

**Repositioning the Corporate Criminal:  
Comparing and contrasting corporate criminal liability in Canada and Finland**

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**Abstract:** Over the past two decades a number of states in the Global North have introduced laws aimed at holding corporations criminally liable for their wrongful acts. While there is an important literature examining these legal regimes, including their respective approaches and patterns of enforcement, there is a paucity of comparative work that interrogates processes of law-making, the different political struggles leading to the enactment of corporate criminal liability (CCL) legislation. This paper aims to address part of this lacuna by comparing and contrasting the development of CCL in Canada and Finland. Both countries share similar histories as social-democratic welfare states with strong mixed economies that recently engaged long and circuitous routes to criminalizing corporate harm and wrongdoing. By scrutinizing the law reform processes in each jurisdiction, including legislative documents, committee hearings and memorandums and written opinions, the paper documents how CCL emerged under different conjunctures in each country, yet were shaped similarly by hegemonic beliefs in the non-criminal status of corporations and corporate actors, the importance of advancing private enterprise and established jurisprudence. Of particular note for the authors are the ways in which dominant notions of legal individualism and the universal legal subject (i.e. the rule of law and dominant notions of *mens rea*) constrained legislative efforts to hold corporations and corporate actors criminally to account, therein preventing corporate misconduct from being processed as ‘real’ crimes.

**Keywords:** corporate crime, crimes of the powerful, corporate criminal liability, transpositionality, criminal law, law reform.

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## Introduction

Over the past two decades a number of states in the Global North have introduced laws aimed at holding corporations criminally liable for their wrongful acts. Whilst there is an important literature examining these legal regimes, including their respective approaches and patterns of enforcement, there is a paucity of comparative work that interrogates processes of law-making, the different political struggles leading to the enactment of corporate criminal liability (CCL) legislation.

Historically, demands for new laws in response to corporate offending have been avoided, side-tracked and/or watered-down in favour of non-criminal rules and regulations (Alvesalo-Kuusi and Lähteenmäki 2016; Snider 1991; Tombs and Whyte 2015). In general states have been reluctant to equate harm and wrong-doing by corporations with serious crimes – that is, they are deemed *mala prohibita* (wrong because prohibited) as opposed to *malum in se* (inherently wrong or evil) (Snider 2000). This apathy does not suggest a total disregard for corporate offending but that reforms have been slow, hard fought and have rarely resulted in dramatic improvements in corporate accountability (Pearce and Snider 1995; Slapper and Tombs 1999). This paper therefore provides an opportunity to critically examine new legislation that criminalizes corporations.

In Canada, the introduction of CCL legislation in 2004 followed the death of twenty-six miners in 1992 in an underground explosion at the Westray mine on Canada's east coast, a disaster caused by dangerous and illegal working conditions. Commonly referred to as the Westray bill, the law creates a legal duty for “all persons directing work to take reasonable steps to ensure the safety of workers and the public” and attributes criminal liability to an “organisation” if a senior officer

knew or ought to have known about the offence. Finland introduced its CCL legislation in 1995 in connection to an overall reform of the Finnish penal code. Unlike Canada, Finland did not criminalize corporate malpractice as a result of a disaster or scandal, but rather owing to a general desire to modernize the criminal code and the political leverage of the left and strong influences within the labour movement. Similar to Canadian law, a corporation in Finland is liable if someone commits a criminal offence on behalf of the corporation or in its operation.

Canada's Westray bill quickly fell into a state of virtual disuse following its enactment, overshadowed by the priorities accorded to the policing of street crimes and the federal government's pro-business, anti-regulatory stance. Since taking effect in 2004 there have only been a handful of charges, resulting in approximately 6 convictions/guilty pleas, despite there being almost 1,000 annual workplace fatalities (Sandborn 2012). What is more, these cases centred on small, independent companies where there is little difficulty tracing the chain of command and establishing liability (Bittle 2013; Glasbeek 2013). Meanwhile, Finland's legislation was originally poorly understood by law enforcement officials and, to date, has rarely been used, producing relatively small fines lacking any deterrent value (Alvesalo & Whyte 2006, Alvesalo-Kuusi & Lähteenmäki 2016). During 2010-2014 the average sentence was € 10 700, while the typical sentence was € 5 000. The annual amount of convictions varies between 30 and 40 cases, and nearly 90 % of the convictions are dealt out of occupational safety crimes (Alvesalo-Kuusi & Lähteenmäki 2016b). The timing is therefore ripe to explore the emergence of CCL law reform, including the reasons for the development of new laws in response to corporate crime, and how they are constituted and enforced (or not).

Canada and Finland represent interesting comparators in that they are historically social-democratic nations that, until recently, have resisted the law-and-order rhetoric and strategies that dominate in many Western nations (Braithwaite 2014). The introduction of CCL legislation thus marks a (theoretically) punitive or at least unprecedented turn in regulating corporate offending in both jurisdictions. However, as we shall see, despite widespread political support for both laws their introduction was far from expeditious, marked by considerable discussion, debate and controversy that is atypical when legislators contemplate new laws to deal with “traditional” serious crime, committed by individuals.

This paper explores the ways in which demands to hold corporations criminally responsible for their harmful and illegal acts were taken up by, and interpreted through, formal state law reform processes. Of particular interest are the influences that gave rise to CCL legislation in Canada and Finland and the extent to which powerful corporate interests and legal orthodoxy combined to help to inform each legislative regime. The paper asks: What were the junctures and reasoning that lead to the introduction of CCL legislation in both jurisdictions? How was CCL constituted through each country’s law reform process? What were the various knowledge claims about corporate crime and CCL that shaped these legislative reforms? As we expand upon below, in answering these questions we draw theoretically from the concept of transpositionality to explore the ways in which powerful discourses converged throughout both law reform processes to limit (albeit not prevent) the state’s efforts to criminalize corporations.

