Canadian Corporate Financial Crime: A Critical Analysis

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Abstract

"Corporations, by their very nature …will engage in criminal behaviour" (Glasbeek, 2003, p. 130). This research considers one form of corporate financial crime: violations of provincial securities legislation in Canada. The opportunities for corporate financial crime were considered using a critical discourse analysis of the *decisions*, *extending orders*, *orders*, *settlement agreements*, and official *news releases* from the provincial securities regulators between the years 1986 and 2012. Seven sites of opportunity were considered: corporations, corporate officers, industry, nation-state, regulators, technology, and investors.

Each site contributed to the creation of a criminogenic environment. The findings, based on the analyses of 76 corporate financial crime cases, suggest that the ability to create multiple corporate entities and connect them across multiple jurisdictions contributes to this environment. Additionally, corporate officers take advantage of personal relationships to sell securities. Recidivism was not uncommon among the officers. The majority of corporations involved in financial crime came from three industries: finance, real estate, and mining, oil and gas. Neoliberalism as a guiding ideology of economic policy limited the regulatory intervention. Technology was most often an accessory to crime; individual investors were the victims of the crimes.

The opportunities for crime were considered from a critical theoretical perspective, informed by the work of Marx, Foucault, and Castells. Findings indicate that although securities regulations are neither coercive nor facilitative, regulations serve an ideological function by maintaining the impression that corporations are not above the law. Corporations as political actors influence government perspectives on regulations, thereby influencing the laws that are created.

This research provides (a) a sociological perspective of the Canadian features of corporate financial crime, (b) a seven factor explanatory model of the enabling environment, (c) a categorization of corporate crime – opportunities and concealments, and (d) four approaches for mitigating harm to investors.

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I would also like to acknowledge the support from my family: Dr. Paul Russell for proof-reading the final drafts and cutting out all those newspaper and magazine articles on securities regulation and corporate crime; Dr. Bonita Russell for sharing her professional experience in business and securities, and for introducing me to the work of Michael Porter; and Ms. Hilary Russell for making my data collection so much easier.

Dedication

Dedicated to my family, Dr. Bonita I. Russell, Ms. Hilary M. Russell, and Dr. Paul J. Russell for their unwavering support of my educational journey.

And to my grandmother, Mrs. E. Elizabeth Chatwin, and in memory of my grandfather, Dr. J.V. P. Chatwin.

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Table of Contents

Permission to Use i

Abstract ii

Acknowledgements iii

Dedication iv

Table of Contents v

List of Figures viii

List of Tables ix

Chapter 1: Introduction 1

1.1 Canadian Securities Regulation System 4

1.2 Research Question 6

1.3 Theoretical Framework and Method 8

1.4 Thesis Outline 9

Chapter 2: Literature and Theory Review 10

2.1 Seven Factors of Corporate Financial Crime 10

2.1.1 Corporations 11

2.1.2 Corporate Officers 14

2.1.3 Industry 18

2.1.4 Nation-state 22

2.1.5 Regulators 25

2.1.6 Technology 30

2.1.7 Investors 32

2.2 Theory 34

2.2.1 Marx 37

2.2.2 Castells 39

2.2.3 Foucault 41

2.2.4 Three Theorists and Porter's Five Forces Model 46

Chapter 3: Methodology 48

3.1 Research Design 49

3.1.1 Data Source 49

3.1.2 Corporate Financial Crime Case Construction 49

3.2 Critical Discourse Analysis 50
3.2.1 Analyze 51
3.2.2 Historicize 51
3.2.3 Visionize 52
3.2.4 Organize 54
Chapter 4: Findings 56
4.1 Characterization of the Corporate Financial Crimes 56
4.2 Opportunity to Commit/Conceal Corporate Financial Crime 59
4.2.1 Low Opportunity/Low Concealment 60
4.2.2 Medium Opportunity/Low Concealment 63
4.2.3 High Opportunity/Low Concealment 66
4.2.4 Low Opportunity/Medium Concealment 67
4.2.5 Medium Opportunity/ Medium Concealment 68
4.2.6 High Opportunity/ Medium Concealment 71
4.2.7 Low Opportunity/High Concealment 74
4.2.8 Medium Opportunity/ High Concealment 75
4.2.9 High Opportunity/ High Concealment 78
4.3 Considering the Research Question 80
4.3.1 Corporations 80
4.3.2 Corporate Officers/Employees 84
4.3.3 Industry 85
4.3.4 Nation-State 86
4.3.5 Regulators 87
4.3.6 Technology 87
4.3.7 Investors 89
4.3.8 Summary 90
Chapter 5: Discussion 91
5.1 Support Institutions 91
5.2 Reinforce Power 94
5.3 Ideological Effects 100
5.4 “Clumsy” Solutions 103

