goal, I have examined 38 workplace WorkSafeBC Incident Investigation Reports which documented the death of an employee(s). **Table 2** illustrates information gathered regarding how often, and in what ways, companies were disciplined in the case of these fatalities:

Table 2: WorkSafeBC Sanctions in workplace fatalities

Type of Response	Frequency	Total Percentage of Sample (%)
Financial Penalty	19	50.0
Prison Term	1	2.6

I chose to look at the how often the most serious forms of sanction (fines or imprisonment) were used in these 38 incidents. The reason for this is to have a more certain level of assurance that an employer was violating an obvious legal duty, and/or, had a history of ignoring similar violations in the past that could result in serious harm to

an employee, and should have taken the appropriate steps to prevent it. Out of the 38 cases examined, 19 resulted in fines, as well as one prison term in addition to a fine. This indicates that half (50%) of the incidents where a fatality occurred could reasonably be attributed to, at least in part, the employer (and one landowner). At the time of writing this section, the penalties for one incident were still pending, and unavailable. That leaves the remaining 18 cases which had an average fine of \$53,406.90 per incident¹. Fines ranged from \$2500-133,000. It is also worth noting that many of these fines were appealed or were in the process of being appealed.

In perhaps the clearest evidence of employer liability for employee death, the data showed one incident (2.6% of the sample) where an individual was sentenced to jail under provincial safety legislation (the sentence length was not made available). In this incident the firm was also fined \$60,000 as the employer, and the owner was fined \$20,000 as supervisor of the workplace. From the causal factors and analysis provided within the I.I.R., it would appear that the employer/supervisor chose to employ work procedures that were against standard industry safety procedures and violated an agreed upon safe work plan established before the work began. It appears that the owner was fully aware of the safety hazard, yet created an unsafe working environment to save time and/or money. It was hard to tell exactly what the difference was in comparison to other cases, other than that of a clearer indication of reckless negligence, which led to the prison sentence. The prison term indicates that this case could reasonably have been

¹ See Appendices “A” and “B” for a list of regulatory legislation cited in these incidents

brought up on criminal charges, as it was deemed serious enough to take away the supervisor's freedom.

The file data used to determine the extent of employer liability was supplemented by responses given by respondents during semi-structured interviews. The experts were asked to estimate a percentage for different forms of liability, based on their background, and perception. When asking the respondents to discuss this topic, the distinction was made between three degrees of liability.

The first degree of liability sought to determine how often the primary (or root) factor(s) in workplace fatalities occur as a result of the employer violating provincial occupational health and safety law. Respondents gave an educated guess based on their perceptions rather than on official statistics, and displayed a range from 5 to 95%. This range is so large that it is essentially meaningless. There did not appear to be any differences between the ways groups of respondents answered this question.

The second degree of liability sought to determine how often violation of safety laws by the employer played a contributing factor, but was not the primary/root factor in worker fatality. The respondents gave a range of 70 to 95%:

“If you are talking about a contributory factor, so it is one of the factors that we find a health and safety violation, that is anywhere from 85-95% of the fatal incidents that we investigate”. (R2)

The third degree of liability explored how often the death of a worker could be attributed to a criminal level of employer liability. It was noted several times by the respondents that it was hard to make an estimate in this regard, as very few, if any, cases had been taken to court on criminal charges. Of the respondents who felt comfortable

making an estimate, the range was from 1 to 10%. A few respondents noted that most cases in this category would fall under criminal negligence causing death, which has a very extreme level of negligence attached. Thus, it is extremely rare for an employer to be guilty at such a level. As R3 notes:

“We would be looking at criminal negligence, and that is a pretty extreme level of negligence, given how the criminal action is defined in the Criminal Code. Criminal negligence involves either wanton or heedless disregard towards safety, and that is a lot less common standard because the threshold doesn’t hit” (R3).

Analysis of Causal Factors in Workplace Fatalities

The WorkSafeBC Incident Investigation Reports provided another opportunity to explore how often employers were at least partly responsible for worker fatalities.

Although it is not an easy task to take regulatory data and extrapolate it into the criminal criteria, some of the cases did appear to demonstrate elements of criminal liability. This finding indicates that the criminal activity could be taking place more than the frequency of charges suggests. This portion of the analysis will examine the data in relation to section 22.1 and section 217.1 of the Criminal Code. Section 22.1 of the Criminal Code addresses corporate criminal liability where negligence is suspected (Goetz, 2003: 8). For the purpose of this analysis, I am examining the part of the law which discusses potential liability where the “senior officer responsible or senior officers collectively show a marked departure from the standard of care that could be reasonably expected in failing to prevent the offence” (Goetz, 2003: 8). Section 217.1 of the Criminal Code created a new statutory duty which requires that “everyone who undertakes, or has the

authority, to direct how another person does work or performs a task takes reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task” (Goetz, 2003: 9). Both of these sections appear to focus on taking steps to prevent foreseeable harm to workers, which is a recurrent theme in many of the cases.

Table 3 illustrates the themes that became apparent when analyzing the causal factors in workplace fatalities from the I.I.R. sample:

Table 3: Causal factors in worker fatalities obtained from the Incident Investigation Reports²

Causal Factors Themes	Frequency of themes present in cases	Percentage occurring in total cases (38)
Employee Error/Personal Factors	20	52.6
Inadequate Work Procedures	19	50.0
Inadequate Risk Assessment	16	42.1
Inadequate Employee Training	10	26.3
Unsafe Equipment Provided	8	21
Inadequate Supervision	7	18.4
Inadequate Safety Culture	5	13.1

From the case data, the most often recurring theme involved factors which showed that employee error or personal factors (Ibid) not pertaining to the employer contributed to his or her death. These two categories were combined together, as the resulting fatalities had nothing to do with factors brought about by the employer. Thus, could not have reasonably been prevented. This theme occurred in 20 (52.6%) of the cases. Of course,

² Note that because of multiple factors involved in the incidents, percentages add up to more than 100%.

this element would likely weigh heavily on whether criminal charges would be used. This theme includes factors such as drug use, and disregarding established safety procedures of the employer. A case illustrating these factors involved a worker who drove a logging truck off a cliff while descending a hill. One of the causal factors stated that the use of cannabis by the driver may have produced psychoactive effects, which impacted his ability to operate a vehicle.

However, five other themes may fit the criteria discussed above. All five themes suggest that employers did not properly prepare and/or protect their employees against harm. The second most common theme involves the failure of the employer to provide comprehensive instruction in work procedures (Ibid). This problem was involved in 19 of the cases, which is 50% of the total. This theme includes factors such as inadequate safe work procedures; lack of site specific safe work procedures; and confusing safety policy procedures. A case illustrating this type involves a young worker who fell three storeys from an unguarded balcony, while he was installing siding. One of the causes identified was that the employer had not developed a written fall protection plan for this type of work. Had an established safe work plan been employed, it would likely have prevented this fatality which occurred in a routine work task.

The third most common theme was an inadequate risk assessment of the workplace by the employer (Ibid), or in one case, landowner. This theme was found in 16 of the cases, which is 42.1% of the total. This theme includes factors such as inadequate risk assessment, and the lack of non-routine work hazard assessment and analysis. A case illustrating this involves a worker who was in the process of cutting down a tree,

which fell over, and the trunk struck the worker in the chest. One of the causal factors identified the lack of risk assessment by the employer towards a specific type of tree called a “school marm”, which is a “danger tree” that presents specific hazards to a faller, and requires a close and thorough assessment before being cut down. It was a risk that should have been accounted for by the employer, and was not.

The fourth most common theme involved inadequate training of employees by the employer (Ibid), and was seen in 10 (26.3%) of the cases. This theme included factors such as inadequate training; employers putting an inadequate emphasis on training; and a lack of written training records. A case illustrating this involves a worker who was setting up falsework, when it collapsed, and the worker was struck in the face by falling plywood which was resting on top of the falsework. It was determined that the four employees, including the supervisor, had not been adequately trained in the erection and dismantling of the falsework. Had the workers received more adequate training, they would have recognized that the stability of the falsework was suspect, and this could have prevented the collapse.

The fifth most common theme deals with unsafe equipment provided by the employer (Ibid), and was found in 8 (21%) of the cases. This theme includes factors such as unsafe equipment; unsafe work materials; and the lack of protective gear for employees and visitors to a site. An example illustrating a case of this type involves a worker who was fatally electrocuted after the ladder he was repositioning came into contact with high voltage lines. The ladder was clearly unsafe, and should have been taken out of service by the employer. The job required the ladder to be repositioned

frequently, and the hassle involved with lowering this ladder may have encouraged the worker to move it without lowering it. It was during the movement of the ladder in the upright position that it came into contact with the exposed high voltage lines.

Inadequate Supervision (Ibid) is the last theme to be included, and was found in 7 (18.4%) of the cases. This theme includes factors such as inadequate/lack of supervision; no formal safety inspections (or records thereof); and ineffective application of safety policies of employer. A case illustrating this involves a worker installing lighting at a warehouse on a scissor lift, when the lift was struck by a bridge crane. The scissor lift fell to the concrete floor, along with the worker, who suffered fatal injuries as a result. The company that was contracted by the land owner to construct the warehouse was found to have inadequate supervision. This employer did not conduct any inspections or audits to ensure that the site superintendent was actively coordinating health and safety activities of all the workers on the site, to make sure workers were aware of hazards, risks, and safe work procedures.

Examining the Reliability of Official Workplace Fatality Data

I also examined how reliable the official statistics were, as there has been criticism over the accuracy of official statistics. Some literature has stated that obtaining an even relatively accurate number for corporate crime in just one category, like crimes against employees, would require a massive examination, dissection, and re-categorization of data from a whole range of bodies (Slapper and Tombs, 1999). Other literature notes that including the violations of civil and administrative data leads to an over-counting of the problem (Friedrichs, 2004). Yet this misrepresentation has been said

to pale in comparison to the numbers generated by not including those statistics, and relying solely on criminal agencies (Friedrichs, 2004).

Thus, it was worth noting the range of opinion among the experts interviewed concerning how reliable official statistics on workplace fatality are, as well as identifying any factors which impede their legitimacy. Several of the respondents felt that, for the most part, the official statistics will be fairly accurate. Reasons provided include the legal duty to notify the appropriate agencies, such as WorkSafeBC and the Coroner's office. R3 notes that fatality statistics may be skewed for a given year due to the reporting of occupational illness or disease, stating "the overall numbers are higher than being reflective of what happens in a particular year; because we have a lot of occupational disease matters". Further to that, R3 notes "for example, people dying from asbestos related issues where they had exposure 30 years ago". However, for traumatic injuries in a given year, he goes on to state that:

"We have a fatal and serious injuries group that deals with this. My understanding is that all traumatic fatalities, not including someone dying from occupational disease, but dying from an industrial accident that has happened this year or whenever, is looked at in terms of whether there should be an investigation or not" (R3).

Thus, traumatic fatalities should be well accounted for. R3 also notes that "there are obligations under our act for employers to report incidents which include fatalities because we also deal with claims". It would appear that accurate statistics in this area, at minimum concerning traumatic fatalities (which is the object of this research), are reliable.

However, while the WorkSafeBC statistics should be accurate, several of the respondents did note factors which could potentially impact the accuracy of workplace fatality statistics. For example, one respondent noted that taking multiple jurisdictions into account is an important consideration to get the complete picture for fatalities in a given year:

“In terms of just counting the numbers of fatalities per year, I think it is important to consider the two jurisdictions so that the number of fatalities, for example reported by WorkSafeBC, in one year would not represent the total number of occupational fatalities. If there were some fatalities within those industries regulated by Labour Canada, you need to look at both bodies” (R1).

Other factors may influence the accuracy of official statistics. McMullen notes that “the ambiguity and even manipulation regarding the cause of death, the reluctance and caution of enforcement agencies, and the general reticence of corporations combine to depress levels of recorded industrial death and injury below the level it would otherwise be” (McMullan, 1992:25).

Two of the respondents commented on the impact that a corporation could have on the accurate reporting of workplace fatalities. R7 feels that:

“The only people who would affect the accurate reporting of a fatality would be the corporation who stands to be affected by the fatality and who would stand to be implicated in any sort of wrong doing, as result of a death. They may inaccurately report it to escape any sort of liability” (R7).

Unfortunately, this point was not expanded upon more in depth within the interview.

However, R9 also feels that corporations can have an impact on the accurate reporting of fatalities. She states that, “some employers will threaten workers and try to get them to change their evidence”. She also feels that, “some employers will cover up evidence.”

These responses indicate that an employer would be able to influence the reporting of accurate workplace fatality statistics. However, R3 disagrees, stating:

“I am not aware of anything of that sort. I think we just sort of report what is out there. I think it would be quite improper in terms of any influence of that sort. I don’t think I’ve ever heard anybody suggest something like that. It is simply reporting on what is out there” (R3).

Factors Unique to British Columbia when Examining Workplace Fatalities

My research focuses on British Columbia. Thus, I wanted to determine if respondents felt that the rate of workplace fatality and the potential for the Crown to prosecute criminally is impacted by factors unique to British Columbia. This part of the study was the most exploratory in nature, and did yield some interesting opinions from the respondents. Many felt those factors such as the administrative penalty system used by WorkSafeBC; the nature of the economy; and the criminal charge approval process within British Columbia all have the potential to stream cases away from the criminal justice system.

WorkSafeBC’s Administrative Penalty System

One of the most recurrent themes mentioned by several respondents about WorkSafeBC referred to the ability to charge corporations under their administrative penalty system. This system allows for regulators to handle corporations (only the actual company, not specific individuals within the company) with less obstruction, and may divert cases away from the criminal court system:

“The first thing I want to make a point of is that we have an administrative penalty process in BC that is fairly unique, so most of our cases do not go to Crown counsel for prosecution. Most cases are dealt with by way of what I would call an administrative process, and the board runs what you might call an administrative court, whereby we can

levy a financial penalty on employers for violations of the Worker's Compensation Act, and or the Occupational Health and Safety regulation" (R1).

In comparison to other provinces such as Ontario, R2 notes that other regulatory bodies need to employ the provincial court to punish companies. R1 explains how the administrative penalty is something other places in Canada would like to have, stating that it "has been viewed by others quite jealously, because it is a reasonably efficient process compared to the courts, especially in terms of timeliness." In that same vein, R4 discusses how "taking companies and individuals to court in a prosecution is a long and expensive model for the government, and is outside their direct control". He goes on to say that, "administrative remedies are cheaper, faster, and within their (WorkSafeBC) direct control". When asked to clarify what he means by out of their direct control, he explains how "It goes to a prosecutor, who doesn't work for the ministry, a judge who doesn't work for the ministry, goes to a standard they are not completely familiar with, and it doesn't go to their own administrative review process".

Thus, it would appear that the existence of a seemingly quicker, cheaper, and more certain administrative penalty process might influence an investigator to recommend an administrative penalty response over a criminal court response when dealing with a corporation. It may be fair to assume that this would play a part in deciding how to deal with cases that are not easily demonstrated as criminal. In addition to filtering cases away from potential criminal charges, one respondent notes how Crown counsel is very aware of the administrative penalty system in British Columbia, and that influences how they will proceed with a case:

“One thing I think you need to know is that the Crown is fully aware that we have an administrative penalty system in British Columbia, and they know it is more efficient than the courts... The fact that we have that administrative penalty system in British Columbia, is a fact that the Crown considers when it looks at a case, and decides whether or not it is in the public interest to prosecute” (R1).

In addition to the other perceived benefits of the administrative penalty system, respondents noted that the sanctions available may not differ significantly from those in the criminal courts and that they are in many cases more significant than what a company would receive if convicted on a criminal charge. One respondent noted that, although administrative penalties are not an option in punishing individuals (which is rare), they are significant to punish the corporation:

“We can levy a penalty every bit as big as through the criminal courts against an employer. What we cannot do through administrative penalty is penalize individuals. But it is seldom that we really need to see particular individuals being sanctioned...if you were to look at the jurisprudence in terms of what courts levy in fines in terms of amounts you would find that the administrative fines are equal to or greater than the amounts levied in the (criminal) courts” (R1).