The paper draws empirically from two different studies on CCL conducted in Canada and Finland, respectively. Each study examined key legislative documents pertaining to the introduction of CCL law, including draft bills, parliamentary debates, testimony/evidence

provided to legislative committees charged with reviewing the law and various statements/position papers produced by various stakeholders (e.g., NGOs, union/labour groups, private law firms and legal academics).<sup>1</sup> The comparative work undertaken herein is, with few exceptions, unique in examining the various elements that shape CCL laws which, on the surface, signal a shift in the regulation of corporations and a direct affront to the interests of capital (for exceptions see Almond 2013; Alvesalo-Kuusi and Lähteenmäki 2016; Bittle 2012; Glasbeek 2002; Wells 2001). Our socio-legal analysis pays close attention to the social context of each law reform processes, aiming to understand both their similarities and differences (see Cotterrell, 2006: 710; Dannemann, 2006; Nelken, 2007, pp. 19–25, Creutzfeld et al 2016). We endeavour to produce a nuanced understanding of corporate crime law reform which accounts for the complex ways in which powerful interests permeate law and its constitution, an approach that differs from some comparatists who reject the value of description and understanding as a valuable per se. (see Creutzfeld et al 2016, p x).

The remainder of this paper consists of four sections. The next section addresses the transpositional qualities of law and its relevance for our interrogation of CCL law reform. Section two outlines the socio-political forces affecting law-making and details some of the conditions that gave rise to corporate crime law reform in Canada and Finland. Following this we compare and contrast the CCL regimes in each country, documenting the cultural, economic and legal influences that shaped their development. Although there was no conspiracy of forces that aimed to avoid or discredit the introduction of CCL legislation in either jurisdiction (power rarely, if ever, proceeds purely in instrumentalist terms), we argue that a range of forces converged to limit the nature, scope and application of the criminal law in response to corporate crime. In the final section we revisit the

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<sup>1</sup> The Canadian study includes verbatim transcripts from Canada's Parliament, semi-structured interviews with individuals with insight into issues of corporate criminal liability (including interviews conducted after the law's enactment), Internet-based materials concerning the law's enforcement and relevant case law. The Finnish study includes several commission reports gauging corporate criminal liability (1973-1987), opinions handed in during the entire process (N=173), government proposals and parliament minutes (1994). Also, some of the individuals who took part in the legislation process were interviewed via e-mail.

concept of transpositionality, arguing that, amidst the influences shaping the introduction of CCL, the law reform process acted as a significant “point of articulation” (Hall 1988: 61) for dominant voices to become part of law’s (self-proclaimed) immutable characteristics, including orthodox rules and methods relating to its constitution and implementation, therein downplaying the seriousness of corporate crime and undermining the need to intervene through formal criminal justice processes.

## Law’s transpositional qualities

Understanding how the justice system works in relation to corporate crime requires that we unpack the laws that are introduced by the state, their nature and scope, what they prohibit and permit, and the ways in which this renders (im)possible the criminalization of corporate malfeasance (Slapper and Tombs 1999: 12; also see Alvesalo-Kuusi and Lähteenmäki 2016; Bittle 2012; Pearce and Tombs 1998). According to McBarnett (1983), interrogating law’s unique qualities entails making sense of the criminal justice paradox in which so many people charged with traditional crimes are found guilty when the entire legal system is, in official terms, structured to protect the rights of the accused and limit the number of guilty individuals. We submit that McBarnett’s critique must be turned on its head when examining crimes of the powerful to understand what it is about law’s constitution and CCL law in particular that explains why so many corporations and corporate executives are able to escape the law’s gaze when the law itself has been transformed expressly to criminalize their acts and omissions. Our concern is therefore about how the “democratic state rules” through law, forming a “bridge” between the priorities of criminal justice officials and the dominant ideologies that inform state decision-making around issues of crime and law and its reform (McBarnett 1983: 1). After all, if the goal is to ensure that legislative responses to corporate

crime help address the harms caused by these offences, then we need to better understand the many different and contradictory factors that shape law and its enforcement.

From this vantage point law has a distinctly social basis (Comack 2014) in that it only ever exists in mutually constitutive relationships with the broader social context (Comack 2014; Hall et al. 2013; Hunt 1993). Law is not simply a “container of ideologies”, dominant or otherwise, but a location where ideologies are reproduced under particular conjunctures (Bonnycastle 2000: 65; also see Chunn and Lacombe 2000; Smart 1989; Woodiwiss 1990). This does not mean that law is not at times dominant but that this outcome is far from automatic – it must be “explained not asserted” (Woodiwiss 1990: 72; also see Cotterrell 1992; Hunt 1993). We are therefore interested in the influences that gave rise to CCL regimes in Canada and Finland, whilst also “re-claiming” law (Hunt 1993; Smart 1989) as an important site of struggle that creates the potential for and imposes limits on the criminalization of corporate deviance.

Key for us to understanding the boundaries of CCL is acknowledging law’s bourgeois roots that make it easier – albeit far from automatic – for certain (hegemonic) voices to inform law’s constitution (Cotterrell 1992; Hunt 1993; Pashukanis 1980). Law emerged historically alongside free market capitalism, tethering law to the commodity form and cementing the very conditions necessary for capital (re)production (Pashukanis, 1980; also see Milovanovic 2011; Woodiwiss 1990). In essence the logic of capital is embedded in law and legal reasoning, generating legal abstractions like the “reasonable man” and “due process” that are essential for the exchange of commodities and for legal subjects to ‘freely’ and ‘equally’ enter into contractual relations for exchange, including those pertaining to work (Milovanovic 2011; Woodiwiss 1990). Law’s

endless pursuit of consistency in method and form solidifies these relations through rules that generate the illusion of law as dispassionate, neutral and fair – something upheld in official discourse to maintain law’s legitimacy (Comack 2014) – despite that it emerges within “a determinate social location” (Woodiwiss 1990: 117). Accordingly, if law abstracts individuals from their social conditions to forge a universal legal subject (Naffine 1990; as cited in Comack 2014), then we would do well to recall that this subject (including the corporation as a legally constituted individual) is principally male, rational, “monied” and “competitive” (Naffine 1990; 52; cited in Comack 2014: 13), all of which constitute essential ingredients for producing “a particular kind of person and a particular form of society” (Comack 2014: 13). Criminal law in particular forms a branch of law where the central function and object of the law is based on the idea of “the other”: the deviant that typically has no voice in the process of law-making but that forms the needed opposition to the rational and the respectable.

In what follows we probe the “privileging” of bourgeois legal discourse in the development of CCL legislation (Woodiwiss 1990). In so doing we examine law’s (trans)positional qualities; the idea that law produces legal subjects or positions in which each subject has their respective rights and duties (Tomlins 2007; Woodiwiss 1990). Law can be used to reposition legal subjects if there is breakdown in the social order or if the disciplinary boundaries of capital have been lost or are perceived to require (re)adjustments (Woodiwiss 1990). For instance, the transpositioning that occurs with the introduction of CCL legislation entails a new subject position for the corporate criminal vis-à-vis its victims. At the same time, however, this transpositioning does not occur in a vacuum, meaning that powerful legal subjects can resist their new position or challenge the state’s efforts to introduce new forms of discipline by invoking various counter-discourses (Woodiwiss



1990: 115). Whilst it may not be surprising to read that powerful voices get heard more easily than others, we argue that realizing this privileged position is not simply a result of the powerful imposing their will on others (if that were the case then neither CCL law would have ever come to fruition) but instead the product of the conveyance of powerful interests through various legal and extra-legal discourses or forms of ‘common sense’ that ultimately serve to reinforce the capitalist status quo (Pearce and Tombs 1998). So even if CCL law in Canada and Finland effectively transforms the subject position of corporations to that of (potentially) criminal or at least punishable, and consumers, employees and the general public as subjects of (re)new(ed) protections against these crimes, there remains powerful (hegemonic) discourses and interests at play that significantly shape laws’ development and enforcement. A transpositional approach thus allows us to focus on the influences that shape CCL law, via Foucaultian inspired examinations of discourse, whilst maintaining focus on Marxist concerns with the privileged role of legal orthodoxy (Tomlins 2007: 54-55). From this perspective law and law reform processes are powerful discursive practices that give meaning to relations of power in society (Comack 2014; Woodiwiss 1990).

## Corporate criminal liability and the conjuncture

This section outlines key conjunctures that produced calls for reforming the criminal law to hold corporations to account for their harmful acts. Of note are the historic problems with assigning criminal responsibility to the limited liability corporation and the emergence of neoliberalism as a political and economic force that prioritized the profit-making capacity of corporations at the expense of the long-term interests of the environment, global financial stability and workers’ health and safety.

### *The trouble with limited liability*

The history of controlling corporate crimes is best described as a “bifurcated model of criminal process” (Tombs and Whyte 2007: 110). For Tombs and Whyte (2007: 110) this contains two distinct, yet related, spheres: attempts to *assimilate* corporate deviance into traditional criminal law by amending mainstream criminal processes to respond to corporate offences; and efforts to *differentiate* corporate deviance from traditional crime by responding through regulatory law. This paper focuses on attempts to assimilate corporate deviance into the realm of criminal law through the introduction of CCL legislation.

Whilst the modern corporation enjoys unprecedented power and a privileged legal status, it was not until the mid-19<sup>th</sup> century that it emerged as the dominant means to undertake significant entrepreneurial ventures (Glasbeek 2002: 32-33; Snider 1993: 21). In both Canada and Finland the corporate form expanded significantly throughout the 19<sup>th</sup> and 20<sup>th</sup> century, pushing the limits of production in the pursuit of profit, bringing with it frequent and serious injury and death in the workplace (Slapper and Tombs 1999: 25; also see Glasbeek 2002; Eklund & Suikkanen 1982). However, despite growing concerns with corporate harm and wrongdoing, corporations were generally successful in lobbying against reforms that they perceived to be overly stringent. In Finland, for instance, industry representatives were mainly successful up until the 1960s in resisting the demands for more government regulation restricting manufacturing, although statutes aimed at punishing violations of ownership, commerce and finance were first enacted in the 1889 criminal code (Eklund & Suikkanen 1982, 15; Criminal justice committee 1976, 10; 30-34; 43).

Underpinning the resistance to new laws was the belief that corporations were private property, and therefore what went on within a company was the owner's private business. Nevertheless, as time passed there was growing recognition of the social and economic damages that corporations were capable of inflicting in the absence of accountability (Glasbeek 2002). It was therefore during the mid-1900s that various efforts emerged, first in the UK and later in countries like Canada and Finland, to develop strategies for holding corporations criminally accountable for their harmful acts.

A series of cases in the UK in 1944 first introduced the identification doctrine, effectively assigning responsibility to the corporation by equating the *mens rea* of certain employees – deemed to be the “controlling officer”, the individual who effectively acted as the company – with that of the company itself (Slapper and Tombs 1999: 29-30). Canada soon followed suit with the introduction of the identification doctrine, which assigned criminal liability to a corporation by tracing the crime to the organization's “directing mind” (i.e., senior employee(s)) (*Canadian Dredge and Dock Co. v. The Queen* [1985] 1 S.C.R. 662). The problem, however, was figuring where responsibility lay in serious and complex matters. As Slapper and Tombs (1999: 31) note, for cases involving manslaughter, courts in the UK (and Canada, too) found it difficult to convict corporations given the distribution of responsibility throughout the corporate body, rendering it challenging to single out one responsible individual. Since the identification doctrine only applied to “high-level managers with decision-making authority”, and since lower-level managers were often the people interpreting company policies, tracing responsibility up to senior management frequently proved difficult (Cahill and Cahill 1999).

In Finland, corporate wrongdoing first came under severe criticism during 1970s (Hakamo et al. 2009, 36). Similar to the UK and Canada, it had become difficult to determine the liability of owners and boards of directors, particularly in large companies, and it was increasingly challenging to determine culpability in cases that implicated the actions and decisions of several individuals within an organization, as is commonly the case with corporate offending. Many cases were therefore dismissed due to the complex nature of the cases in addition to the law requiring premeditation on part of the perpetrator (Committee memo 1983, 160).

It was within this context that critics argued existing laws failed to “...reflect the reality or complexity of corporate decision-making in large, modern companies” (Cahill and Cahill 1999: 154). Thus, following the division of Tombs and Whyte (2007: 110), CCL laws in Canada and Finland attempted to “assimilate” corporate wrongdoing into the realm of criminal law.

### *The changing socio-political landscape*

In addition to concerns with inadequate legislation in Finland and the identification doctrine in Canada, tensions and contradictions surfaced within the broader social formation to help propel CCL to the legislative fore. We suggest that the introduction of CCL legislation reflects a growing conflict within traditional social welfare states that, beginning in the 1970s and 1980s, embraced liberalized markets through policies and regulations that aimed to advance the accumulation of private wealth at the expense of suppressing their social democratic roots (Hall 1988). Canada and Finland were not immune to these processes of neoliberalization, albeit Finland embraced the “open for business” (Snider 1993) mantra later than many other capitalist states (Kantola 2002).