With this in mind, respondents also noted the flexibility and potential severity of sanctions available under this system. R3 describes how:

“Normally our penalties are based on the firm’s payroll, so we take a penalty amount on a scale based on the size of the firm. But, in a fatality, if certain other conditions are met then we have the authority to have our president authorize us to depart from a grid in terms of their payroll. For a single fatality potentially imposing the maximum penalty of \$250,000 or for multiple fatalities go right up to our limit of around \$560,000” (R3).

The potential for harsh penalties (a maximum of around \$560,000 for multiple fatalities) under the administrative penalty system is one thing to consider, as several

respondents made note that a fine is all a corporation is likely to get from a criminal charge. Yet, it is worth noting how often they are used. The respondents showed some disagreement in how ready WorkSafeBC is to hand out large fines:

“It (the maximum fine) has been used a number of times. There are conditions that have to be met in terms of legal conditions. Those have to be a high risk violation, it has to be committed knowingly and with reckless disregard, and there has to be a causal link between the violations and the result, meaning, that you have to be able to say that the violations led to the person being killed. But that is a tool that we have used” (R3).

“W.C.B. (WorkSafeBC) can fine up to 500k, although this has never happened in B.C.” (R9).

“Highest fine we have had is, I think, \$297,120” (R2).

“We do regularly impose administrative penalties, some as high as, the highest one we have imposed would be \$292,000” (R1).

While respondents commented specifically on the use of the administrative penalty system and how it is able to fine corporations, they also compared the use of fines and jail sentences under the regulatory and criminal models in more general terms.

The criminal law option for punishing a corporation is usually a fine as you cannot send a corporation to prison. Several of the respondents reported that the fines under provincial and federal regulations were similar. This may limit the appeal of using criminal sanctions, particularly with the difficulty in establishing the necessary level in burden of proof to get a successful conviction:

“I think that is why you don’t see a lot of these cases go to court, because what goes through the minds of the people charged with making the decisions as whether to charge these corporations criminally is that they have an easy out. They can say that the Criminal Code only allows for fines, for example, in the penalty phase of sentencing for the corporation. For example, if they are sentenced with a summary

conviction offence it is no more than a \$25,000 fine. If they are sentenced to an indictable offence the fine is unlimited. So I think what these Crown counsel's will decide is that, ok, they will only get a fine under the Criminal Code anyway, so why don't we just leave it to the regulatory agencies which have a lesser burden of proof to fine them"
(R7).

Having said that, R7 also pointed out that the criminal law potentially allows a corporation to be fined an unlimited amount for an indictable offence. This is an advantage that the criminal law has over the regulatory model, which has a cap on what they can assess:

"I feel that if the case is met, and it is proven beyond a reasonable doubt through investigation that there is a criminal aspect to it, that can be proved, I think that a criminal path should be followed. And even though the sanctions are somewhat the same as the regulatory board... there is no limit on the penalty that can be imposed by the criminal court on conviction of an indictable offence. I think I read of a case where a criminal court upheld a fine of 2 million dollars. I think the regulatory bodies are limited in what they can impose as a fine on a company"
(R7).

It should be noted that, under the new amendments, corporations can be made subject to more than simply a fine under the Criminal Code. Corporations can also be placed on probation, in which they would have to meet a criterion of accommodation, and supervision specified to the court's requests (Goetz, 2003: 10-11; Department of Justice, 2007:9). A probationary sentence also may include measures such as providing restitution, making offences known to the public, and implementing effective approved policies found in section 732.1 (3.1). However, one respondent noted that the regulatory body in British Columbia also has the ability to impose similar restrictions on companies and their actors:

“A recent example was that we prosecuted both the employer, and essentially the principal of that firm, and they both pled guilty. Both were given fines, as well as the court imposed some conditions on the supervisor of the firm in terms of reporting on his activities to WorkSafeBC so WorkSafeBC could monitor his future activities for certain periods of time to ensure that he was fulfilling his obligations” (R3).

Respondents also commented on the use of jail terms under the criminal and regulatory models. While the ability to punish a corporation may be limited in comparison to what can be given to individual actors acting on its behalf, several respondents noted that people could go to jail under regulatory violations. One respondent noted that the ability to place those actors in jail under regulatory law is available in most provinces and territories:

“I am not an expert in every jurisdiction in Canada, but I am sure if you went to any Worker’s Compensation Act and looked at the remedies for breach, companies under that legislation can pay fines, and individuals can pay fines or go to jail. So the answer would be that in most jurisdictions in the country, a person charged in a regulatory way, not a criminal C-45 way, can go to jail if they are convicted” (R4).

The options available for enforcement in Canada seem to fall under the enforcement pyramid scheme outlined by Fisse and Braithwaite (Fisse and Braithwaite, 1993). One criticism of this pyramidal enforcement scheme is the degree to which regulators are willing to escalate a situation to the upper levels of the enforcement pyramid (Pearce and Tombs, 1999). R4 discusses how the use of incarceration is very rare in Canada in general, and that jail is being saved for the most serious offenders so we should not be surprised when the most serious forms of penalty are not being used against corporate actors:

“In Canada, we are famous or infamous, for being reticent at the judicial level to send people to jail even for crimes. Certainly when you look at our method of incarceration next to the US, we incarcerate people for a lot less time and a lot less often for pure crimes. Translate that over into the regulatory breach area. If we don’t put people in jail for crimes, why do we put people in jail for regulatory breaches which amounts to negligence rather than diligence, as opposed to intending harm? It is not really a surprise that people don’t go to jail for being negligent. So jail should be reserved for the worst cases” (R4).

R4 goes on to state that the fact that businesses take a stronger approach to occupational health and safety means that less people are going to be getting potential jail time. Although, he does note that he knows of cases where jail terms could have been asked for in a regulatory context and were not, that the tools are there without the use of criminal charges, and that Crown prosecutors are not asking for them:

“If Canadian business was remaining reckless, like the bad old days where worker safety wasn’t dealt with as a serious corporate matter, then absolutely you crank it up and send a few people to jail and say we mean business. But that is not the way that health and safety practice has gone in Canada. Big businesses I think are far safer than they were 10 years ago, and certainly 30 years ago. So there is less cause to say these individuals should go to jail for this incident... I deal with cases...where you could say there is such a pattern of negligence here that this is serious enough that there should be personal repercussions and there could be jail, and it is not asked for...the (regulatory) remedies are there and they generally are not sought” (R4).

However, when actions do reach the higher levels of liability, two respondents noted that the criminal law is not a very effective means of having people incarcerated, and that regulatory law is better if that is the Crown’s aim. R4 said that if he felt that a jail sentence was warranted, he would choose the jail options under regulatory law as it is more certain there would be a conviction (it should be noted that, to the best of my knowledge, no maximum is placed on regulatory jail terms):

“If I was a Crown prosecutor...and I had a case where somebody was grossly negligent at the supervisor level, so you want to go after the individual and not just the company, and I looked at the penalty provisions and saw that nobody ever goes to jail in Canada as an individual for workplace fatalities, or rarely, and I thought to myself that this person should. This was so egregious a breach of any safety standards, I’ve got lots of ammunition to successfully prosecute that individual in the regulatory model without going to Bill C-45 or even Criminal Code negligence causing death where I have got to prove that his actions amounted to a guilty mind. Why do I need to put that hurdle?” (R4).

It could be argued then, that the ability to fine as harshly as criminal courts is only significant if it actually occurs. However, the low likelihood that a corporation will receive any punishment at all through a criminal court may temper that feeling, as some penalty would be better than none at all.

Criminal Charge Approval Process in British Columbia

Respondents commented on the criminal charge approval process as a notable factor that makes British Columbia unique, and may explain why fewer cases make it to criminal court in British Columbia compared to other provinces. After a workplace fatality has taken place, the incident will be investigated by the applicable regulatory board. In the rare event that a fatality is deemed criminal at the onset, the investigation would then be conducted immediately by the RCMP.

Respondents also discussed how the regulatory body can investigate the incident until they come to the conclusion that the fatality might be the result of a criminal law violation. At this point, they would refer the case to the RCMP, who would start their own investigation, and decide whether to recommend criminal charges to the Crown counsel. All the evidence collected by the regulatory body up to that point would be made

available to the RCMP. However, it was also made clear that any evidence collected after that point would be subject to criminal law statutes for admissibility. Thus, the regulatory body would have to be mindful not to potentially compromise evidence crucial for a criminal investigation. The unique aspect of this process is the need for the RCMP to gain Crown prosecutor approval (federal or provincial, depending on the type of occupation) before laying charges:

“I think we are one of the only provinces that have a charge approval by Crown counsel before charges are laid. I touched on it earlier where we forward the results of our investigation and evidence to the Crown, who reviews the file and decides whether or not charges will be sworn and processed. I believe we are one of the only provinces that have that. Where in other provinces, once the police are done with an investigation, the police can have charges sworn, and have the corporation charged” (R7).

Respondents commented on the criteria that Crown prosecutors will be considering when deciding whether or not to approve the charges. The criteria test is a two step process that looks at whether the charges are in the public interest to proceed with, and then whether it has a high likelihood of getting a conviction:

“Their test is a two part test; they look to see if it is in the public interest to prosecute this case, and is there a substantial likelihood of conviction? So they are looking at if the evidence is likely to support a conviction, and does it make sense to prosecute this person from a public interest perspective, or rather this corporation?” (R1).

In terms of whether it makes sense to prosecute a corporation from a public interest perspective, R1 explains how the decision process is somewhat of an amorphous test:

“You could imagine the Crown would consider such things as ‘O.K., does this particular industry need to be sent a message, is there a need for a message of deterrence. Is this type of conduct wide spread?’ ‘Or,

do we need to send a particular message to this particular employer because this is the third time they have had a fatality in their workplace?’ So those are the kinds of traditional considerations that a Crown counsel will have when they look at the public interest aspect of their charging standard” (R1).

It would appear the charge approval process filters cases away from the criminal courts. This could help to explain why criminal charges have not been used more often. Although, criminal charges recommended by WorkSafeBC have been extremely rare, the experts spoke of one incident where criminal charges were recommended by WorkSafeBC to the RCMP, and those charges were ultimately not proceeded with after the charge approval process was completed:

“We turned over what evidence and materials we had acquired, gave it to the police, briefed them on the circumstances, and they then commenced an investigation. In that particular case they did a very detailed and lengthy investigation, it took several months. It resulted in a report to crown counsel recommending charges under the Criminal Code, and specifically criminal negligence. The Crown chose not to charge that particular case” (R1).

The Nature of British Columbia’s Economy

As discussed earlier in this paper, the B.C. economy is very dependent on resource-based industries, which tend to be more dangerous than other industries. Several respondents noted this reality, as well, which helps to explain why British Columbia has a higher fatality rate than other areas of the country, even with a strong regulatory system in place:

“B.C. has such a heavy resource based industry. When things go wrong in those industries like mining, fishing, logging, those kinds of industries, quite often the injuries are not a stubbed toe, they are catastrophic. So because they are high risk industries, if it is going to happen it will always be serious” (R5).

A couple of respondents spoke about how the nature of the economy creates cultural issues that have an impact on worker safety, and attitudes towards being regulated:

“British Columbia is not the oldest society in North America, I think it is part of the continent that was most recently settled, so there is still a bit of that frontier mentality” (R1).

He goes on to describe this “frontier mentality” as an, “I am a free man; I should be free to earn my living and do what I want and how I want to do it” attitude. R1 clarifies that he does not think all people think this way, stating “(I’m) not saying all people are like that in British Columbia, but I think because it is not as old a culture as for example in Eastern Canada, there perhaps is a legacy of that which is more present in pockets of the province, and pockets of some industries”. That kind of attitude presents a challenge to keeping employees safe at work, and accepting the role of the regulator.

R8 notes a similar attitude in the tree planting industry, and would appear to believe that employees themselves are not interested in a more comprehensive regulatory presence:

“There seems to be sort of a culture of not following the regulations, simply because the regulations slow you down, and if you are paid on a piece meal basis, then following the regulations that slow you down means that you don’t get paid as much” (R8).

If this type of attitude is prevalent among different work groups, it might be hard to justify the use of criminal sanctions against corporations or individuals, in terms of best serving the public interest.

One respondent noted that there would be no inclination for a Crown Counsel to choose whether to proceed criminally based on the nature of the economy, as it would open the door for political selection of which cases you were interested in prosecuting, depending where on the political spectrum your government was situated:

“I don’t think the economy dictates, in British Columbia or anywhere else, what prosecutions go forward. At least I would like to think that is the case, and there is nothing to suggest to me that has ever been a consideration. If you go down that road then you could argue that corporate liability is not something that governments in certain provinces would want to prosecute, because it interferes with their constituents and their donations to the parties”(R6).

How Effective is the Criminal Law in Dealing with Workplace Fatalities?

This section of my analysis examines how effective the criminal law is in dealing with workplace fatalities after the Bill C-45 amendments, in the eyes of the experts who were interviewed. In general, the experts gave the impression that the law, as it stands right now, is not very effective in dealing with workplace fatalities, and that there are a number of challenges and issues that are present when attempting to use criminal law as a means of punishing corporations. Experts seemed relatively split on whether the amendments themselves did anything to make it easier to use criminal law in workplace fatalities. The rest of this section will explore the themes that became apparent in regards to the effectiveness of criminal law and the amendments, and are presented as follows: impressions of the Bill C-45 amendments on the Criminal Code; criminal versus regulatory law; the existence of a pro-business ideology; resources and training in the investigation and prosecution of these events; and risk.

Impressions of the Bill C-45 Amendments to the Criminal Code

It was hard to get a definitive answer on whether the amendments themselves improved the Criminal Code's ability to handle workplace fatalities in a significant way. Several of the respondents noted positive things, as well as negative things, about the law. Not all of the respondents interviewed specifically made the distinction between the impact of the amendments and the utility of the Criminal Code to deal with workplace fatalities. However, similar comments made about the impact of the amendments themselves were sorted into sub-themes revolving around positive and negative impressions of the amendments, which will be presented below.

Positive Impressions of the Amendments to the Criminal Code

The positive impressions of Bill C-45 mainly dealt with the ways in which the laws improved the awareness of occupational health and safety as an issue that should be taken more seriously; that the amendments improved the law to more adequately reflect the modern structure of corporations; and the new duty created under section 217.1 in the Criminal Code.

The role that the amendments played in elevating the seriousness of occupational health and safety in the eyes of corporations, as well as the general public, was noted by several of the respondents. The amendments were said to get the attention of corporate executives, as they felt they had an increased chance of being prosecuted criminally as an individual, as well as the corporation as a whole. Some also noted that the biggest impact of the law was that it motivated corporations to take occupational health and safety standards more seriously, and at the very least, meet their regulatory legal requirements.

A respondent also noted that the amendments signified a societal awareness and emphasis being placed on serious consequences for failing to provide safe workplaces:

“I think that when Bill C-45 came along that it performed a useful function in terms of the fact that it did generate public debate about this issue. I have always maintained that the real impact of that is, hopefully, that it will drive employers to meet their provincial obligations of the Worker’s Compensation Act and the Occupational Health and Safety regulation. I say that because if you can meet those duties, if you are in compliance with those laws, you are not going to be prosecuted criminally” (R1).

“I think that was something that probably had a significant effect historically in bringing to people’s attention the seriousness of occupational health and safety and that there were going to be consequences engaged if that wasn’t addressed by workplace parties” (R2).

Prior to Bill C-45, the Criminal Code was based solely on the identification theory model to attribute liability to the corporation through its directing mind. Literature suggested that this is difficult to do, and that it is rare for someone identified as being part of the directing mind whom can be held directly responsible for safety violations (Goetz, 2003; Savoline, 2003). The amendments were intended to address this issue by broadening of the range of employees whose actions can result in criminal liability to the organization, and included cumulative negligent actions under the umbrella of criminal liability (Goetz, 2003: 8; Department of Justice, 2007:5). Several of the respondents felt the amendments had done this, and more adequately reflected the way a modern corporation is structured:

“I think what they found was that the law was inadequate, and that addressing the reality of the problem whereby these senior managers of the corporations had little or no knowledge as to what was happening at the front line or front end of the organization where a lot of the fatalities and injuries occur. Now they have broadened the definition of directing

minds of a company to not only the senior management, but individuals who exercise decision making authorities over matters of corporate authority and all that kind of stuff, so it broadens the definition of the directing mind” (R7).

“Now you can take the cumulative mens rea, if you would, of representatives of a firm in an action, and treat that as one individual and then add in, with respect to a senior official in the firm being aware of that, or intuiting flows from it, that makes it easier to charge the organization. So it really reflects; they tried to reflect more the way modern organizations and corporations operate” (R2).

Bill C-45 introduced section 217.1 into the Criminal Code, which creates a new statutory duty requiring that: everyone who undertakes, or has the authority, to direct how another person does work or performs a task takes reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task (Goetz, 2003: 9). Three of the respondents noted that the creation of this duty was an important outcome of the amendments. R2 notes that this duty is effective, in that it can catch a wide range of people who may not have been caught before based on their responsibility to direct the work of another person, and may not be caught under provincial legislation:

“The duty that has been created in 217 is a bit broader, it is much more general, it doesn’t identify a specific individual or anything; just anybody undertaking to, or the authority to direct another. So it can capture people who might not be captured by provincial legislation specifically. Just the senior worker, a lead hand, somebody that is relied on might not have an official position, but is directing let’s say younger workers who are often at the most exposed risk of injury. Taking on the mantle of instructing a person, that would create, that would engage the duty under 217. Even if the provincial legislation didn’t identify that as a specific role having a duty” (R2).

Negative Impressions of the Amendments to the Criminal Code

The negative impressions of Bill C-45 mainly dealt with difficulties in using the law after the amendments as well as how the amendments were a knee jerk response to public pressure to address the problem.

Several of the respondents noted difficulties and issues in using the criminal law after the amendments, which included criticism of specific sections of the amendments as well as more general comments. One respondent noted how the new wording in the criminal negligence portion is “regressive” and creates an unfounded potential for liability that is unfair to corporations, that is fundamentally wrong, and that Crown prosecutors realize is going to fail:

“The crime of criminal negligence causing death or injury has been around for 100 years, and if you were a mine manager and were criminally negligent the code did not need to be amended with C-45 to send you to jail...And what Bill C-45 has tried to do is ‘well we can aggregate everybody’s actions and inactions and collectively hold them criminally negligent’. Guilty mind out of a series of inadvertent acts, which is why I think the law is fundamentally wrong, and ultimately I don’t believe it will stand the test of a Supreme Court challenge...I think that is wrong in law. So I think they will fail, the prosecutor will fail. And I think they must know that, which is why we are never seeing any of these cases...it is regressive” (R4).

Another respondent notes how the criminal negligence under Bill C-45 has become a difficult piece of legislation to use, because it is bringing together a number of different elements:

“Criminal negligence itself, given the way it has been implemented in Bill C-45, is a pretty complicated piece of legislation, and it is quite challenging to put everything all together in terms of what is required, because there are a number of different elements that come into play” (R3).

In comparison to those respondents who felt that section 217.1 was an important improvement to the law, one respondent noted how the section is very vague, difficult to use, and essentially requires a Crown prosecutor to prove the same level of criminal negligence as has always existed. By having to prove criminal negligence (and the difficulties in trying to do so, which will be discussed later in this section) to employ section 217.1, a Crown prosecutor may have no advantage employing the new legislation.

“I think the attorney generals across the country have taken the position that a charge under section 217.1 of the code, which is the new legislation dealing with directors or supervisors or people who are directing work, that you really have to establish a criminally negligent act or omission before you can hope to obtain a conviction. I am not absolutely sure that is correct, but that seems to be the approach that the attorney generals are taking” (R6).

R6 goes on to note that building a case using the criteria laid out under section 217.1 is very challenging when trying to define what a duty is, who is responsible for it, and if reasonable steps were taken to meet a legal duty:

“The difficulty of 217.1 is that it is under the title of duty of persons directing work, everyone who undertakes or has the authority to direct how another person does work or performs a task is under legal duty to take responsible steps to prevent bodily harm to that person or any other person arising from that work or task. It doesn’t talk about the commission of an offence; it simply sets out a duty. So if you have a duty then you have to establish that there is a duty, and then you have to establish that the duty was not in some way carried out. And that failure to carry out that duty was a result of criminal negligence. So it is a multi-step prosecution which can be difficult to isolate. You know, who is the person that has the duty, to the person who is the victim? Is it the foreman? Is it the general manager? Is it the directors? Is it the officers of the company? Or all those people? And which of those people can you establish the requisite criminal intent? In other words which of those people would you say you can establish as criminally liable? It is a difficult process, if you just read the section, it is difficult. The section just talks about a duty, it doesn’t go on to say that everyone who

breaches this duty is guilty of an offence. I mean that is the implication from reading it, but it doesn't actually say that" (R6).

In addition to these two criticisms of the amendments, R5 commented that the new penalty guidelines are good to have, but that she is not sure if they include anything that would not already have been taken into consideration when penalizing an offender, or how readily the penalties will be escalated to higher levels:

"Officially, the penalties under the Criminal Code, there is no cap on them, but again will they reasonably go that high, I don't know. It is nice to have the sentencing guidance, but I don't think that there is any difference in the sentencing that the judges already wouldn't have kept in mind" (R5).

Other more general comments were made about the lack of impact the amendments had on holding corporate offenders more liable under the criminal law from the respondents. One respondent noted how the amendments are too broad in general for Crown prosecutors to be confident in using them:

"I just don't know how much more this gets the Crown. People are worried how these might apply and whether they are too broad, and I think the Crown is not completely confident in using them" (R5).

Another respondent noted that the Criminal Code was as effective as it was going to be prior to Bill C-45, and that the existing regulatory law avenue should be exhausted before using the criminal law:

"Well I think the Criminal Code was as effective as it could be without Bill C-45. I just don't believe that Bill C-45 is good law. And I think part of that is that we don't see it being applied. We don't see prosecutors saying this is a Bill C-45 case, we better do this... I think what the public misunderstands is a high rate of accidents and injuries with an inadequate law. And I don't see that parallel at all...If we had exhausted a strict view of regulatory law, had we taken people to court, individuals, and had lengthy prison sentences, and still no change in safety

standards, then maybe you would contemplate something like a Bill C-45. But we are a long way from that” (R4).

Several of the respondents noted that they felt the amendments were the result of public and union pressure, largely due to the tragedy at the Westray mine. Two respondents noted that the amendments were directly the result of a knee jerk response by the government to be seen as acting to address the issue. Neither of these respondents feels that the amendments are very effective. Structural Marxism states that mass public consent for any hegemonic order is crucial to social control, as the majority of people must accept their place in the class structure (Snider, 1993). Through this process, the state provides a superficial fix, as opposed to addressing the inherent problems in the conflict between labour and capital (Smandych, 1985). R4 discusses how the amendments were put forth, even though corporations could already be charged effectively under occupational health and safety legislation:

“It was a complete reaction to that one horrible mining disaster in Nova Scotia. Parliament acted in an effort to satisfy the public that companies and individuals within companies could be held criminally responsible for workplace negligence effectively, and missed the point entirely that those same individuals could have been convicted and gone to jail just as well under the OHS legislation.... It is unnecessary, it was a knee jerk reaction, the government needed to do something and they did the wrong thing” (R4).

R6 notes that the laws are vague, and difficult to use, and that this is the result of a compromised wording of the law, particularly with the new duty that has been clarified:

“In my view, speaking of course just for myself, of course the wording was a compromised wording. I am not aware of any other provision in the Criminal Code that talks about a duty without any consequence if you breach the duty. Even in those provisions that say that you leave a large hole in the ground, you know and somebody falls into it, you are

liable for an offence. They don't say you have a duty not to leave a large hole in the ground" (R6).

When asked why the government would use a compromised wording of the law he describes the amendments as a “statement of principle”. R6 feel that a statement of principle is a clear message that the government has no real intention of using the law any more than it already does, and that it is hard for prosecutors to go ahead with any charges:

“I can only speculate, but I would assume that the people who drafted the legislation were of the view that ‘you know we have got to make a statement’, but whether they were serious with wanting to move forward with prosecutions with this so called duty, or the result of this duty, or absence of duty, or absence or injuries as a consequence of the failure this duty, they certainly haven't made this clear. They have made a statement of principle and not much else. Usually when governments make statements of principle and nothing else, it is a pretty good indication that they are not that serious about it. That is my interpretation of it” (R6).

He cites section 217.1 of the Criminal Code as an example of how the law is written in such a way, that the intention was not to make it easy for Crown prosecutors to use:

“So ok we are going to put a statement in the Criminal Code that talks about a duty (section 217.1) and we are going to leave it like that, we are not going to really refer to corporations necessarily, we are not going to give the prosecutor the tools in order to prosecute a corporation, we are just going to create a duty and let the chips fall where they may. So it is difficult to expect prosecutors to go ahead with that kind of legislation” (R6).

Criminal versus Regulatory Law

The theme comparing and contrasting criminal verses regulatory law was very important to understanding the effectiveness of the criminal law concerning workplace fatalities, as all of the respondents commented on one or more of the following sub-themes. Responses were also more readily given in this area, and did not require the

probing that other factors did for respondents to comment about them. The most commonly mentioned factors in the debate between the uses of criminal verses regulatory law have been grouped into several sub-themes: factors surrounding the burden of proof required to prosecute; the appropriate use of criminal and regulatory law; and the stigma that results from being charged under a given model.

Burden of Proof

Glasbeek notes that regulatory law requires a lower level of burden of proof for conviction (Glasbeek, 2002). Information gathered from the respondents in this study noted this advantage for the use of regulatory charges over criminal ones, as well. Several of the respondents feel that meeting the level for burden of proof was the hardest aspect of using criminal charges. It also became apparent through the interviews that the most likely charge that is going to be used in these cases would be criminal negligence, and that is where the major points of contention about the burden of proof seemed to fall when experts discussed the two models:

“The offence that you are most likely looking at in regards to a workplace fatality is some sort of criminal negligence on the part of the corporation. So the charge would be criminal negligence causing death for example... at the end of the day, you still have to prove criminal negligence causing death, as they would if they were going to charge an individual person on the street. And the burden of proof in proving criminal negligence causing death is huge” (R7).

Respondents noted that the burden of proof as it is defined in the Criminal Code for criminal negligence is an extremely high level of liability to prove in workplace fatalities. Criminal negligence implies that the employer acted with disregard, and in an extremely callous and overtly reckless manner concerning the safety of the workers. This

level of liability also requires that charges be proven beyond a reasonable doubt. This approach is compared to regulatory law where prosecutors only have to prove on a balance of probabilities that due diligence was not carried out. It was also noted that the ability to charge a corporation through its individuals with criminal negligence has always existed, and was rarely used, because it presents an enormous challenge in finding and conclusively presenting evidence which meets the Criminal Code's level of burden of proof:

“I think the fact that there has been very few criminal prosecutions in part would tell you that it is extremely rare to reach the level of misconduct that would be criminal in nature. It is important to note that C-45 came along but it was always open to have criminal negligence charges because these provincial duties have existed a long time” (R2).

“The burden of proof in proving criminal negligence causing death is huge. It is beyond a reasonable doubt, which to give a numerical aspect, which I believe means about 95% certainty on behalf of a judge. And you have to prove what is referred to as a wanton and reckless disregard for the lives and safety of others. Not just a disregard, but a wanton and reckless disregard, and not just a wanton or reckless disregard, it is both. And the Criminal Code goes on ad nauseam as to what these two definitions or descriptors mean, and it is quite difficult to prove... WorkSafeBC has a burden of proof...which is 51% compared to beyond reasonable doubt in a criminal charge” (R7).

It was noted by several respondents that the Criminal Code generally deals with tighter connections to the intent (mens rea) and the actual act (actus reus) to use criminal charges, and that crimes involving negligence are not common in the Criminal Code. One respondent also commented on the impact that the structure of a corporation has when trying to use the Criminal Code; as the Criminal Code is designed for charging individuals rather than corporations, and that trying to locate fault within the corporation can be very challenging:

“I think the criminal law is ineffective, because it makes it too difficult. You want to look at these things as being factually driven. Crime in the Criminal Code is factually driven, and it works because the drunk driver is the guy behind the wheel, the assaulter is the person standing over the person who is beaten, the rape victim is the one who has been raped and the aggressor, the facts are easily established. Not much doubt about the intention, I got in the car I beat the person, I raped the person, those facts are easy to establish. Workplace accidents are factually easy to understand, the actus reus of the worker was hurt on the job is easy to establish, but the intention is very difficult to establish” (R4).

“In a corporate context, it is very difficult to isolate one particular individual who is the person who is making the decisions in that regard. So in absence it is difficult to prosecute individuals under the legislation, and that is what it is geared towards” (R6).

It should be noted that a few of the respondents believed the higher standard of proof required for criminal negligence causing death is warranted, because of the increased seriousness involved in using criminal charges:

“The burden of proof is high, and for good reason, because criminal law has the ability can take away a person’s liberty, and they want to make sure that when they do prove a case that it is proven beyond a reasonable doubt, so that when we do take away a person’s liberty we are absolutely sure” (R7).

Defining the burden of proof for criminal charges is guided by case law, which sets a precedent for what should be prosecuted as criminal behavior, and what criteria are required to meet that standard. Several respondents noted that the lack of case law in using criminal charges for workplace fatalities impacts on the ability of prosecutors to use the Criminal Code. R9 notes that for the law to be more effective it needs “the first solid case to use where someone gets sent to jail, which hasn’t happened”. She goes on to say “It (the use of criminal charges against employers) needs more case law”. R7 seems to agree with this perspective, and adds that the reluctance to make bad case law,

particularly after the amendments, is a factor on whether to pursue criminal charges, so as not to create an ineffective precedent that courts would be bound by:

“I don’t think there has been a successful prosecution in Canada, and it [the law] came in 5 years ago. Because of that, because it is hard to prove, because of standard of proof, because there is no case law precedent that has been established yet, prosecutors are reluctant to go there because they have nothing to go by, they are going in blind, and they are reluctant to make case law, whether it be good or bad case law, because courts are bound by precedent” (R7).

The higher burden of proof in criminal law could also have an impact on the desire of the Crown to have a defendant plea bargain down to regulatory charges. Two respondents commented on how this impacts whether criminal charges would ever get to court, as R2 noted the laying of criminal charges will result in a much more “rigorous defence”. Another respondent discussed the defence perspective, and how they would get access to “Crown disclosure” to see how strong the evidence is against them, which would open the door for negotiation on the charges:

“You would have an opportunity for what is called Crown disclosure so you get to look at the Crown’s file. You get to take a look at the evidence that the Crown has against you as a company’s counsel. Then you decide whether there is a defence or not, and talk to your client on whether it is a situation that they would be potentially successful in court, or whether it is a situation where they might want to consider negotiating with the Crown. It is then between the lawyers, it is like any criminal file at that point. If you think there are evidentiary issues, and sometimes there have been situations where supervisors, workers, and the company charged will do things like ‘if you let our supervisor go or our worker go we will take the charges’ there is sometimes a negotiation there, which is common in criminal cases” (R5).

Another interesting comment was made by R5 to explain why plea bargaining down from criminal charges may be preferred, noting that Crown prosecutors may not

want to put the victim's friends and family members through the rigors and potential re-victimization of going through a criminal trial, and that they may prefer to take a route that allows the grieving parties to move on with their lives:

“It is quite a traumatic event for people to go through at a worker health and safety trial: no one wants to go through it. I have seen people, by the time it gets to court, the incident happened two to three years ago and the people involved have tried to get on with their lives so it is hard to bring that all back up for them, which is a challenge in these cases. The people you are testifying against, if you are, if one of your co-workers has been charged you are often testifying against a friend at the compulsion of the Crown, and people don't like to do that. People involved in these incidents end up with a lot of psychological issues afterwards, and they have been through a lot already. So if it is at all possible people involved tried to get it resolved outside the court system, but sometimes that is not possible” (R5).