As critical corporate crime scholars have noted (Friedrichs 2010; Snider 2000; Tombs and Whyte 2015), with the ascendancy of neoliberalism many countries of the Global North downplayed the need to regulate corporate harm and wrongdoing, preferring instead to believe that “potentially profitable acts cannot be wrong” (Snider, 2000: 192). As part of the triumph of private enterprise, corporations successfully argued that laws governing the economic realm were unnecessary, even redundant, because competition through “free” markets was seen as the best way to separate out irresponsible companies. Tragically, however, the new-found power and influence accorded corporations came with considerable downside. Examples abound of high profile corporate crimes that starkly reminded everyone of the dangers of private enterprise when it operates “beyond democratic control” (Pearce and Snider 1995: 26).

In Canada, although the Westray disaster represented a watershed moment in terms efforts to improve corporate accountability, the enactment of CCL legislation followed a series of high profile disasters in other countries that heightened awareness of corporate malfeasance (e.g., the Bhopal chemical disaster, the sinking of the Herald of Free Enterprise) and it coincided with the Canadian government’s introduction of markets fraud legislation in response to the disastrous collapse of the US stock markets in 2000/01 (Bittle and Snider 2011). In Finland, corporate impunity was first questioned in the early 1970s by the labour movement, environmentalists and left-wing criminologists (e.g. Commission memo 1973a&b). Also, serious tax fraud and bribery cases involving local and government officials resulted in a task force examining the scale of economic crime in Finland (Committee memo 1983). At the beginning of nineties, after the revelation of scandals in the banking sector and other elite offending and the states’ bailout of the resulting damages there emerged a particular social and political moment in Finland to fight

economic crime triggered also by the economic depression (Alvesalo 2003). This development was furthered by pressure within the EU for member states to ensure that legal persons can be held liable for offences committed for their benefit.

From the preceding we can see that corporate crime only became subject to state scrutiny as a result of an emerging social (Kramer 1989; Katz 1980) and/or political moment (Alvesalo and Tombs 2001). The contemporary movements against corporate crime are, in this respect, rooted in crises of confidence and legitimation in corporate capitalism (Friedrichs 2010: 17, Glasbeek 2002; Snider 2015). As such, not only did neoliberalism create the conditions for corporate crime to spread rapidly and globally, it also meant that when crises emerged states had few strategies at their disposal to respond to the resulting harms. The tables had been turned, organized labour was weakened considerably, corporate health and safety, environmental and financial regulations and their enforcement were increasingly undermined by neoliberal rhetoric and corporations had become more powerful than ever (Tombs and Whyte 2015). The question for many states of the Global North therefore became how to maintain (neoliberal) consensus in the face of overwhelming evidence of the harms caused by private enterprise. From our perspective CCL represents one attempt by the state to negotiate this balance: to continue supporting free market principles whilst not undermining the state's responsibility to provide its citizens with basic protections, namely the right not to be injured, killed or defrauded by corporations.

## Comparing corporate criminal liability in Canada and Finland

Before examining the influences that shaped CCL in Canada and Finland, we briefly outline the parameters of each law, providing a sense of how each law attempts to criminalize corporate

wrongdoing. In so doing we are well aware of the systemic differences between civil- and common-law systems, but a detailed examination of these legal traditions is beyond the scope of this paper given our focus is on conducting a qualitative socio-legal analysis of the emergence of CCL legislation in each jurisdiction - not a legal-positivistic, nor a functionalistic analysis of the contents of the laws. Legal-systematically the solutions were different in the two jurisdictions. In Canada Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* (2004) meant that changes were made to many different sections of the *Criminal Code* (section 2, section 22.1, 22.2., 718.2). In Finland, a new Chapter 9 was legislated in the Criminal Code, and it contains all the general regulations of CCL, and it applies if such a sanction has been provided in the Criminal Code for the offence. This means that organizational liability has been legislated crime by crime, for example safety crimes came under the purview as late as 2003. In Canada, CCL legislation was enacted primarily in response to calls for improved accountability measures for safety crimes. Bill C-45 created rules for establishing criminal liability of organizations, and it also established new legal duties for workplace health and safety, imposing penalties for violations that result in serious injuries or death. However, CCL is intended to apply generally to all situations where a corporation can be found guilty of an offence.

Both jurisdictions have a broad scope of punishable legal entities including public bodies. In Canadian law a punishable organization includes a “public body, body corporate, society, company, firm, partnership, trade union or municipality” (*Criminal Code of Canada*, section 2). The Finnish law attributes liability to all *legal* persons covering a variety of entities from business companies to registered authorities and societies. In Canada, for a corporation to be found guilty of a subjective intent offence, and to attract criminal liability, a “senior officer” must have intended

at least in part to benefit the corporation (*Criminal Code*, s 22.1), while for offences based on negligence a senior officer must have “departed markedly” from standards that could reasonably be expected to be followed in order to prevent the offence from occurring (*Criminal Code*, s 22.1; Archibald, Jull, and Roach 2004, 385). Section 2 of the *Criminal Code* defines “senior officer” broadly and is not limited to individuals appointed by board of directors. Specifically, a senior officer is defined as a director, chief executive officer, chief financial officer, partner, employee, member, agent or contractor “who plays an important role in the establishment of a corporation’s policies or is responsible for managing an important aspect of the corporation’s activities”. In Finland the corporation can be punished when someone in corporate management participates in the crime or allows the commission of the offence, or if corporate management breaches negligently its duty to prevent the offence. The person has to be part of the legal persons statutory organ or other management or exercise actual decision making authority therein (2§).