The difficulties in establishing the burden of proof in criminal compared to regulatory law could be said to be the single biggest factor identified by respondents in the relative lack of criminal charges in this field. All the experts mentioned the problems in meeting the burden of proof directly or indirectly, by citing issues such as providing compelling evidence that criminal charges were warranted. Some also mentioned the impact this would have on the overall punishment of employers who have workers die from workplace-related causes:

“I think you make it easier for the bad guys to get away. If you want to put them in jail and send a message, regulatory prosecutions will do just fine. You are more likely to fail by putting a higher criminal standard. Unless you've got that clear case where a supervisor says to a worker who then goes out and gets killed 'get up that mountainside, I don't care how wet it is, you are way behind in production, knock down 50 cubic metres of trees in the next whatever'. You know some smoking gun supervisor, but that is not how business generally works, and even if it is, it is not evidence investigators get, so you are likely to fail if you are a prosecutor trying to invoke criminal negligence standards, go the

regulatory route...I think a very compelling argument can be made that it is less likely to bring guilty parties to justice by putting it a higher standard... I don't think criminal law is effective, nor necessary, for high workplace safety standards. I think the proper way to deal with it is social regulatory violation" (R4).

"If we only did criminal prosecution we would probably be doing less enforcement, or we would be less successful in our enforcement because of the difficulty in meeting the criminal standard in some cases. Where as in administrative penalties there is a lower legal standard because it is an administrative proceeding. So that actually makes it easier to enforce our legislation in terms of our act and regulation than if we were solely reliant on the criminal system" (R3).

The Appropriate Use of Criminal and Regulatory Law

Another sub-theme that became apparent from the interviews involved the appropriate use of criminal law, particularly in comparison to the regulatory model. Several of the respondents expressed the view that workplace fatalities were different from more traditional crimes. Respondents discussed factors such as how these fatalities are often the result of omission and better suited for regulatory law; reasons why these incidents do not reach the criminal standard of liability; the types of incidents that the use of criminal law would be appropriate for; as well as other factors that may influence whether it makes the most sense to use a criminal sanction.

Slapper and Tombs (1999) suggest that corporations, and actors on their behalf, become what are termed "amoral calculators", which refers to people who are "motivated entirely by profit seeking, and carefully and competently assess opportunities and risk" (Slapper and Tombs, 1999: 170). However, some argue that corporations are not amoral calculators, instead, that they are "political citizens who may indeed sometimes err, but more because of organizational incompetence than deliberate wrong doing" (Pearce and

Tombs, 1999:230). The argument that corporations and their actors are not amoral calculators, but rather err due to accidental error, was expressed by several respondents. It was often noted that a workplace fatality is the result of omission, a failure on the employer's part to carry out their safety duties, and that the use of criminal law is not justified against a corporation which is trying to do the right thing, but faltered. The impression gleaned from several of the interviews was that most employers do everything they can to ensure their workers are safe, and do not want to see any employees lose their life while at the workplace. For example, R5 notes that "no company wants to lose a worker, it is basically the worst thing that could happen to a company; I have never seen any company I have worked with take it lightly". Going on to state that "there is usually a lot of tears at the highest level; it is a big deal". Other respondents made similar comments to the ones above:

"The other comment that I want to make about the criminal versus administrative process is this: most regulatory violations are dealing with acts of omission...I think the administrative process is much better suited for the kinds of offences we are dealing with here. We are really dealing with a body of law that you could call statutory negligence...I have had a lot of experience speaking to the families of deceased and injured workers, and the families of deceased workers are understandably seriously aggrieved by what has happened to their family member. And they often want a pound of flesh in return. But the one thing I say to them is 'look, the day that your father or husband or son went to work, everybody went to work that day because they wanted to do a good job, they wanted to get their job done, they wanted to go home at the end of the day. They didn't go there intending to hurt anybody, but some people failed to do certain things. And because of that failure, this accident happened'... So to use the criminal law for acts of omission, I think is a misuse of the criminal law" (R1).

"Criminal negligence isn't for people trying to do the right thing and fall short. It is for a highly reckless wanton disregard, a high level of mens rea, and typically you just don't see very much of that." (R2).

In a similar vein to the deaths being the result of omissions, several of the respondents made note that corporations often do enough due diligence in occupational health and safety to negate the use of criminal liability. A couple of the respondents felt that corporations, generally speaking, place a greater emphasis on employee safety than they had in the past. While a couple of experts also felt that corporations do enough to avert the level of criminal liability through their own due diligence:

“You know the bad old days of saying ‘get into that hole and dig that hole anyway’ are largely a bygone era. Most companies do have an understanding of reasonable care and diligence, and to some level, exercise it. And probably at a high enough level to avert the idea of a criminal intention” (R4).

“The majority of employers and people who are at the worksite understand that occupational health and safety is part of the culture there, is part of the role, a primary interest that has to be thought of by everybody. It is really just how much attention you are paying to it. So if you make any reasonable effort at all to understand your duties and to comply with them, you’re probably not ever going to get close to a criminal negligence situation” (R2).

Slapper and Tombs (1999) suggest that those who favour a compliance strategy feel that businesses need advice rather than punishment, and need regulators to act as consultants rather than policemen (Slapper and Tombs, 1999). A couple of the respondents commented on the fact that the existence of the regulatory legislation ensures that companies are going to be receiving education on how to meet those standards, as well as being investigated and regulated at the provincial occupational health and safety level. This education should be sufficient to help them avoid the level of criminal liability:

“I guess it is a regulated environment so the companies have a lot more guidance than people have out there in the world” (R5).

“I think the fact that it is not used a lot speaks to the issue of occupational health and safety, which has long been regulated and investigated at the provincial level. There has been sanctions at the provincial level, so that kept the conduct of work at the worksite such that people just don’t reach the level of misfeasance or misconduct that would reach criminal negligence” (R2).

However, one respondent notes that regulators need to do a better job of teaching employers about the legal responsibilities, as often they are unaware they were required to maintain a particular safety standard:

“I think regulators generally need to do a better job of educating people about their legal duties in the workplace. I think if you look across the country you typically see that safety initiated by regulators tends to focus on safety awareness, that tends to focus on individuals, look out for this, be aware of that, what we constantly see, or what I constantly see are supervisors who do not understand what their fundamental responsibility as a supervisor is. We see employers who do not understand what their fundamental legal responsibility is. And I think everyone needs to do a better job of understanding those responsibilities” (R1).

Respondents commented on the situations in which they felt the use of criminal law was the most appropriate. Two of the respondents reported that the criminal law does have a use in both crimes of intent and crimes of omission (although, as noted, crimes of intent are extremely rare). The belief is that the Code works well for the crimes where intent is clearer, and in the case of criminal negligence, the respondents noted how the use of criminal law is appropriate in situations where an employer was made aware of a particular hazard, and did not take reasonable steps to correct the problem:

“I think in a case where a corporation has had its mind turned to a particular hazard, and the awareness has been developed that this is going to kill somebody if we don’t do something or if we don’t spend the

money to fix it, then that is an appropriate case for criminal negligence, and we have seen cases like that in the past where an employer's mind was turned to a hazard, and where the evidence seemed to suggest that the hazard was not corrected because of cost... I think that is an appropriate use of criminal law" (R1).

Three of the respondents believed that the use of criminal law was reserved for the most egregious cases, which could explain why the law has not been used as much as some may have predicted. One respondent noted how it may take a Westray type level of employer liability for it to be used again:

"I think they kind of keep it in their back pocket where it would only be for the most egregious crimes. For a Westray sort of situation where there is more than one fatality, if it was flagrant, where the facts supported it and they wanted to put the message out there to other companies that this is not the way to be... I shouldn't say the bigger events; I think it could happen even if there was one fatality or serious incident" (R5).

Stigma

A few of the respondents commented on the role that the perceived stigma of criminal charges would have on an offender, compared to the response to a regulatory sanction. The literature suggests that proponents of criminal sanction believe that criminality is the heaviest form of moral sanction a society can impose, and the only one that the corporate sector will take seriously (Snider, 1993; Weissmann and Newman, 2007). One of the respondents also felt that the social condemnation of criminal charges carries a more significant weight and is something corporations will want to avoid, noting:

"Even though the sanctions available under both are essentially a fine, it is not only that, it is the stigma that does come along with it. For example if you are a company who has violated a safety regulation and paid a fine, that is not as bad as the stigma from being convicted for

criminal negligence causing death of one of your employees. I think that stigma that is attached is something that a corporation would want to avoid” (R7).

However, a couple of respondents noted that it does not make a difference to a corporation if they are receiving a fine under the Criminal Code or occupational health and safety legislation:

“I think if a headline screams ‘company convicted of worker fatality’. I don’t think anybody bothers to read the fine print to see whether it is a section of the Criminal Code or a section of the OHS regulation. Certainly my clients don’t draw any distinction; they don’t want to be convicted of that” (R4).

Tombs notes that corporate crimes need to be taken seriously as “real” crimes, and that an essential part of making this transition in the way society thinks is to strive for a system which includes more adversarial, punitive, and interventionist style of regulation against corporate criminals (Tombs, 2002). Thus, it may be important to send a message to employers, or society at large, that these sorts of incidents are more preventable, and the stigma of handing out a criminal charge to an employer could help facilitate by setting an example as deterrence to others. However, the use of criminal charges may not be as effective in sending a message, to employers, and society in general, when compared to regulatory sanctions. One respondent notes that he thinks corporations are generally safer than they have been in the past; and that a message does not need to be sent to employers. However, if it was felt that a message did need to be sent, that the use of regulatory charges would be the more effective means of creating stigmatization through more certain conviction, and tools available under regulatory legislation:

“If there is a belief that we need to send people to jail to make it a safer work place, and I certainly understand the deterrent effect of that, then

the solution is to charge individuals and not just companies, which happens rarely, and seek incarceration rather than just a fine. And if you believe that is necessary to change fundamental practices then those tools are already there (via regulatory legislation)...If the public wants a change, and the workers demand a change, and society demands a change, and you want to send a clear message, then why don't you make it more certain that you will send somebody to jail for it. And if you want to make it more certain, don't use Bill C-45, don't use the Criminal Code, use the regulatory tools you have had for 50 years where it is capable for prosecuting a company or an individual" (R4).

He goes on to state that the use of criminal charges makes it, "easier for the bad guys to get away", and further noting that the penalties under regulatory law offer just as much stigma as criminal law:

"The guy is going to go to jail for 6 months to 2 years... Do I want him to have the stigma of a criminal prosecution? Will he be any less stigmatized if he is jail for 6 months? Will anybody be thinking he is less stigmatized if he goes to jail on a regulatory conviction than a criminal conviction? I don't think so" (R4).

Pro-Business Ideology

This study examines the impact that a pro-business ideology plays in determining whether criminal charges will be used in workplace fatalities. Opinions in this area were not given very frequently without probing. It is worth noting that none of the lawyers in this study felt that pro-business ideology played a part in whether criminal law was used. The three respondents, who felt that pro-business ideology did play a factor, were more varied in their background. Those who felt that a pro-business ideology played a role in whether criminal charges would be used mainly focused their comments in two areas. The first revolves around how a pro-business ideology results in a weaker enforcement culture, and prioritizes de-regulation when dealing with business. The second area

focuses on how these events need to be re-assessed by society as a whole, so that we give more weight to the seriousness of them.

The British Columbia Federation of Labour (2006) states that, since British Columbia's provincial Liberal government came into power in 2001, there has been a direct and dramatic drop in workplace safety enforcement in B.C. (British Columbia Federation of Labour, 2006:4). The British Columbia Federation of Labour also noted that "falling levels of enforcement didn't reflect a growing compliance with health and safety regulation, they were directly tied to staff cuts, weakened standards, and a new environment of employer self-regulation" (British Columbia Federation of Labour, 2006:4).

Three respondents commented on how the desire for deregulation and getting out of the way of the employer has become a powerful influence. R9 commented on how "all regulations were cut 20%", that "Liberals disbanded regulation", and how WorkSafeBC has "less staff, less inspections, they are not doing enough". R9 notes that the B.C. Federation of Labour takes issues with the name "WorkSafeBC" as it implies that the duty to be safe rests upon the employee. She states that "WCB believes that workers should be working safe", and "would rather they use the name 'SafeWorkBC'". It should also be noted that several respondents felt that WorkSafeBC is funded well enough, and that lack of resources does not play a role in their ability to regulate effectively. This is illustrated by a quote from R1 who notes "I don't think there has been a big impact on our regulatory framework here in British Columbia because of that ideology".

A couple of the respondents noted how the belief that employers should be left alone influences how ready Crown prosecutors may be to punish corporations. R9 states that the desire to prosecute corporations is not very strong because they represent an important political group, noting that “reluctance comes from the lack of political will”, and that “political will protects ‘their friends’ over employees”. Another respondent notes that the belief that government should de-regulate permeates society as a whole, and likely exists in the Crown’s office as well, but that this is changing:

“I do think that there has been a pervasiveness of that in our society in the last decade. I think there has been an emphasis on de-regulation to ‘get out of the face of the employers’ to make things easy for them to make money and to do business, in our society generally...Has it had a spillover effect in terms of the discharge of regulators responsibilities? I think it has in some respects. I think it has had an impact on Crown counsel across the country, and on Ministries of Labour, there has been a huge cultural shift that way. I think fortunately though we are starting to see a bit of a turnaround in that” (R1).

Two of the respondents noted that the public needs to be educated to view these incidents as more serious than just random accidents. For example, while speaking on why the public does not show more outrage after workplace fatalities, R9 notes that “they don’t see themselves as being affected by it... You don’t understand until you have experienced it”. The literature noted that the use of the term “accident” to describe these events is a barrier in helping to shape public opinion of these incidents as criminal acts as opposed to random acts. Slapper and Tombs note how the term “accident” evokes notions of discrete, isolated, random, events which are unforeseeable, despite the many incidents which prove these factors to be lacking (Slapper and Tombs, 1999). One respondent also commented on how society needs to redefine how we look at these crimes, comparing it

to how drunk driving used to be viewed as less serious in the past, and how workplace fatalities need the same sort of cultural shift:

“Well, the problem with it is that I think you can characterize almost all workplace fatalities as an accident. Now historically we used to characterize drunk drivers killing people as accidents. Now we no longer do that, now it is a crime to actually kill somebody with your car when you’re drunk, but when I was growing up it wasn’t a crime it was an accident, it was an unfortunate accident that nobody ever thought could be prevented... So I think unless you change that kind of attitude it is not going to, you are never going to find that these things being sanctioned criminally” (R8).

Resources and Training

The resources and training of those groups involved in the criminal enforcement of workplace fatalities (such as police, Crown prosecutors, and judges) was an issue addressed through the literature as a factor that may play a part in the ability, and or willingness to prosecute. Again, respondents only addressed this theme in response to probe questions, but they did have some interesting comments about this issue.

Respondents spoke about the impact of resources and training at both the investigatory and prosecutorial level, as well as comparing the capability of the state’s resources in comparison to that of private actors.

Resources

Several researchers have concluded that the amount of resources put towards the investigation and prosecution of white collar crime pales in comparison to the amount allocated towards conventional crimes (Salinger, 2005). Coleman noted that “one of the most fundamental reasons for the failure of the enforcement effort is a chronic shortage of personnel and resources” (Coleman, 1989:189). Respondent R9 believes that resources

and funding, “comes back to political will...the political will isn’t there”. She goes on to state that, “Crown counsel is over loaded with cases, and the public has been re-focused on more traditional crimes, these things are not high on the agenda”. Thus, the funding goes towards more traditional crimes over things such as workplace fatalities. However, it appeared that more of the respondents believe that the funding for criminal prosecution was not a factor in the use of criminal sanction.