Finnish law differs from the Canadian context regarding corporate guilt: the Finnish law is built on the idea that a corporation as such cannot be criminally liable for its actions, liability lies on the individuals working in or for the corporation. The criminal liability of legal persons is based on the intentional or negligent acts of individuals who are in a certain relationship with the corporation i.e. corporate criminal liability is *always secondary to individual liability*, since Chapter 9 is based on the notion that a corporation cannot act or think “criminally” because it does not have a body to act or mind to have malice (Nuutila 2012). Finnish legal doctrine clearly rejects the identification theory according to which the individual who acts is not acting for the company but acting as the company. In this respect, the Finnish law differs from the traditional common law theory of vicarious liability (see Tolvanen 2012). However, Section 2 (Paragraph 2) allows a corporation to



be sentenced even when the individual offender cannot be identified or otherwise prosecuted and convicted. This provision of anonymous guilt is reserved for exceptional situations only (Nuutila 2012).

Canadian legislators also rejected the vicarious liability approach, arguing it strayed too far from the principle of *mens rea* by transferring the guilt of the individual too easily onto the company (Department of Justice Canada 2003: 5). Instead, criminal liability is assigned to the organization based on the acts or omissions of its representatives (i.e., the senior officer(s)), meaning that a corporation can be held accountable for the actions of someone who is not necessarily the directing mind. Archibald *et al.* (2004: 381) have argued that, “while this is not pure vicarious liability (as it only applies to senior officers), it borders on that principle.”

In Canada, sentencing options range from fines (max \$100 000 for summary conviction offences, with maximum fines for indictable offences already unrestricted), to probation orders – for example, restitution, new policies to prevent further offending, notification of the offence to the public, and any other “reasonable condition” that the court deems necessary (*Criminal Code* s.732.1). In Finland, according to Section 5, the only sentence is a fine, from € 850 to € 850 000. This applies to all offences for which a corporation can be sentenced, and defining a suitable sentence is left to the discretion of the Courts. Unlike Canadian law, there are no additional punishments available to Finnish courts, such as warnings, suspended fines, publication of the conviction, judicial supervision or the dissolution of the corporation. In Finland these additional sentencing options were considered unnecessary, ineffective and difficult to administer.

In Finland a court may waive imposition of a corporate fine on a corporation if the omission/participation or the offence is slight or when the punishment is deemed unreasonable (CC 9: 4 §). In addition, the prosecutor can waive charges if the corporate omission/participation has been of minor significance in the offence, or only minor damage or danger has been caused by the offence and the corporation has voluntarily taken the necessary measures to prevent new offences. In Canada, upon sentencing the courts must consider factors such as “moral blameworthiness”, “public interest”, the potential of the “economic viability of the organization and the continued employment of its employees” and “prospects of rehabilitation” (*Criminal Code* s.718.21).

### *The different paths to enactment*

Whilst the preceding demonstrates some differences and overlap in CCL regimes in Canada and Finland, of importance is to scrutinize the different routes these laws took to their respective enactment. First, different motivations propelled CCL to the political fore in each jurisdiction. The Canadian government, for instance, followed a well-trodden path to law reform by introducing new legislation following a high profile public disaster (Braithwaite 2005; Snider 1993; Tucker 2006). Although reform chatter circulated within political circles in the years preceding the introduction of CCL legislation – in the late 1980s and early 1990s a series of proposals surfaced to amend the criminal law to include corporate offending<sup>2</sup> – it was not until the Westray disaster and its aftermath that legislators began seriously (albeit slowly) contemplating changes to the law.

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<sup>2</sup> In 1993 the Standing Committee on Justice and Human Rights recommended legal reforms to address the criminal liability of corporations. The Committee based its proposal on a 1987 report by the Law Reform Commission of Canada. Similarly, a 1993 Department of Justice White Paper proposed that corporations be made liable for any “collective failure” to exercise reasonable care by any or all corporate “representatives.” Also in 1993, the Minister of Justice Canada released a white paper, “Proposal to Amend the Criminal Code (general provisions),” that included offences by corporations (Minster of Justice Canada 1993).

In comparison, discussions concerning CCL legislation in Finland emerged during 1970s within the context of societal and political turbulence. As the Finnish society was striving to become a modern, western society, the entire penal code was one of the targets for modernisation. As for criminal liability, the effective penal code dating to Russian rule of 1889 stated that liability should rest *solely upon the acts and omissions of natural persons*. Also, the objects of legal protection were drawn by the gentry: the working class had not had any say in these formulations (Committee memo 1976). As both the malpractices detected in corporate and administrative action as well as civic pressure for more just relations of accountability were at the root of the reform, CCL was first proposed to apply to work safety offences, environmental offences and bribery.

Second, by the mid-1990s/early 2000s both jurisdictions had witnessed growing political support for reforming the criminal law to hold powerful corporate actors, notably senior corporate executives and boards of directors, accountable for their harmful acts (Alvesalo & Tombs 2001; Bittle 2012). At the same time, however, consistent with historic trends whereby states are reluctant to use criminal law strategies against the powerful (Snider 2015; Tombs and Whyte 2015), there was certain reticence amongst legislators and private sector actors with the prospects of ‘getting tough’ on corporate crime (Bittle and Snider 2006; Alvesalo-Kuusi & Lähteenmäki 2016). As a result, the reform process in both jurisdictions was less than expeditious. It was more than ten years after the Westray disaster before the Canadian government finally introduced the Westray bill, while the struggle for CCL legislation in Finland took more than 22 years to materialize. In Finland the enactment of CCL law was further restricted when the right-wing cabinet of 1994 unexpectedly narrowed the scope of legislation by leaving work offences outside CCL and by imposing the law as discretionary. Only in 2003, under a social-democratic cabinet,

did the law finally cover the lethal consequences of safety crimes and to be imposed as mandatory. It is truly unfathomable that legislators would ever proclaim crime-fighting success in taking that long to introduce new laws in response to serious street crimes!

Third, in both Canada and Finland there were a number of factors that helped to characterize the nature of the debates regarding CCL and the legislative options deemed reasonable. Governments in both countries closely scrutinized the issue of CCL over the years, holding committee meetings and inviting opinions from various interests groups (e.g., NGOs, employer organizations, jurists, courts, lawyers' associations, and government agencies) as to the prospects of reforming the law. These voices that participated in the struggle over CCL shaped the final legislation in both countries in important ways.