At the R.C.M.P. level, one of the respondents felt that, if it was determined that the criteria for criminal charges could be met, that funding for building the case would be available to do so. R7 did not feel that the funding for investigations is an issue, but could be improved for training, noting:

“When we are investigating a potential fatality involving criminal negligence, we don’t have funding issues with respect to that, we will investigate that to the nth degree regardless of funding, because it is a serious offence, we can’t, as a police agency, ethically and morally, decide which serious offences we are going to investigate and which we are not, because of funding issues” (R7).

The availability of resources at the R.C.M.P. level is critical, as they will be gathering evidence, and helping to build a strong case. If this individual is correct, that the funding will be there should it be needed, it is encouraging to hear.

It has been put forth that wealthy private actors will try to dissuade the state’s desire to prosecute by increasing the time, effort, and ultimately resources needed to pursue a case through techniques such as “the delaying game”, “adversarial information control” (Coleman, 1989:192; McMullen, 1992:92). Or, conversely, by employing a strategy of “over-compliance”, where a defendant will over load the prosecution with

documents to review (Coleman, 1989:192). Benson (2001) noted that the difficulties in investigating and prosecuting corporate criminals make it hard for the state to invest scarce resources in these cases (Benson, 2001:382). A couple of the respondents noted that the fear of having to get an increased allocation of resources will not impact on the willingness to go ahead with a prosecution. One respondent stated that:

“There is nothing to suggest to me that any prosecuting authority is influenced by that, I like to think that if the prosecution is of the view that there is a substantial likelihood of conviction it goes ahead, and it is in the public interest of course. Whether it is going to take 10 months, 10 days, or 10 minutes, I don’t think it matters to the authorities” (R6).

Conversely, two respondents noted that there is a myth that the Crown will have vast, almost unlimited resources that can give them an advantage over private actors. One respondent noted that access to resources is not as readily available as one may believe, and that Crown counsel across the country have been forced to stretch their budgets, and decisions on which cases to prosecute do have to be made in regards to resources:

“Most Crown counsel offices are stretched very, very thin. So when they have to make choices I think resource allocation is critical... there is this myth that the state has unlimited resources, and that within the context of a prosecution, that the state has the full support of the treasury of the state, to support these prosecutions, but that is kind of mythical, because we have seen all across the country cuts to government services across the board. Certainly I think Attorneys-General, and generally across the province and Crown counsel offices, generally across the country are stretched to the limit” (R1).

Some researchers have also suggested that the size of corporations and their access to resources was also found to be an issue when it comes to the willingness to prosecute. Brown notes that smaller companies have fewer resources to optimize privacy, litigate, and generally raise the government’s cost in enforcement (Brown, 2004). Some

of the respondents commented on the issue of whether the size of a corporation made them more likely to be prosecuted. One respondent feels that if there was a similar charge, with similar fact patterns, a smaller company would be more likely to be prosecuted than a better resourced company:

“If you had a company that is known to fight everything forever and take 5 years, or you’ve got a smaller company that had the same end result, a worker dead, and a similar fact situation, there might be a tendency to say ‘well let’s get that one it is going to be the easier fight, we will get that conviction’. That would be a decision that would be practical and prudent” (R4).

This belief did not appear to be held by a majority of respondents. R6 did not agree with any perception that Crown prosecutors would be any more likely to charge a larger company as opposed to a smaller company, citing his own personal experience:

“I am not within the Attorney General’s office so I am not privy to any of their decisions in that regard. But I have never had any knowledge or experience that suggested to me that they would back away from a prosecution because it is a large corporation or go ahead aggressively because it is a small corporation” (R6).

Several of the respondents felt that the advantage that larger or better resourced companies have over smaller, or less well resourced companies, is the ability to have better safety programs, which do enough to prevent companies from reaching levels of criminal liability. One respondent notes how larger companies have more people dedicated to ensuring safety measures are met, and that smaller companies may be overwhelmed in some cases:

“I think there are more likely incidents that are going to happen in a smaller company because they don’t have the money and the time to put into the health and safety system to prevent it from happening in the first place...A larger company has dedicated people dedicated human resources people dedicated to health and safety issues, where as a

smaller company might just have a guy running the store be the health and safety person, and he is not a health and safety person. He is not an expert” (R5).

Training

The training available to those investigating and prosecuting these incidents at a criminal level was discussed by the respondents. The first stage of criminal investigation rests with the R.C.M.P., either investigating a fatality scene immediately, or having an incident referred to them by WorkSafeBC or the appropriate agency for the jurisdiction. Alvesalo discusses how most of the training and investigatory procedures for police are rooted in traditional forms of crime (Alvesalo, 2002). Some respondents noted that the lack of training available to R.C.M.P. officers in this area poses a significant challenge to carrying out investigations. R3 discusses this issue, as well as some of the specific issues R.C.M.P. officers will encounter:

“I would suspect that it is a challenge for the police in terms of training... it is an extremely complicated area because it involves a lot of judgment, in a lot of cases. For example, if you look at say the Criminal Code offence of impaired driving, police officers are trained that there are certain issues of impairment in that you can observe certain symptoms, you can conduct breathalyzers, and there are rules for doing so. A lot of what we are dealing with, for example, penalty or prosecution, may be based on inadequate training, and right there I think by the terminology you get into a very subjective realm. Inadequate training is not saying that there is no training. There is some training but it is not good enough. Then you get into the expertise of assessing what is appropriate in the circumstances, what should workers in this particular industry have perceived? What was missing in this particular case?... In BC, we deal with everything from the oil industry, to forestry, to manufacturing, to construction, all these different industries, different rules, different standards, different issues, even the terminology can be a challenge to master” (R3).

Some researchers have concluded that the police are so under-trained in white collar criminality that investigation is hardly possible without using the expertise and powers of individuals outside their departments (Alvesalo, 2002; Benson, 2001). Three respondents mentioned that R.C.M.P. officers would have access to expertise from regulatory bodies such as WorkSafeBC, although the cases still present challenges to investigators. R7 discusses his experience as an R.C.M.P. officer investigating a work fatality case, and how he was required to teach himself about the law and how to investigate it:

“I can tell you from our agency, we are relatively small, but I can tell you there is zero training with respect to investigating workplace fatality. We have training investigating fatalities, but not specifically workplace fatalities. When I investigated the one I did, I basically had to learn on my own everything I learned about Bill C-45 and a bunch of other issues and a bunch of other things to do with workplace fatalities I had to learn on my own while I was investigating this file. So there is very little training for police... I would term it inadequate” (R7).

As noted in the literature, the evidence in these cases may be little more than an elusive paper trail of memoranda and files (Benson, 2001). It is the R.C.M.P.’s duty to investigate an incident and create a report for a Crown prosecutor so they can decide whether to recommend charges under the charge approval process. If the R.C.M.P. is hampered in their ability to investigate these fatalities, the lack of training may also result in fewer recommendations in general, should the R.C.M.P. not be confident in the evidence collected.

The issue of the complexity of white collar crime, and the training and experience of prosecutors was an issue that has been addressed by researchers. McMullan states that “corporations can hire the best defence: first rate lawyers, many support staff for appeals,

private investigators, and expert witnesses” (McMullan, 1992:92). This disparity in resources can create a situation where there is rapid turnover in the state’s legal staff, as they lose much of their best talent to the better paying world of representing corporations (Coleman, 1989). Therefore, the state may have to fight long legal battles against some of the nation’s best attorneys and staff, while making do with a constantly changing team of young inexperienced lawyers (Coleman, 1989). Respondents commented on the training of Crown prosecutors once any potential case is recommended by the R.C.M.P. Several commented on the complexity of the cases and how Crown prosecutors are able to handle this challenge. R7 explains how the lack of familiarity with these types of cases will play a factor in whether a Crown prosecutor will be comfortable enough to take a corporation, and or individual, to court:

“For Crown prosecutors there is a special branch here who deals with workplace fatalities, or deals with what they call special prosecutions, not your run of the mill criminal prosecutions, and even for them I think the training is not as good as it should be, and they are the ones who are supposed to be presenting the evidence in court trying to get a conviction beyond a reasonable doubt...Perhaps that is one of the reasons they are reluctant to go ahead with criminal charges; because they are probably not as comfortable as they should be with the law” (R7).

R3 comments on how their lack of exposure to these cases will likely impact on how quickly charges will be approved, although he is not certain if this impacts on the likelihood to approve charges:

“The Crown counsel may only get one or two cases a year or less. As a result, it is very difficult for them to get that sort of expertise... it is a much more difficult matter to deal with. Compare this to someone who is well versed in the topic area. Again, for example, routine criminal charges, even if they are a high level of sophistication, they can be approved very quickly because the Crown has a high level of familiarity with the topic and what is required. Whereas matters such as ours

involve huge amounts of documents, and it is a challenging subject matter that they are not typically dealing with. Due to this, the approval process can be quite a bit longer” (R3).

However, other respondents noted that the lack of training and experience for Crown prosecutors is not as significant as one might think. R5 notes that, in B.C., it is the same Crown prosecutors doing the cases, so they will be well versed in the area:

“My only experience is in B.C., but in B.C. it is like 1 or 2 prosecutors that do all the health and safety prosecution. So although it is not something that all the prosecutors know about, the people who get the work are pretty familiar with it. I have never had a situation where the Crown on the other side has not been well aware of the legal issues and more up on the case law than I am probably. I have never had that be an issue at all” (R5).

R2 agreed with this line of thinking, noting that it is likely the same in other parts of the country. He notes that, in “for instance Ontario, they have the same Crown, the same lawyers on them all the time, so they are very familiar with occupational health and safety”.

Respondents also compared the level of expertise that a Crown prosecutor would have compared to a defendant. A couple of respondents noted that, if a private lawyer is holding themselves out as a workplace safety specialist, they are likely not very busy, nor have much experience. Thus, the experience and expertise would not be any greater for the defence. R2 feels that, because WorkSafeBC would be better versed than anybody in this area, and that their expertise would be available to the Crown, the Crown would have the advantage:

“We have lawyers who are working in here and who are experts in this because that is all they do. If we did have something that was referred to Crown, then these lawyers would assist those lawyers. So certainly, no, a

large corporation doesn't have any sort of advantage in terms of knowledge when they get into the legalities of occupational health and safety or skills; because the experience in these prosecutions resides with the agencies and or the Crown" (R2).

The literature also discussed how prosecutors may be required to translate highly technical testimony and evidence into lay language for jurors to understand, and for judges to comprehend and appreciate (McMullan, 1992; Friedrichs, 2004). Although he did not state whether this would impact a Crown prosecutor's decision to press criminal charges, R3 feels that the courts in general, in particular judges, do not have a lot of experience in these cases, which presents a challenge:

"And that is not the same as criminal matters where our judges who deal with those sorts of matters would be dealing with those on a daily basis... our matters would be something like criminal negligence. The actual criminal concept is like most of the other ones, but when you get into the specifics of special offences it is far more challenging than some of the other matters you face" (R3).

Risk

Respondents commented on levels of risk, namely, the likelihood that an individual will be injured at work, and how these ideas impact on the effectiveness and willingness to use criminal prosecution. It appears the majority of respondents feel that ideas of risk had little impact on how effective the criminal law was, or the willingness to use it, in regards to workplace fatalities. Most respondents feel that ideas around risk would not be a factor in whether criminal laws would be used, or the effectiveness of the legislation in general. Respondents mainly focused their comments on three areas which will be examined in this section. The first revolves around consent of workers toward higher degrees of risk; the second focuses on the individualization of risk in worker

fatality; and the third area focuses on the role of safety and training in preventing workplace fatalities.

Respondents spoke about the perceived consent of the worker to more dangerous work. As noted in the literature earlier, Glasbeek feels the state will always have difficulty applying criminal law in workplace accidents, because this would be in conflict with the fundamental starting point of capital-labour relations, and to its legitimization as a scheme, which is based on freedom of contract (Glasbeek, 2002). Further to this, the starting point of capital-labour relations states that when workers enter into a social contract with employers, they are consenting to a certain level of risk for wage, and that the materialization of risk should not be seen as criminal (Glasbeek, 2002; Friedrichs, 2004). When speaking about a perceived consent to risk, namely that a worker may be accepting a higher level of risk for a higher level of pay or some other benefit, most respondents felt that this would have no impact on a Crown prosecutor's decision. R3 discusses how, to think otherwise, is a flawed concept:

“I think, overall, the feeling is that there are certain industries that are high risk is a flawed concept. For example, I think there was a feeling about that with forestry, people who fell trees said you know dying was just part of the risk of the job, and that is why you got well paid. I think, overall, WorkSafeBC has rejected that. There aren't any jobs out there that you shouldn't be able to come home from” (R3).

Several of the respondents noted that a higher level of risk would result in a higher expectation of safety provision, not alleviate the responsibility of the employer:

“I would hope that would never be taken into account by a prosecutor. I think we all know that some work is more dangerous than other work...I would just say that a more hazardous job requires a higher standard of care of everybody, including the worker... I would hope that the Crown

never says ‘oh he was doing a dirty job and a dangerous job, and I guess he knew it, so he doesn’t get OH and S protection’. I would hope that never happens” (R4).

The role that the individual or individuals played in their own fatality was discussed by the respondents, and was seen as a factor that would be accounted for when deciding whether or not to use criminal law. Literature has noted that there is a trend to view risk-information, risk detection, and risk management as a matter of private responsibility and personal security (Elliot, 2002). O’Malley discusses how risk has “devolved” towards being an individual responsibility, and that the bearers of risk are provided with “choices” as to which risks they are willing to engage in, and are forced to live with these consequences (O’Malley, 2004). Respondents commented on whether the duty for the employee to act in a safe manner allows for blame to be placed on the individual for not controlling their own risky activity. R1 discusses his experience where companies have tried to lay blame on the worker in fatal accidents:

“I do think there are certain circumstances when a bad accident happens and somebody gets killed, nobody’s first instinct is to stand up and say ‘I screwed up’, most people’s first instinct is to minimize their involvement, and when it gets down to a prosecution I have seen many cases where the corporation, in defence of a charge, has attempted to lay the blame at the hands of the worker, either partially or completely” (R1).

A few of the respondents noted how it was a legal duty for the employee, under the provincial safety legislation, to work in a safe manner, and that the failure to do this would be taken into consideration when deciding whether to use criminal prosecution. A

couple of the respondents note how employee negligence is always a significant factor when evaluating whether to use criminal liability:

“I think that is always considered, you know, was the worker negligent themselves, were they doing what they should be doing, I think that is considered, and I think that is a legitimate thing to consider. Workers have duties too, they have a duty to work safely, they have a duty to work in a manner that doesn’t create a hazard to their co-workers. Everybody has a duty to take care for themselves and others. So that is a factor that is legitimately considered I think” (R1).

While negligence by the employee was seen to be a factor, respondents also noted that the system is not slanted in the employer’s favour to avoid liability, and that workers have rights to refuse work they feel is unsafe:

“It is not on the worker to identify. The expert in that situation is your supervisor in your company, they know the risks of the job and it is their job to explain it to you. It is their job to find out if you have the right training... I think the system is not skewed to be worker responsibility at all, which is probably a good thing” (R5).

“We do have a scheme in place where workers can refuse unsafe work. If they suffer any adverse consequences from that then we (WorkSafeBC) have a whole process where they could potentially be reinstated. They could get lost wages and all sorts of things back” (R3).

However, while employees may have the right to refuse work, some respondents noted that there are factors, such as earning potential, which could influence their decision to exercise that right:

“Well the reason they do it is that they need the money right... People still do it (ignore known risks), and they still do it here in the tree planting industry. They go out in dangerous situations where they probably ought not to be engaged in dangerous behaviours, they get paid on the number of trees they plant, and they do it because it is the only way to make good money” (R8).

In addition, R6 notes that part-time workers are at a higher risk, stating that, “you have part-time employees afraid to make waves because it may affect their employment”.