### *The voices shaping law's development in each jurisdiction.*

Our main goal in this section is to explore the constitution of CCL – the discourses that helped resist the state's efforts to criminalize corporate harm and wrongdoing. We attempt to unearth the “common groupings of techniques and practices” that formed the conditions of existence within which it was possible to question the seriousness of corporate crime and if it was necessary to intervene through law and/or whether it was necessary to enact stringent legislation (Wickham 1983: 480). The following three influences are examined below: the non-criminal status of the corporation, the importance of advancing private entrepreneurship and respecting the confines of established legal principles, particularly as it relates to dominant notions of *mens rea*. As we shall see, the convergence of these discourses allowed powerful corporate actors to challenge their new

position as (potentially) criminal subjects and, in the process, undermine the state's efforts to discipline the corporation.

### *The Non-criminal status of the corporation*

The first influence that downplayed the seriousness of corporate crime in both jurisdictions was the culturally-based and historically-rooted belief that corporate crime is not 'real' crime. In Canada, the Westray Inquiry report, which characterized the disaster as "foreseeable and preventable" (see Nova Scotia 1997), recommended that the federal government introduce changes to the *Criminal Code of Canada* to make *corporate officials* "properly accountable for workplace safety" (Nova Scotia 1997: Recommendation 73). Likewise, a series of private members' bills tabled in Canada's parliament by the New Democratic Party (NDP) (Canada's left of centre political party) emphasized the need to criminalize corporations *and* their executives and officers for seriously injuring and/or killing workers. However, when it came time for legislators to contemplate the introduction of CCL legislation there was an overall belief that corporate harm and wrongdoing is not 'real' crime and that corporations and corporate actors are not criminals. For instance, ignoring the socially constructed distinction between 'true' crime and regulatory offences (Pearce 1992: 319) a prominent legal academic who appeared before a Parliamentary committee argued that "...there has to be some attention given to the differences between true crimes as we know them and offences that are more of a regulatory nature" (Standing Committee on Justice and Human Rights (Justice Committee) 28 May 2002: 11:50).<sup>3</sup> In addition, whilst legislators agreed that some corporations and corporate official do commit crimes, dominant voices argued that only a minority are guilty of serious offending and corporate crime is the

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<sup>3</sup> See: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652689&Language=E&Mode=2> (accessed 20 September 2016).

exception to the rule. Even those who supported CCL legislation argued that corporations are, for the most part, law-abiding. As a NDP Member of Parliament (MP) stated: “Quite frankly ... I don’t believe this legislation will ever deal with probably 99% of the corporations and industries in our country” (Justice Committee 9 May 2002: 10:20).<sup>4</sup> As such, even though a majority of legislators recognized that some changes to the law were necessary to hold negligent corporations to account, they maintained healthy scepticism about being too ‘harsh’ or ‘punitive’ against otherwise good and law-abiding corporations.

In Finland, the first memos calling for enactment of CCL were submitted in 1973. Referring to the unjust and unclear relations of accountability and liability, the initial calls were based on the idea of “placing the liability where it belongs” (Commission memo 1973a; see also Alvesalo-Kuusi & Lähteenmäki 2016). The first comprehensive proposal for CCL was handed in by the Criminal Law Committee in 1976, and a reformed proposal in 1987. The opinions following the proposal in 1976 were divided. The opposing side consisted mainly of jurists and industry representatives (employers of commerce and industry) while on the supporting side were mainly the unions, NGOs and civic activists.<sup>5</sup> The opposing side chiefly advanced the discourse about the ontology of crime that could and should not include economic activity. For instance, powerful private sector voices demanded that criminal sanctions and societal resources “should rather be aimed at real criminals”, thus emphasising the divide between real criminals and business actions that were presented as essentially non-criminal (opinion of the Employers’ Federations’ of Industry and Commerce

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<sup>4</sup> See: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652685&Mode=2&Language=E> (accessed 20 September 2016).

<sup>5</sup> There were some legal professionals too who supported the proposal from the beginning, e.g. The Court of Appeal in Helsinki, Water Rights Appeal Court and the Union of Progressive Legal Policy, but in the main, jurists opposed CCL.

1974). Bringing in heavy armament, the employers refereed to a memo written by a professor of criminal law, in which the entire idea of punishing corporations was denounced as “futile, discriminatory and utterly erroneous” (opinion by Reino Ellilä 1973). The stance was furthered by the Committee of Lorry-traffickers which in its opinion (1977) stated that “it seems peculiar that new-found criminalisation for actions previously non-criminal is suggested at an atmosphere of gentler treatment of even perpetrators of true crime”. Throughout the opposing opinions of industry and commerce the tone was thus very critical of representing the corporation as something other than a beneficial social actor.

### *Advancing private entrepreneurship*

Further reinforcing the belief that corporations and corporate actors are not ‘true’ criminals was an underlying commitment in both countries to advancing private entrepreneurship. For instance, in Canada many legislators and pro-business witnesses appearing before Members of Parliament (MPs) to discuss CCL argued that the profit-making activities of corporations are inherently good, delivering enormous economic benefits to all Canadians. This pro-business sentiment revealed itself most prominently in arguments that corporate actors and interests must be protected from CCL – that the “best and the brightest” will no longer be interested in working for corporations if overly strict legal regimes are instituted (Glasbeek 2002: 13). A criminal defence lawyer argued, “[w]hether it’s a big company or a small company, corporations are important. Some are offensive, but corporations are important. You will not have people who want to be directors and officers. Then we’re in a different state” (Justice Committee 28 May 2002: 11:55).<sup>6</sup> Likewise, a representative from the Canadian Bar Association (CBA), a powerful voice for lawyers in Canada

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<sup>6</sup> See: See: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652689&Language=E&Mode=2> (accessed 20 September 2016).

with a membership that includes lawyers from the corporate ranks, warned legislators that casting “too broad a net of liability” could have a “chilling effect” that might deter “dedicated and talented” people from becoming company directors, therein reducing the global competitiveness of Canadian corporations (Justice Committee 23 May 2002: 11:05).<sup>7</sup> What is more, some MPs worried that overly stringent laws would mean some corporations would leave Canada for jurisdictions with more business-friendly regulations. The dominant message in these cases was that measures which threaten or impede corporate profitability must proceed with great caution, if at all.