Lastly, the respondents commented on how issues of safety and training are related to the use of criminal liability in the workplace. As noted earlier in this paper, the ability to consent to a risk is going to be based on the employee’s ability to appreciate the risks that are presented to them. If an employer has adequately attempted to prepare their workers for the risks they may encounter on the job site, and how to manage those risks, it would reason that this would lessen the likelihood that criminal liability would be pursued. Some literature has noted that employers have adopted a greater sense of hazard communication, including an increased union presence in safety matters, joint health and safety committees, and worker participation in decision making (Pearce and Tombs, 1999:273; Johnstone et al, 2005). However, Smith and Mustard (2007) found that only 21 percent of Canadian workers had received safety training in their first year with a new employer. Several respondents noted that safety and training was the backbone of regulatory law, and that WorkSafeBC does a good job of putting an emphasis on those responsibilities. However, some also felt that it was hard to generalize how well workers were being trained. Although, it seemed that most felt the majority of employers were trying their best to ensure worker safety. With this in mind, R1 feels that employers need to do a better job of training their employees, stating:

“I do feel that employers need to spend a lot more time educating their workforce, about the risks that they face, after all, they own the workplace, they are the ones who have introduced the equipment and the materials into that workplace, and the circumstances that create the risks. So they need to be on the front line of educating their people about

what the risks are, about doing particular jobs... In many respects we don't suffer a plague of workplace fatalities in this country, fortunately, but we still have high injury and death rates. I think the population is still largely ignorant of it. And I feel public regulators have failed to educate society generally about the real consequences of workplace death and injury. And they have failed to educate the population about their legal duties in the workplace" (R1).

In regards to whether or not the employer did enough to prepare and educate in the avoidance of risk, and how this relates to whether an employer will be charged, and prosecuted, one respondent felt that the reliance on formal documentation of training can lead to paper systems not training workers enough and less-formal training being unfairly penalized:

"There is a real focus in making sure training and supervision is appropriate. The great error here is that because they are so important, people think that the documentation of it is the be all and end all. And I have had people who repeatedly say 'look there are no training records'. The issue should not be records; the issue should be training, and the company that has excellent records but no real substantive training, what they are more careful? Or the company that has excellent training but no records, what they are more reckless? Clearly you have got to get the knowledge into the head of the worker and the supervision to go with it, so there is a disproportionate belief that bad training records equals bad training, or that good training records equals good training" (R4).

Improving the Facilitation of Criminal Law for Incidents that Support its Use

This final results section focuses on ways in which the law could be improved in the eyes of the experts interviewed. The majority of the respondents felt that the law itself did not need any improvement, although the reasons they felt this way did vary. Some of the respondents felt that the law was full and complete, as it stands today; while others felt that the law was too new, and used too infrequently to identify ways that it could be improved. In discussing ways that the law could be improved to address this issue,

responses generally fall into three main themes. The first theme identifies the operationalization of the existing laws; the second looks at improving case law; while the final theme discusses changes to the legislation itself.

Operationalization

Several respondents felt that it was not the law that needed to be improved; rather it was the operationalization of the current law that needs to be addressed. As R1 notes, “it is mostly the operationalization of how those laws work, how people comply with them, and how they are enforced, that is the critical thing”. The ways in which they felt the operationalization should be improved were discussed mostly in regards to regulatory bodies; and changing attitudes towards how criminal law is utilized in workplace fatalities.

When discussing how operationalization needs to be improved at the regulatory law level, R4 explains that enforcement officials need to take the broad regulatory law already in place and apply it more aggressively before it should consider whether to make changes to the Criminal Code:

“We have to take that broad law (regulatory) and apply it in a meaningful way so that both workers and supervisors and companies pay great attention to detail and on safety. That is an application of the existing law that needs to be improved more than broadening the scope of the law. Bill C-45, I think was regressive not progressive in that respect. If we had exhausted a strict view of regulatory law, had we taken people to court, individuals, and had lengthy prison sentence and still no change in safety standards, then maybe you would contemplate something like a Bill C-45. But we are a long, long way from that” (R4).

Meanwhile, R9 cites the lack of “political will” among the WorkSafeBC Board of Directors as an impediment in using existing laws more effectively, believing the needs of the worker are not adequately represented:

“We get along with the WCB. The problem lies in the board of directors to get things done. We need more balance on the board of directors; we only have one person (from the B.C. Federation of Labour) there. We need two opposing sides who appreciate each other. Otherwise the desires of the employer win out. They are more concerned with the employer’s bottom line” (R9).

Lastly, R1 feels that regulators need to do a better job of educating corporations and their actors, while making sure they are more aware of their legal obligations:

“I think regulators generally need to do a better job of educating people about their legal duties in the workplace. I think if you look across the country you typically see that safety initiatives by regulators tend to focus on safety awareness, that tends to focus on individuals, look out for this, be aware of that, what we constantly see, or what I constantly see are supervisors who do not understand what their fundamental responsibility as a supervisor is. We see employers who do not understand what their fundamental legal responsibility is” (R1).

Ultimately, it appears some experts feel that the regulatory body is not being used appropriately enough to instead turning to the use of criminal law. Regulatory bodies are the first line of defence, and often will be the ones who help determine whether criminal charges will be pursued. If companies are better versed on the legal obligations, and there is more support at the board of director’s level of WorkSafeBC, it may help identify cases that fall outside of regulatory response more easily than is now the case, and make it more likely that charges will be recommended for criminal prosecution. For example, a company has a documented history of being educated, and or penalized, for not following a certain piece of safety legislation, and still showing a disregard for taking steps to

correct their procedures. This may aide in proving the very difficult standard of criminal negligence, as the company has shown that they have been made aware of the problems, and not taken steps in preventing it from occurring in the future.

A couple of the experts expressed the view that the operationalization of the existing laws requires a change in societal attitudes towards using criminal law, from the public all the way up to those who are responsible for implementing the law. R9 identifies the lack of emphasis placed on enforcement stemming from the low pressure applied by the public, and that the issue often is not prioritized until it affects someone personally. R9 states that there is “no outrage by the general public...they don’t see themselves as being affected by it; you don’t understand until you have experienced it”, and this contributes to the lack of “political will”. R8 notes that the enforcement culture needs to be addressed from the police level, all the way up to the courts:

“The police, who really don’t have time for this kind of thing because they are into other things, and then you move to Crown counsel, who also is probably more into more of the regular run of the mill street crime than they are into this, and then you run into judges who probably don’t take it seriously, so I am not sure how you even change that” (R8).

It is apparent that some of the experts feel that the enforcement culture is hampered by the lack of emphasis placed on incidents such as workplace fatalities, which they felt stems from public disinterest, and reaches the highest levels of the enforcement bodies. Identifying this issue may be a step forward in an effort to explore further into how big a factor this may play in corporate liability. Perhaps unions or workers groups could create media campaigns focused on detailing the stories about how family and friends have been killed while on

the job. This could help to put a face to these sorts of incidents, much like how anti-drinking and driving campaigns have done in the past. As a respondent noted earlier, much like drunk driving has been reclassified as criminal, whereas before it was viewed as accidents, perhaps it would be beneficial to examine how this transformation was able to take place. It seems that individual responsibility for these incidents is emphasized, perhaps companies that have strong records of employee safety can be spotlighted, and have them speak on how they view workplace safety. Publically commending safe workplaces, as opposed to shaming offending workplaces, may provide incentive for companies to meet a higher standard. Having the public aware of, and to take issue with, workplace safety is a critical step in greater emphasis placed on making a change.

Improving Case Law

It has been noted by the experts that the lack of effective case law is one of the challenges to prosecuting workplace fatalities criminally. Case law serves as a road map to follow for prosecutors, by identifying which actions are illegal, and what criteria need to be established to prove guilt, based on precedent set within the courts. A lack of case law may limit the willingness to prosecute, as prosecutors face uncertainty when taking a workplace fatality into the criminal jurisdiction which does not have as much experience dealing with these sorts of incidents. A few of the experts commented on ways that a lack of case law could be improved to better facilitate the use of criminal charges. Comments mainly focused on initiatives that could be taken to increase the number of cases taken to court; while one respondent notes a way to make better use of existing case law.

Two of the experts discussed how specialized prosecution initiatives could be taken to increase the number of cases being brought before the courts. R8 discusses the use of one such method, stating that the federal government could employ a unit specializing in bringing these incidents to court, such as the process used by the Integrated Market Enforcement Team (I.M.E.T.), although, it should be noted that I.M.E.T. has been criticized for not having many prosecutions. I.M.E.T. is used for economic market-based criminality:

“The way they have sometimes done this, is that they have developed a specialized (unit), for example IMET, but IMET hasn’t been very good example. Sometimes police forces develop a specialized or a ‘gang’ force or an IMET force or whatever, I suppose if they developed a specific group of people who specialize in looking at one particular aspect of workplace injuries and fatalities I think that would be one way of bringing cases, and if they found a prosecutor who specialized in it, that would be the way to go” (R8).

When asked if the existence of regulatory bodies (such as WorkSafeBC) would have an impact on the justification for creating such a group, R8 notes that:

“Well you have the same thing in the securities area for example. You have the securities commission, but you also have insider trading under the Criminal Code, so there are parallels in other areas. And there have been some prosecutions under the Criminal Code and under provincial legislation, with regard to securities, despite the fact that there is also a huge regulatory force set up, like the securities commissions across Canada, so there is no reason why you can’t do both” (R8).

This type of unit would not be unprecedented in British Columbia, although it occurred at the regulatory level. In discussing this initiative and its effectiveness, R1 notes that these efforts improved the investigation practices of WorkSafeBC when using regulatory legislation:

“Back in the mid to late 90s, the board here undertook a prosecution initiative...in terms of taking cases to Crown counsel and working with Crown counsel...about 20 some odd cases through to completion. There was just under an 80% conviction rate, but also had some very big significant cases fail. Those failures were problematic for the board, but they also pointed out to us where we needed to improve our process. It was a very good learning experience for the institution, because it pointed us to the need to improve our investigative practice” (R1).

The benefits of improved investigative practices are certainly not something that should be discounted, as this will be the backbone of any prosecution of an employer. Thus, those responsible for applying the criminal law should consider adopting a similar initiative, and identify any areas of investigation that could be improved. The goal of this exercise would not be the pursuit of using criminal charges where they do not apply. Rather it would be to make an effort to prosecute cases that may fall into a grey zone, with the aim of clarifying exactly which types of situations should be referred for criminal prosecution. The aim is not to promote the use of criminal law over regulatory responses as a mandate. Instead it is to improve the use of criminal law in cases where enforcement officials feel that it applies.

While these methods of increasing the number of cases prosecuted to improve case law rely on bringing new cases to the court system, R5 notes that it may not be a lack of case law available in this area, so much as the difficulty in accessing provincial case law.

“There is a body of law out there for prosecutions in court; the problem is that they are in provincial Court. If you are in the Supreme Court in provinces, those are very easily searched as lawyers, there are databases you pay into and you can get every single decision at that level of court in Canada, you can always get those. Provincial courts sometimes make it into the reporting databases, but more often they just sort of stay filed in individual court houses all across Canada. So if you do a case in

Golden, B.C., nobody knows about it unless you knew somebody who was working on it or saw it in the paper, and where to go look for it, but as lawyers it is difficult to research that case law. I don't think it is not out there, but it is an enormous challenge to pull it together. To keep on it, I would somehow have to be able to search all the provincial court houses in all of Canada and get those decisions sent to me and sort out all the ones that are family law and all these other things. But every court house sees one or two every couple of years, so there is a body of law, you just can't access it" (R5).

When asked how R5 would go about making the case law more available, she cites that an organization, such as the Canadian Legal Information Institute (CANLII), could be asked to improve access to provincial court case law:

"A website called 'CANLII', their aim is to make law accessible to all for free. So organizations like that will say to a provincial courthouse "send us your decisions and we will post them up to our databases" but it is an enormous undertaking, so you have to have buy in by everybody. There is a provincial registry of judgments in BC, but it is just not complete and it only goes back to around 1997. So it is a pretty big undertaking" (R5).

R5 feels this would be effective, and notes that Crown prosecutors, "would have a body of case law around what they are looking at and they can make a decision based on more guidance than what the words of the legislation are".

While there certainly is benefit to creating more case law in this area, there is the possibility that any initiative to increase case law might suffer from the hesitance to create bad case law, especially using new amendments. However, at the very least, perhaps this would increase the amount of case law in Canada, and help to identify any weaknesses in the Crown's ability to investigate these incidents, in the same way R1 felt that an initiative to prosecute more identified weaknesses in British Columbia regulatory law.

Changes to the Legislation

One goal of my study is to determine whether the law, as it is currently written after the amendments from Bill C-45, is effective in addressing criminal liability in workplace fatalities. Three of the respondents felt that the Criminal Code needed further changes to better address these events. One respondent notes that the law is too fragmented, while two of the experts feel that a specific charge in the Criminal Code dealing with corporations is required.

As discussed earlier, the crimes being examined by this study can be very complicated, and this could be compounded by trying to utilize a law which is not worded as clearly as enforcement officials may hope, when deciding whether or not an incident falls within the realm of criminal liability. Perhaps one way to address this issue is to re-write existing laws to make them clearer. R3 feels that the law is too fragmented; having been pieced together rather than composed in a more structured purpose in its aims, and would benefit from being written in a more straightforward manner:

“My sense is that it has come about by pieces being added to the legislation. So they had criminal negligence provisions in there, they’ve added the legal duty, they’ve added some stuff about corporate responsibility, but the overall picture means you have a bunch of little pieces you have to integrate. If there was a prosecution under C-45 and it was more clearly integrated and perhaps more simply drafted it might be easier to apply...if you put together a complicated situation with complicated legislation that may pose much more of a challenge than if it was more straight forward and streamlined” (R3).

While this change may require the reorganization and re-wording of the existing law, a couple of the experts noted that a separate charge dealing specifically with corporate criminal liability is the ideal next step in the progression of dealing with

incidents such as workplace fatality. R7 explains that he would like to see a new set of criteria to better address how criminal negligence is applied to corporations:

“What is required to prove, criminal negligence causing death, is a very tough thing to prove, maybe the government could create a new offence, give it a different name, and require different things to be proven in order for the offence to be proven beyond a reasonable doubt, for example, criminal negligence causing death is a wanton and reckless disregard for the lives and safety of others, and what the corporation is charged with is criminal negligence causing death, well parliament can come up with a new offence under the criminal liability of corporations, come up with a new offence, different wording, different things that have to be proven, and then sanctions connected specifically to that offence, and not to criminal negligence causing death part of it” (R7).

R6 shares a similar line of thinking, and would like to see amendments to the Criminal Code similar to the ones done in the United Kingdom and Ireland, which have criminal charges made specific to the corporate context:

“The law requires that you establish either intent to commit the crime, or the intent to commit the injury that represents the crime, or you establish a reckless disregard for the consequences of your acts ...But I don’t think the same should apply to corporations. You can’t put a corporation in jail, so you are not denying a corporation its liberty, and a corporation is not the same as a person, so if you restrict a corporation’s activities, that is a problem for the corporation but nobody is going to jail. So in that sense in my view there can be a lesser guilty state of mind for the corporation” (R6).

When describing how the law would work under that method of enforcement, he cites a potential “willful blindness” addressing a known problem as one possible key:

“The legislation can be drafted so that when dealing with a charge against a corporation the legal concept of “willful blindness” can be applied to establish the necessary intent or “mens rea” when evidence is led that establishes that a complaint concerning an unsafe situation has been made more than once in writing to management and management has failed to acknowledge such complaint or to address it” (R6).