In Finland, the employers especially emphasized the particular and positive significance of economic activity by stating, for instance, that “the Committees have purposely overlooked several positive outcomes of economic activity, namely the rising of the standard of living and the improvement of working conditions” (Joint opinion 1974, 4). These developments were then contrasted with the proposal to criminalize employers’ omissions regarding e.g. work place safety. The employers judged the proposal as “anti-employer” as it, in their opinion, “criminalized entrepreneurship”. The proposal was thus interpreted as prejudice, biased and excessive (see also the opinion of the Federation of Construction industry 1974, 1-2). The rhetoric in many opinions was, in a very Finnish way, constructed with negations but the clear message was that economic activity should rather be encouraged not punished. Industry and commerce lobbyists continued by bringing up the amazement of the blasting of economic activity. They stated for instance that CCL shows “a desire to criminalize all profitable economic activity as such” (opinion by the Construction industry 1974, 2). The industry also worried that corporate criminal liability would

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<sup>7</sup> See: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652688&Language=E&Mode=2> (accessed 20 September 2016).



only produce obstacles to the development of both industrial life and citizens' welfare (ibid. 2), thus envisioning dire societal outcomes if economic actors and corporations are punished. The metal industry's opinion echoed similar reasoning, stating that "the entire proposal aims falsely at slandering private entrepreneurship as irresponsible and indefensible action", which was seen as disrespectful (Opinion of the Metal industry 1974, 3). Finally, in the draft law of 1991, the government stressed the point of corporations not being essentially criminal by stating that the punishment, the fine, is meted out according to the financial standing of the corporation since "legitimate business of the corporation should not be affected by the punishment".

### *Respecting established legal principles*

Perhaps the most prominent factor shaping CCL legislation in both countries was a general adherence to established legal doctrine. Recalling our interests with law's bourgeois roots, even if it is to be expected that law reform processes typically include some deference to established legal rules, our main concern is with how this legal orthodoxy coheres with hegemonic beliefs regarding free market capitalism and the non-criminal status of corporations. Of particular note is that legal principles and their essentially unalterable substance were repeatedly used as arguments against CCL. In Canada, for instance, any 'reasonable' reform option could not be seen as straying too far from traditional notions of *mens rea*. In this respect legislators had difficulty conceptualizing how to hold senior executives and the corporation responsible for something they did not do, for something they "ought" to have known. As one MP argued: "... how far up the chain do we attach accountability and liability? ... If you're talking about a large corporation that may have directors in Vancouver and something happens at a plant in Toronto, how liable is the director in Vancouver

for what happens in Toronto? That's what I'm struggling with (Justice Committee 23 May 2002).<sup>8</sup> Similar sentiments were expressed on several occasions by those who equated criminal wrongdoing with the actions and decisions of individuals.

The concern expressed with the NDP's Private Member's bill (legislation that is not sponsored by the governing party), tabled in response to the Liberal party's reluctance to enact CCL legislation, is another indication of commitments to individual responsibility. The NDP's bill included the concept of corporate culture, wherein senior management could be held criminally liable if a corporate culture allowed or encouraged law violation or facilitated law avoidance (Department of Justice 2002).<sup>9</sup> This recommendation represented a significant legal departure by implying that there is collective responsibility within an organization for corporate offending (Department of Justice Canada, March 2002). However, reference to "corporate culture" was deemed problematic and overly vague by many MPs and witnesses who testified on the bill. As one legal expert, whose expertise was lauded by MPs, stated: "As for the corporate culture point, I don't mean to be flippant about it, but the idea is, was it in the air that this kind of activity would be tolerated on behalf of the corporation?" (Justice Committee 28 May 2002).<sup>10</sup>

In Finland, industry and commerce found an ally in the legal profession to oppose CCL. Legal discourses concentrated on the issue of guilt, as many jurists strictly adhered to "the essential

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<sup>8</sup> See: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652688&Language=E&Mode=2> (accessed 20 September 2016)

<sup>9</sup> The concept of corporate culture was pioneered by the federal government of Australia in 1995, defining corporate culture as an "attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place" (Department of Justice Canada, March 2002).

<sup>10</sup> See: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652689&Language=E&Mode=2> (accessed 20 September 2016).

principle of the Finnish legal system, the individual guilt”. With references to *mens rea* – subjective blameworthiness and the guilty mind needed to form culpability and, thus, the justification for punishment – the essential reason for CCL, the ineffectiveness of individual liability, was denounced as *an oxymoron*. Several members of the legal profession categorically objected to the idea of CCL by referring to the idea of “traditional principles of criminal law”, meaning CCL “simply did not fit in to the prevailing, Finnish jurisprudential conception of liability.” The Association of Finnish Lawyers’ (1977) similarly argued that “corporate criminal liability has strongly conflicting principles if compared to the prevailing system of criminal law,” therein reinforcing the idea that only an individual can be an offender. As the reformed proposal was issued in 1987, the employers repeated the argument of individual liability by stating that, “the absolute precondition for sentencing is that a criminal act can be specified and the perpetrator identified. Criminal liability can thus only and solely base on acts and omissions of an individual” (Joint opinion of Employers’ Federations 1987, 2-3).

While the most cogent reason to forward CCL in Finland, according to the government, was the evident disparity of individual liability and a need for a tool to steer corporate decision-making, a strong point forwarded in the final draft law (1991) was, anyhow, that the corporation is not considered a perpetrator in a way individuals are, since “corporations do not commit crimes.” Echoing opposing voices, the final legislation then constructed CCL as resting upon the liability of individuals. Industry lobby thus succeeded in getting their voices heard and written down in the law.

## Discussion: Corporate criminality and transpositionality

The introduction of CCL legislation in Canada and Finland represents a (theoretically) significant shift in the state's efforts to discipline powerful and transnational corporations. At the very least their introduction provides a new way to speak about corporate harm and wrongdoing by signalling that corporations are capable of committing – or at least they can enable – serious crimes and deserve to be punished accordingly. At the same time, however, relying on the concept of transpositionality, we have demonstrated how corporations and powerful corporate actors, with the support of legislators who championed the interests of private enterprise, were able to restrict (albeit not prevent) the state's disciplinary efforts by invoking various counter-discourses that questioned whether corporate offending was 'real' crime and reminded everyone of the essential role of corporations in modern society. This scenario does not suggest a conspiracy of powerful forces to avoid responsibility for corporate crime, but that 'common sense' assumptions about crime and corporations combined to animate the reform process in both countries, allowing corporations to resist their new subject position as (potentially) criminal. The power and capacity of corporations to realize these benefits is a privilege that is rarely, if ever, extended to most everyone else in society who is subject to the state's disciplinary measures, particularly within the context of new laws directed at serious crime committed by individuals.