As a point of reference, the Health and Safety Executive in the United Kingdom notes that under the “*Corporate Manslaughter*” charge enacted in 2008 “companies and organizations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care” (Health and Safety Executive, 2012). Prosecutions are of the corporate body itself, and not the individuals within it (Health and Safety Executive, 2012). Penalties include unlimited fines, remedial orders (requiring a company or organization to take steps to remedy any management failure that led to a death) and publicity orders (Health and Safety Executive, 2012). It should also be noted that there are criticisms of the corporate manslaughter charge. Gobert (2008) notes that the law has been disappointing, and that “it is limited in its scope, restricted in its range of potential defendants and regressive to the extent that, like the discredited identification doctrine before it, it allows its focus to be deflected from systemic fault to individual fault” (Gobert, 2008: 413).

The amendments made effective by Bill C-45 were seen by many as a good step in the direction of regulating employer’s more effectively in incidents such as workplace fatality. The next step in this evolution may be to create a piece of legislation which pertains solely to the unique challenges that corporations present in this area.

Chapter Five: Conclusion, Limitations of the Study, and Future Research

Conclusion

The goal of this study was to gain a better understanding of how often workplace related fatalities are the result of employer liability, as well as to explore how effective the criminal law is in light of the legislative amendments in 2004. The amendments put

forth in the “Westray Bill”, were made in response to gaps in the legislation that were allowing criminal activity to go unprosecuted. For this study I focused on British Columbia due to a high level of traumatic injury compared to the rest of Canada and to its large population. The most significant points yielded through the analysis of the Incident Investigation Reports, and interviews with experts in the field can be summarized in five points. First, employers were found to be liable under regulatory law in half of the I.I.R. cases examined in this study. Second, there are unique features of British Columbia that combine to increase the number of workplace fatalities in the province, and the likelihood of those incidents being prosecuted under the Criminal Code. Third, the criminal law remains largely ineffective in prosecuting the majority of workplace fatalities where liability may exist. Fourth, several of the experts interviewed believed that the law could be improved. Fifth, respondents expressed opinions that are consistent with some aspects of Structural Marxist ideology.

1. Employers were Found Liable in Half of the I.I.R. Cases Examined

One of my research questions asked how often employers (a broad term used to include landowners, business owners, and the employees working on their behalf) could be found liable in the death of a worker, or workers. Given the number of workers who are dying from workplace related causes in Canada, it seems appropriate to question how often these fatalities are accidents that could not be avoided, or whether they are, at least partially, the result of some lack of safety provided by the employer. Nineteen of the thirty-eight Incident Investigation Reports examined showed liability on the part of the employer that was punished by fines or incarceration. Only one (2.6%) of these cases

resulted in an employer being incarcerated. These cases were based on the legal standards of regulatory law, as opposed to criminal law, so it is impossible to make any clear connection between this data, and how often employer's criminal action or inaction led to the death of a worker or workers. Interviews with experts did not yield a consensus into this area of discussion.

Further, looking at the I.I.R., this study found that the most common factor present in the death of an employee was some level of liability on behalf of the deceased. Certainly this factor would make it difficult to pursue criminal charges in a fatality. However, in almost as many cases, employers had shown a deficiency in providing safe work procedures for their employees to do their job. These deficiencies deal with matters such as outlining specific measures necessary to ensure safety of the employee directly and explicitly. Inadequate risk assessment of the work site by employers was also found to be a recurring theme, applying to 42.1% of the cases examined. What this data shows is that there are, arguably, elements of the criteria required under section 22.1, where negligence of the employer may be present, and section 217.1, where an employer makes a marked departure from standard of care in ensuring whether reasonable steps were taken to protect workers. Certainly one limitation of looking at these cases in such a way is the inclusion of overlap between employee error, and any of the factors indicating employer liability, in deciding whether or not to pursue criminal charges. However, these cases do show that employee liability in their own death is not the sole overriding factor in the majority of cases examined, and that employer liability may be more common than it is currently believed to be.

Another issue addressed through interviews with the experts was the reliability of the data obtained by official sources. The majority of experts felt that the data was reliable in terms of the raw number of fatalities caused by work place factors, and that there would be few ways that an employer could hide any liability. One respondent did note that combining statistics from federal and provincial jurisdictions was required to get a complete picture of the situation, rather than relying on statistics from one agency or another. Respondents also noted the thorough nature used by applicable agencies to identify cause of death. However, some of the respondents did note a concern that employers could influence the statistics gathered in this area. One respondent noted employers can intimidate workers into changing their story, while others indicated, vaguely, that employers could hide whether a fatality was caused by their liability. However, this study showed that the majority of experts interviewed felt that the statistics gathered by official agencies would be accurate, as would the causes of death.

2. Unique Characteristics of British Columbia that Effect the Use of Criminal Charges

I chose to focus on British Columbia because of the high number of fatalities resulting from traumatic incidents, as opposed to sickness or disease, compared to the rest of Canada. Thus, one of my goals was to inquire into any unique factors of British Columbia that should be identified when trying to explain rates of fatality relative to the rest of Canada, as well as any factors that would impact on the use of criminal law in workplace fatalities. Respondents identified three main areas in this regard:

WorkSafeBC's administrative penalty system; the charge approval process to elevate charges to the criminal level; and the nature of the British Columbia economy.

The main effect that the administrative penalty process has on this phenomenon is to divert cases away from the criminal courts. This effect was identified by several of the respondents, who noted that this process has advantages over the criminal regulatory model. Respondents noted some advantages of the administrative penalty process such as the speed with which charges can be processed (it takes longer through the criminal model), and stated that the level of penalty would not differ significantly. Respondents also noted that the likelihood of receiving a penalty is higher through the regulatory model. The administrative penalty process does not allow for imprisonment, it focuses on financial penalty as the main deterrent. The administrative penalty process is different than in provinces such as Ontario, which requires the use of a provincial court procedure to punish offenders. Thus, the number of cases that get taken to criminal court may be lower in British Columbia as a result.

The experts also discussed how the charge approval process is unique to British Columbia, and may influence whether criminal charges will be pursued. This process differs from other provinces, in that the RCMP is not able to lay charges without the permission of the Crown. British Columbia requires that the Crown approves the charges based on a two-step criterion. First, to determine if the charge(s) is in the public interest, and second, whether there is a high likelihood of conviction. A couple of the experts noted that, in the rare occasions criminal charges had been recommended by the RCMP, there had yet to be an approval of charges by the Crown Prosecutor's office in British

Columbia that they were aware of. The impression given by several respondents was that: with the abilities of the regulatory process, such as the administrative penalty system, charges may have a more difficult time reaching approval for the criminal level, than other provinces. As a result, the charge approval process may divert cases away from the criminal process. Third, British Columbia's economy is based on primary resources, and respondents note that this will result in a higher fatality rate, as accidents in these sectors tend to be more serious. This helps to explain the higher rate of workplace fatality compared to other parts of Canada. However, respondents also noted that there is a culture among some industries in the province. One respondent terms this a "frontier mentality", where workers do not like to be told how to do their job by regulators, and often see the enforcement of regulation over the workplaces as an unnecessary impairment to doing their jobs quicker or making more money. This could influence whether criminal charges will be used, as it may be hard to justify charges that could have a negative impact on the ability of an employee to earn a living.

3. The Criminal Law is Most Ineffective in Cases of Criminal Negligence for Workplace Fatality

The experts interviewed for this study seemed split on whether the amendments to the Criminal Code made the law more effective in prosecuting cases with workplace fatalities. There was no predictable split amongst experts; several had both good and bad comments about the amendments. For example, some respondents believed that the amendments helped to raise awareness of the seriousness of these incidents, not only to employers, but to society as a whole. Some experts also noted that the amendments were

a step towards better recognizing the change in how the modern corporation is structured. A couple of the experts noted that the new charge, section 217.1, is an important step in acknowledging that an employer should be liable if those workers in charge of directing the work of others are putting employees in harm through intent or negligence. However, experts also noted negative aspects of the law, including that the amendments were a knee jerk reaction by the federal government, largely in response to the Westray mine explosion. Other comments about the amendments indicated that they do not offer anything more substantive in prosecuting employers, and that the law was as effective as it could be prior to Bill C-45. Some respondents also felt that the new charge, 217.1, is extremely difficult to use effectively in prosecuting employers.

In general, regardless of personal background, experts seemed to note that the overall effectiveness of the criminal law is low when dealing with these sorts of incidents due to a number of factors. The most significant factor that was discussed revolved around issues pertaining to the use of regulatory verses criminal law when deciding how to punish employers. Respondents noted repeatedly that the biggest factor in determining whether criminal law or regulatory law will be used centres on the differences in burden of proof required between the two models. Respondents noted that the most likely charge to be used would be criminal negligence, which relies on proving a wanton and reckless disregard for worker safety beyond a reasonable doubt, while regulatory law relies on proving negligence within the balance of probabilities, and requires a much lower level of proof. Experts commented that it is very rare for incidents to clearly reach the level of criminal negligence, and that locating liability within a corporation still provides a

challenge, as the criminal law generally deals with tight connections of liability. Experts also noted that the criminal law suffers from a lack of case law to guide its future application, as the Crown needs a case or two to be brought through the courts to completion, to show what elements are necessary to prove criminal liability. However, a couple of respondents noted that, if a criminal avenue was pursued more often, it may actually negatively affect regulation of employers, as it would result in less enforcement against them due to the issues of proving criminal liability.

Respondents commented on the appropriate use of criminal law, several noting that the reason criminal liability is not pursued more often is that it is not warranted. Respondents also noted that, for the most part, employers take appropriate enough steps in providing safety to their workers. These measures help to avoid meeting the criteria required for criminal prosecution. Experts noted that the criminal law is mainly used for crimes of intent, and that, while there are cases where employers may be criminally negligent, they are extremely rare. Respondents saw the use of criminal law towards cases of omission, or unintentional oversights as inappropriate, and that this composes the vast majority of incidents involving worker fatality. Incidents where companies had their mind turned towards a hazard, and clearly did nothing to rectify the situation were identified as incidents where criminal negligence would be appropriate, but several of the respondents felt that companies are more proactive in their safety measures than they have been in the past. It appears, as noted by a couple of the experts, that criminal law is most likely saved for the most egregious cases, like the case of the Westray mine explosion, which would be a very limited group of incidents.

Another factor identified by the experts which favours using regulatory sanction is that the penalties an offender is likely to receive are not substantially different from one model to the next. Thus, if the goal is to punish offenders, it may be a more certain route to charge the employer under the regulatory model, as the burden of proof is lower, and the penalties are comparable. Experts seemed indecisive on whether there was more stigma attached to one form of punishment over the other.

4. Improvements Could be Made to the Criminal Law

I also sought to determine if the criminal law was in need of improvement after the amendments to the code in 2004, and, if so, in what ways could the law be improved to better address this phenomenon. Several of the experts felt that the amendments were too new to adequately form an opinion on how well the law itself is worded or could be improved, and wanted to see more cases going to court before commenting on making it better.

However, several noted that the operationalization of existing laws was important to improving how the law works, and that the impetus from those who have the decision to use the law, more so than a change to the laws themselves, at both the regulatory and criminal level needs to be addressed. It is important to note that some of the experts feel that the regulatory law was not being enforced as fully as it could be, and that the strength of the regulatory body was considered to be a factor when determining whether the use of criminal law should be pursued. The effective use of regulatory law, and procedures could play an important role in determining whether criminal law would be used. A previous history of regulatory violations, such as the lack of response by employers to

regulatory warnings, orders, and sanctions may help to establish a level of criminal liability. It was felt that regulatory law was also adequately equipped in most cases to handle effective punishment of employers in the majority of cases, but this would also assume the willingness to escalate sanctions under regulatory law. A couple of the experts mentioned that the public needs to apply more pressure to use criminal law, as the pressure to do so seems less strong than for other crimes. While one respondent feels that a more employee-oriented representation is required at the Board of Governors level within WorkSafeBC to recommend criminal charges to the Crown more often.

Secondly, several of the experts noted that the lack of effective case law was an impediment to the use of criminal law, and that increasing the number of cases in this area would help to guide prosecutors on when it should be used. Experts noted that there have been initiatives to do so in the past with special prosecution units such as IMET in the financial sector. This type of unit would not be unprecedented in B.C., having done this sort of activity at the regulatory level. Another expert noted that there is an existing body of case law that is available, but the access to this law is cumbersome, and would benefit from an agency such as CANLII collecting all court rulings in the province, and making them available online.

Lastly, a few of the experts noted that they would like direct changes to how the legislation is written, so that it may be more easily applied to cases that may warrant the use of criminal law. One expert noted that the current law would benefit from being written in a more integrated way, so as to bring together all the pieces of liability that need to be established more comprehensively. The benefit of this would be to have a

more direct piece of legislation, as it is often very difficult to establish liability, and adding a piece of complicated legislation makes it cumbersome to use. Thus, a re-organization of how the current law is written was suggested.

While re-organization, or re-wording, of the current law to make it more functional was one suggestion, other experts believe that a separate charge that uniquely applies to corporations in these situations is desirable. The current criminal law is difficult to use in relation to corporations, specifically in cases of criminal negligence, and the law would benefit from a unique set of criteria for prosecuting corporations, or employers, to reflect these unique challenges. One expert noted that they would like to see the use of a charge similar to the separate criminal charges for corporations that exist in Ireland and the United Kingdom.

5. Some Responses Showed Issues Consistent with Structural Marxism

I chose to use Structural Marxism as one possible theoretical explanation for why the amendments had been made to the Criminal Code, but was not as effective as they may appear. Some responses from the experts gave support to ideas that are consistent with those put forth by Structural Marxism.

Many of the respondents noted that the amendments had more to do with the government acting in response to pressure from unions, and the public, rather than something that had come organically from the government acting to correct an issue. Structural Marxism holds that the government is not as much a tool of the capitalist class as it is a mediator for the competing interests of a fractured class, with the goal of maintaining the overall health of capitalism. This requires that the public consent, or

believe, that capitalism is the best system available to them. The phenomenon of workers dying as a result of the action or inaction of their employers may jeopardize the public's trust, as nobody goes to work expecting to die. A couple of the experts noted that the amendments were directly the result of a knee jerk response by the government to be seen as acting to address the issue. Neither of these respondents feels that the amendments are very effective. The appearance of the government acting to fix a problem in a superficial response to social unrest, without fixing the core issues, is one claim of Structural Marxism. One expert felt that the wording of the law itself was compromised, and the wording was done in such a way, that the law would be cumbersome to use. This would indicate that there was no desire to see criminal charges against employers more often. However, it should be noted that one of these two respondents felt that the changes to criminal negligence were regressive, and made attributing liability to corporations too easy.

Responses from experts showed evidence of Structural Marxist concepts in other areas as well. Particularly in the ideas around a pro-business ideology, some of the respondents felt that there is a belief that capitalism is, for the most part, a positive thing, and that this may influence whether criminal liability is used against employers. A few of the experts noted that capitalist beliefs may weigh on the decision process of enforcement officials. It was also noted that there seems to be a lack of political will and general interest from the public to use criminal liability towards employers more often. It was felt that a societal adjustment in the way these incidents are viewed is required to place more emphasis on the seriousness of the action or inaction of employers in worker fatalities.

However, one respondent felt that, while this way of thinking may exist among some of those involved in regulating employers, there has been a change in this attitude, even if it has been slower than some may hope.

Limitations of the Study

The nature of this project was exploratory in that not very much work has been done in the area of criminal law used to address workplace fatalities since the relevant amendments to the Criminal Code were enacted through Bill C-45. The goal of my study is to expand the research in this area, and perhaps help to inspire future work. That said, I feel that the limitations of my research come in three main areas.

First, due to the narrowed focus of this research, it was difficult and time consuming to find experts in this field who felt they could speak adequately about the area I am exploring. While I feel that the professionals that I was able to interview for this study all offered a great source of knowledge, and offered a fairly diverse group of participants, it would have been ideal to interview an even broader range of individuals involved in this area. For example, some other groups which may have offered valuable insight could include members of Parliament to discuss possible issues that were considered during the creation of the amendments; as well as unions; and other employee interest groups. While I feel that all respondents offered honest impressions of the law, the majority of the respondents worked in the field of regulatory enforcement, or were currently private defense lawyers. Efforts were made to contact a broader range of individuals working in these additional areas. However, as mentioned; it was very difficult to find qualified, available respondents in these groups.