From our perspective legal discourses were used to veil corporate interests, and they played a significant role in undermining and limiting the evolution of CCL in Canada and Finland. Despite differences in CCL law in both countries, including the different conjunctures and legal regimes, there was a privileging of legal discourse when it came to contemplating the introduction of measures directed at corporations and corporate actors. In both cases we see that the powerful

influence of jurists resulted in an odd mongrel of a law: its justifications stressed over and over that individual liability is paramount, not to be undermined, and that the very idea of punishing corporations must respect dominant notions of individual guilt. As Harry Glasbeek (2002: 130) has observed within the context of previous efforts to amend the criminal law to deal with corporate deviance: “the corporate hand may have been twisted into shape to fit inside the criminal glove, but it still seeks to revert to its original, ill-fitting shape.”

Further evidence of an overriding commitment to established, bourgeois legal principles is found in the enforcement of CCL legislation in both jurisdictions. In Canada, for instance, established notions of individualized guilt and intent permeate the common sense of criminal justice officials wherein it remains difficult to prove negligence in corporate crime cases involving several individuals with some responsibility for the offence. Regardless of changes to the law Crown prosecutors still struggle with questions about how to hold someone criminally responsible for something they did not do, or did not intend to do. For many criminal justice officials it is just too difficult to prove this standard in cases involving large corporations or, alternatively, that they just do not see this level of negligence breached – there are too many intervening variables and unanswered questions within the corporate hierarchy to assign criminal negligence.

In the Finnish context, tenacious commitment to established legal principles is evidenced both in the outcomes of the (few) convicted cases as well as in the absence of cases where the corporation is the only punished entity (anonymous guilt). While CCL legislation in Finland aimed at “placing the liability where it belongs” in cases of work place safety the liability still rests on the supervision level, as 70 percent of the punished individuals represent middle management at the most. Even

as the law accepts anonymous guilt, in the majority of the cases it is still the individuals that are convicted. Furthermore, the fines the corporations are punished with are very low, both absolutely and when compared to the level of the individuals' fines. In both jurisdictions it is not necessarily that criminal justice officials believe that corporations cannot be criminal, or that the acts they commit are unworthy of criminal justice scrutiny, but that the nature of guilt or intent involved in many corporate crime cases do not cohere with established legal principles.

There are two points that we draw from the privileging of bourgeois legal discourse in the development and enforcement of CCL legislation (Woodiwiss 1990). First, while law is not always or absolutely dominant, law reform processes can and do act as a significant “point[s] of articulation” (Hall 1988: 61) for powerful voices to inform law’s constitution, most notably in downplaying the need for, or suitability of, criminal law strategies in response to corporate offending. After all, if law helps to secure the conditions necessary for capital (re)production, then measures that contradict this role are not easily digestible according to legal orthodoxy (Pashukanis, 1980; Milovanovic 2011; Woodiwiss 1990). Second, and relatedly, by emphasizing the importance of respecting legal doctrine, such as those in relation to *mens rea*, dominant notions of crime are reinforced, not challenged or transformed. Crime is something committed by ‘actual’ individuals, not corporations, which are merely facilitating private profit-making opportunities in a ‘free’ market system that is to everyone’s benefit (Glasbeek 2002). As a result, whilst CCL legislation now exists in Canada and Finland, corporations are mostly punished in ‘severe cases’, or in situations where traditional notions of intent can be readily established. The non-criminal status of the corporation is therefore reinforced, ensuring business as ‘usual’ for most corporations and powerful corporate actors. Hence, even as CCL legislation aimed at introducing a new subject

position for the corporate criminal vis-à-vis its victims, the ideology of *mens rea* and the primacy of legal reasoning - which manifested itself in the very attempt to assimilate corporate offending to that of traditional crime - acted as insurmountable barriers to the actual criminalization of corporate malfeasance. Efforts to transposition one legal subject, the corporation, were thus, in the end, restricted by the law's internal form of "common sense".

## Conclusion

This paper has attempted to better understand why corporations and corporate executives have, to date, been largely successful at escaping the law's gaze when the law itself was transformed specifically to criminalize their harmful acts and omissions. In so doing the concept of transpositionality helped to identify the cultural, economic and legal strategies and discourses used by the powerful to resist their subject status in law. Nevertheless, it would be erroneous to conclude from this analysis that it is impossible to hold corporations and corporate actors to criminal account. For one, the mere fact that CCL legislation now exists in Canada and Finland is evidence that corporate power is far from absolute in resisting the state's disciplinary measures. In this respect, law (and the state processes that give rise to law) remains an important site of struggle over the meaning of corporate crime and how it should be regulated and controlled (Pearce and Tombs 1998).

What is more, despite claims that it can establish 'truth' via its methods and rules (Comack 2014), law's dominance is only ever partial, incomplete and thus subject to resistance and change. As Norrie (2001) argues, law ultimately fails to obtain the (ideological) closure that it sets out to achieve through its commitment to consistency and rationality – a goal rendered impossible by the overdetermined nature of the economic, political and moral interests that shape law's constitution

and enforcement. It is within this context that we see various and ongoing efforts to challenge the ineffectiveness of CCL law and its enforcement in Canada and Finland. In Canada, for instance, the United Steelworkers union has launched a campaign, “Stop the Killing: Enforce the Law”, which aims to educate law enforcement and Crown prosecutors about CCL legislation and how they might adjust their investigations of workplace fatalities to better account for the forms of negligence involved in these cases. In Finland, concerted and relatively successful efforts were undertaken to alter traditional policing methods to better tackle corporate offending, therein offsetting the ability of corporate actors to resist the law (Alvesalo and Whyte 2007). Such efforts are yet to be realized in the Canadian context. And while these efforts might ultimately prove ineffective in undermining law’s bourgeois roots, they nevertheless stand as reminders of the ongoing struggle for corporate accountability and the role of the law therein. So, while McBarnet (1983) argues that law forms a bridge between the priorities of criminal justice and dominant notions of crime and law, we would do well to remember that this is not a one-way or fixed bridge in that law’s precepts are open to resistance and its destination undetermined. The story of CCL in Canada and Finland is thus still being written.

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