Secondly, the amendments put into effect through Bill C-45 are fairly new, and it may take more time to get more use out of the legislation. Once enforcement officials get more familiar with the amendments, and become clearer on what incidents fall within the scope of criminal liability. Perhaps with more time there will be a significant increase in the use of criminal charges in situations that would seem to call for it.

Third, as noted through my research project, this study is focused on the province of British Columbia, while the Criminal Code is legislation that applies across the country. Thus, while opinions of the experts interviewed offered a great source of knowledge, they may not accurately reflect how similar experts in other parts of Canada view the amendments and the issue of criminal law use in workplace fatality, in more general terms. The scope of identifying the unique factors related to each province and territory, comparing these to one another, as well as locating, interviewing, and analyzing the similarities and differences of opinion of experts for each, presented a formidable obstacle for this research project.

Future Research

Future research into the area of workplace fatality and the use of criminal liability in Canada would provide a great benefit in offering more clarity into the scope of the problem.

First, it would be ideal to compare different provinces and territories in Canada, perhaps identifying which of them have similar characteristics at the regulatory, police, and Crown prosecutorial level, which may allow the research to be more feasible. Looking at one area in isolation can certainly provide some insight into the law, how it is

used, and how it is viewed, but other parts of Canada may have different impressions of the law, and it would be interesting to explore and compare any differences, as well as account for why those differences may exist.

Secondly, it would be worthwhile to compare opinions more directly between the models Canada has chosen to employ with those used in other countries. This would likely require an exhaustive search for qualified experts to speak to the effectiveness of given models in different countries. This may provide insight into whether differing perspectives could be borrowed or even replace existing legislation, should it be deemed as an improvement over the current model. It should also be pointed out that, what works for one country and its own unique factors may not necessarily be effective in another. Given the relative infancy of Bill C-45 amendments, it would also be intriguing to see the impressions of experts from other countries as to its effectiveness.

Lastly, while it does not directly relate to the effectiveness or application of criminal law, I feel it would be interesting to explore impressions towards the effectiveness of the WorkSafeBC enforcement efforts, looking at the use of fines and jail terms, such as amount and length of imprisonment, as well as how frequently they are employed. Most of the experts I interviewed felt that WorkSafeBC was a strong body, which handed out significant penalties. However, it would be interesting to test these opinions on a larger and broader scale. While this may not directly relate to the use of criminal law towards workplace incidents, bodies such as WorkSafeBC are the first line of defense for workers, and their involvement with an employer could impact on whether

criminal charges are seen as necessary, perhaps, if a company has a long history of ignoring regulatory standards.

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Appendix A: Occupational Health and Safety Act Legislation Cited in I.I.R. Cases

115 (1) Every employer must

(a) ensure the health and safety of

(i) all workers working for that employer, and

(ii) any other workers present at a workplace at which that employer's work is being carried out, and

(b) comply with this Part, the regulations and any applicable orders.

(2) Without limiting subsection (1), an employer must

(a) remedy any workplace conditions that are hazardous to the health or safety of the employer's workers,

(b) ensure that the employer's workers

(i) are made aware of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed by their work,

(ii) comply with this Part, the regulations and any applicable orders, and

(iii) are made aware of their rights and duties under this Part and the regulations,

(c) establish occupational health and safety policies and programs in accordance with the regulations,

(d) provide and maintain in good condition protective equipment, devices and clothing as required by regulation and ensure that these are used by the employer's workers,

(e) provide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace,

(f) make a copy of this Act and the regulations readily available for review by the employer's workers and, at each workplace where workers of the employer are regularly employed, post and keep posted a notice advising where the copy is available for review,

(g) consult and cooperate with the joint committees and worker health and safety representatives for workplaces of the employer, and

(h) cooperate with the Board, officers of the Board and any other person carrying out a duty under this Part or the regulations.

General duties of supervisors

117 (1) Every supervisor must

(a) ensure the health and safety of all workers under the direct supervision of the supervisor,

(b) be knowledgeable about this Part and those regulations applicable to the work being supervised, and

(c) comply with this Part, the regulations and any applicable orders.

(2) Without limiting subsection (1), a supervisor must

(a) ensure that the workers under his or her direct supervision

(i) are made aware of all known or reasonably foreseeable health or safety hazards in the area where they work, and

(ii) comply with this Part, the regulations and any applicable orders,

(b) consult and cooperate with the joint committee or worker health and safety representative for the workplace, and

(c) cooperate with the Board, officers of the Board and any other person carrying out a duty under this Part or the regulations.

Coordination at multiple-employer workplaces

118 (1) In this section:

"multiple-employer workplace" means a workplace where workers of 2 or more employers are working at the same time;

"prime contractor" means, in relation to a multiple-employer workplace,

(a) the directing contractor, employer or other person who enters into a written agreement with the owner of that workplace to be the prime contractor for the purposes of this Part, or

(b) if there is no agreement referred to in paragraph (a), the owner of the workplace.

(2) The prime contractor of a multiple-employer workplace must

(a) ensure that the activities of employers, workers and other persons at the workplace relating to occupational health and safety are coordinated, and

(b) do everything that is reasonably practicable to establish and maintain a system or process that will ensure compliance with this Part and the regulations in respect of the workplace.

(3) Each employer of workers at a multiple-employer workplace must give to the prime contractor the name of the person the employer has designated to supervise the employer's workers at that workplace.

General duties of owner

119 Every owner of a workplace must

(a) provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace,

(b) give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace, and

(c) comply with this Part, the regulations and any applicable orders.

120 Every supplier must

(a) ensure that any tool, equipment, machine or device, or any biological, chemical or physical agent, supplied by the supplier is safe when used in accordance with the directions provided by the supplier and complies with this Part and the regulations,

(b) provide directions respecting the safe use of any tool, equipment, machine or device, or any biological, chemical or physical agent, that is obtained from the supplier to be used at a workplace by workers,

- (c) ensure that any biological, chemical or physical agent supplied by the supplier is labelled in accordance with the applicable federal and provincial enactments,
- (d) if the supplier has responsibility under a leasing agreement to maintain any tool, equipment, machine, device or other thing, maintain it in safe condition and in compliance with this Part, the regulations and any applicable orders, and
- (e) comply with this Part, the regulations and any applicable orders.

213 (1) A person who contravenes a provision of this Part, the regulations or an order commits an offence.

(2) If a corporation commits an offence referred to in subsection (1), an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence.

(3) Subsection (2) applies whether or not the corporation is prosecuted for the offence.

Appendix B: Workers' Compensation Act Legislation Cited in I.I.R. Cases

4.2 Safe buildings and structures

The employer must ensure that each building and temporary or permanent structure in a workplace is capable of withstanding any stresses likely to be imposed on it.

4.3 Safe machinery and equipment

(1) The employer must ensure that each tool, machine and piece of equipment in the workplace is

(a) capable of safely performing the functions for which it is used, and

(b) selected, used and operated in accordance with

(i) the manufacturer's instructions, if available,

(ii) safe work practices, and

(iii) the requirements of this Regulation.

(2) Unless otherwise specified by this Regulation, the installation, inspection, testing, repair and maintenance of a tool, machine or piece of equipment must be carried out

(a) in accordance with the manufacturer's instructions and any standard the tool, machine or piece of equipment is required to meet, or

(b) as specified by a professional engineer.

(3) A tool, machine or piece of equipment determined to be unsafe for use must be identified in a manner which will ensure it is not inadvertently returned to service until it is made safe for use.

(4) Unless otherwise specified by this Regulation, any modification of a tool, machine or piece of equipment must be carried out in accordance with

(a) the manufacturer's instructions, if available,

(b) safe work practices, and

(c) the requirements of this Regulation.

[Enacted by B.C. Reg. 312/2003, effective October 29, 2003.]

[Amended by B.C. Reg. 243/2006, effective January 1, 2007.]

10.2 General requirement

If the unexpected energization or startup of machinery or equipment or the unexpected release of an energy source could cause injury, the energy source must be isolated and effectively controlled.

11.2 Obligation to use fall protection

(1) Unless elsewhere provided for in this Regulation, an employer must ensure that a fall protection system is used when work is being done at a place

(a) from which a fall of 3 m (10 ft) or more may occur, or

(b) where a fall from a height of less than 3 m involves a risk of injury greater than the risk of injury from the impact on a flat surface.

20.3 Coordination of multiple employer workplaces

(1) If a construction project involves the work of 2 or more employers or their workers, each employer must notify the owner, or the person engaged by the owner to be the prime contractor, in advance of any undertaking likely to create a hazard for a worker of another employer.

(2) If a work location has overlapping or adjoining work activities of 2 or more employers that create a hazard to workers, and the combined workforce at the workplace is more than 5,

(a) the owner, or if the owner engages another person to be the prime contractor, then that person must

(i) appoint a qualified coordinator for the purpose of ensuring the coordination of health and safety activities for the location, and

(ii) provide up-to-date information as specified in subsection (4), readily available on site, and

(b) each employer must give the coordinator appointed under paragraph (a)(i) the name of a qualified person designated to be responsible for that employer's site health and safety activities.

(3) The duties of the qualified coordinator appointed under paragraph (2)(a)(i) include

(a) informing employers and workers of the hazards created, and

(b) ensuring that the hazards are addressed throughout the duration of the work activities.

21.2 Employer's responsibility

Nothing in this Part relieves an employer of the responsibility to provide adequate direction and instruction of workers, and to assign work only to those workers who are competent.

21.5 Authority to blast

(1) Only the holder of a valid blaster's certificate issued by the Board or acceptable to the Board is permitted to conduct or direct a blasting operation, and then only if the work involved is within the scope of that certificate.

G26.16 Slope limitations - Safe work procedures

Issued November 18, 2009; Revised April 13, 2011

Regulatory excerpt

Section 26.16 of the *OHS Regulation* ("*Regulation*") states:

- (1) Repealed. [B.C. Reg. 312/2003, effective October 29, 2003.]
- (2) If the manufacturer's maximum slope operating stability limit for logging equipment is known, the equipment must be operated within that limit.
- (3) If the manufacturer's maximum slope operating stability limit for logging equipment is not known, the equipment must be operated within the following limits:
 - (a) a rubber tired skidder must not be operated on a slope which exceeds 35%;
 - (b) a crawler tractor, feller buncher, excavator and other similar equipment must not be operated on a slope which exceeds 40%;
 - (c) any other forestry equipment specifically designed for use on a steep slope must not be operated on a slope which exceeds 50%.
- (4) Despite subsections (2) and (3) but subject to subsection (5), logging equipment may be operated beyond the maximum slope operating stability limits specified in those subsections if
 - (a) a qualified person conducts a risk assessment of that operation, and
 - (b) written safe work practices acceptable to the Board are developed and implemented to ensure the equipment's stability during operation.
- (5) Despite anything in this section, logging equipment must not be operated in a particular location or manner if its stability cannot be assured during that operation.

26.27 Location of fallers

- (1) Fallers and buckers must not work in a location where they or other workers could be endangered by that work.
- (2) If an elevation or steep slope poses a risk to a faller, the faller must be provided with and use an appropriate fall protection system.
- (3) Any fall protection provided under subsection (2) must not impede the ability of the faller to move to a predetermined safe position as required in section 26.24 (7).

(4) A faller must not work in a location where the faller is supported solely by a lifeline and harness.

26.5 Initial safety meeting

(1) In this section, "**new work location**" means a work location in a forestry operation where the crew of workers has not previously worked.

(2) Before a crew of workers starts work in a new work location, a crew safety meeting must be held to inform the workers of any known or reasonably foreseeable risks in that location and the actions to be taken to eliminate or minimize those risks.

(3) If a worker did not attend the crew safety meeting under subsection (2) for a new work location, before starting work in that location, the worker must receive a safety orientation that covers any known or reasonably foreseeable risks in that location and the actions taken to eliminate or minimize those risks.

(4) Records must be kept of the crew safety meetings and safety orientations provided under subsections (2) and (3).

26.54 Equipment stability

Repealed. [B.C. Reg. 20/2008, effective May 1, 2008.]

Appendix C: Consent Form Given to Respondents

Matthew Giesbrecht
Master's Student
University of Manitoba
Department of Sociology

Supervisor:

Dr. Rick Linden
Professor
University of Manitoba
Department of Sociology

Title of Project:

Canadian Corporate Criminal Liability in Workplace fatalities: Evaluating Bill C-45

Purpose of the Study:

The purpose of this study is to contribute to the understanding of workplace fatalities in British Columbia, and to explore the functionality and practicality of the current criminal law in these events. This will put focus on the 2004 revisions to the Criminal Code. The first part of this study will use selected Incident Investigation Reports and information about selected cases obtained from the Worker's Compensation Board in British Columbia from 2005-2006. The second part will use interviews with those considered experts in this field. The goal will be to gain a better understanding of how well the criminal law is able address this problem, how often these events can be attributed to the employer, barriers to using criminal law more often, and the ways that criminal law could be improved to deal more effectively with these types of events.

What Will I Be Asked To Do?

Your participation will take the form of a phone interview, which will last no more than one hour. You will be asked to answer questions concerning the use of the criminal law in cases of workplace fatalities in Canada, and more specifically British Columbia. The questions will centre on the effectiveness of the law, what could be done to improve the law (if anything), opinions on how prevalent corporate liability in fatalities may be, and what barriers might impact the use of the law.

Your participation in this study is completely voluntary, and you may refuse to answer any question you are not comfortable answering. You may also end the interview at any time without penalty.

What Type of Personal Information Will Be Collected? What Will Be Done With It?

This research is designed to protect your confidentiality. Although personal information will be collected in this study, steps will be implemented to keep your identity and any person, or business identified confidential.

The researcher will be conducting the interview and transcribing the tape recording of it. The transcript of your interview will be shared with the researcher's supervisor. The taped recording of your interview will be labelled with a pseudonym and stored in the researcher's locked file cabinet. The information will be kept for a maximum of five (5) years for the purpose of publications. After which, the information will be destroyed. At the completion of this study I will send a (free) summary of the results and findings of this study. This will be available via three methods of delivery: fax, email, and surface mail.

Please **put a check mark** on the corresponding line(s) that grants the researcher permission to:

I grant permission to be audio taped: Yes: ___ No: ___

I grant permission to have my organization/company's name used: Yes: ___ No: ___

I wish for my personal information to remain confidential: Yes: ___ No: ___

The pseudonym I choose for myself is:

You may use my name: Yes: ___ No: ___

You may quote me: Yes: ___ No: ___

I would like a summary of this study's findings upon completion (October 2009):

Yes: ___ No: ___

Please **circle** the method you would like your summary delivered by, and fill in the corresponding information for that method

Fax

Email

Surface Mail

Fax
Number: _____

Address: _____

(Street Name and Number) (City/Province) (Postal Code)

Email
Address: _____

Are there Risks or Benefits if I Participate?

There are no foreseeable risks involved in participating in this research. The benefits are that your participation will enhance the understanding of these phenomena.

Signatures (written consent)

Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research project and agree to participate as a subject. In no way does this waive your legal rights nor release the researchers, sponsors, or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time, and /or refrain from answering any questions you prefer to omit, without prejudice or consequence. Your continued participation should be as informed as your initial consent, so you should feel free to ask for clarification or new information throughout your participation.

Participant's Name:

(please print) _____

Participant's Signature _____

Date: _____

Researcher's Name:

(please print) _____

Researcher's Signature: _____

Date: _____

Questions/Concerns

This consent form is only part of the process of informed consent. It should give you the basic idea of what the research is about and what your participation will involve. If you would like more detail about something mentioned here, or information not included here, you should feel free to ask.

This research has been approved by the Psychology/Sociology Research Ethics Board at the University of Manitoba. If you have any concerns or complaints about this project you may contact the Human Ethics Secretariat. A copy of this consent form has been given to you to keep for your records and reference.