5.4.1 Effective Regulation ... 104
5.4.2 Reallocate Funds from Enforcement to Education ... 105
5.4.3 A National or International Regulator ... 106
5.4.4 Empower minority shareholders. ... 108
5.4.5 Summary ... 109
5.5 Sociological Implications and Final Considerations ... 111
5.6 Limitations ... 112
Chapter 6: Conclusions ... 114
Works Cited ... 117
Appendix A: Provincial and Territorial Securities Regulators ... 129
Appendix B: Company List by Case ... 130
Appendix C: Opportunity to Commit/Conceal Corporate Financial Crime by Case Number ... 133

List of Figures

Figure 1.1: Canadian Securities Regulation System 4
Figure 2.1: Relationship Diagram of Corporate Financial Crime Influence 10
Figure 2.2: Relationship Diagram of Corporate Financial Crime Influence with Theoretical Framework 36
Figure 3.1: Relationship Diagram (Case 30) 52
Figure 3.2: Decision Tree for Classifying Case Opportunity 53
Figure 3.3: Decision Tree for Classifying Case Concealment 54
Figure 4.1: Characterization of the Corporate Financial Crimes (76 cases, 92 crimes) 57
Figure 4.2: Low Opportunity/Low Concealment (Case 9) 60
Figure 4.3: Medium Opportunity/Low Concealment (Case 41) 63
Figure 4.4: High Opportunity/Low Concealment (Case 62) 66
Figure 4.5: Low Opportunity/Medium Concealment (Case 44) 67
Figure 4.6: Medium Opportunity/Medium Concealment (Case 16) 69
Figure 4.7: High Opportunity/Medium Concealment (Case 14) 71
Figure 4.8: High Opportunity/Medium Concealment (Case 12) 74
Figure 4.9: Low Opportunity/High Concealment (Case 15) 75
Figure 4.10: Medium Opportunity/High Concealment (Case 5) 76
Figure 4.11: High Opportunity/High Concealment (Case 26) 78
Figure 4.12: Corporations with intermediaries (Case 46) 81
Figure 4.13: Corporations and Corporate Officers (Case 31.2) 82
Figure 4.14: Corporations transfer operations (Case 5.3) 83

List of Tables

Table 3.1: Dance of the Dialect 51
Table 4.1: Opportunity to Commit/Conceal Corporate Financial Crime 59

Chapter 1: Introduction

"Anti-social and criminal behaviour are endemic to the very structure of the corporation" (Glasbeek, 2003, p. 4). This close relationship between business and crime has long been of interest to sociologists, beginning with Edwin Sutherland's landmark 1945 study in which he reported that all the companies he studied had legal decisions (court or administrative commission) of wrongdoing filed against them (Sutherland, 1983). Thirty years after Sutherland's research, Clinard and Yeager (1983) reported similar findings, as did Mishina, Dykes, Block, and Pollock (2010) 65 years later. In Clinard and Yeager's (1983) study, 60% of the companies included had violated the law; Mishina, Dykes, Block, and Pollock's (2010) study reported 469 incidents of corporate illegality for 194 companies.

In addition to tracking the instances of illegal business actions, sociologists have also examined the origins of *crime in business* (or *corporate crime*), identifying four sources: (a) the individuals who make up a corporation, (b) the corporation, (c) the industry, and (d) the tenets of capitalism. At the level of the individual, corporate crime is tied to *unethical pro-organizational behaviour* (Umphress & Bingham, 2011). At the corporate level, crime manifests itself as either top-down *corrupt organizations* (i.e., collective corrupt actions coordinated to benefit the corporation), or bottom-up *organizations of corrupt individuals* (i.e., many individual corrupt actions creating a corrupt organization) (Pinto, Leana, & Pil, 2008). Needleman and Needleman (1979, p. 517) argued that there can also exist internal corporate structures, meaning the economic, legal, organizational, and normative structures of the organizational entity, that generate criminal activity. At the industry level, crime is more likely among corporations in industries which can create both the opportunities for crime and the conditions to conceal it (Rosoff, Pontell, & Tilman, 2007, p. 29). Finally, governments in capitalist societies like Canada's often normalize crime committed by corporations (Glasbeek, 2003). Glasbeek (2003) argued that the Canadian state is unwilling to characterize serious corporate wrongdoing as criminal, in part, because capitalism is more than an economic system; it is also the political system for Canada. Acknowledging systemic crime by corporations would undermine both the economic system of Canada and the government itself.

Corporate crime is harmful. To appreciate the scope of this harm, it is useful to consider five categories of corporate crime: those affecting the *economy*, *humanity*, *environment*, *consumers*, and *employees* (Gordon & Coneybeer, 2006). The type of harm and type of victim clearly vary by category. Crimes affecting the *economy* are violations of provincial or federal statues regarding economic policy. Those affecting *humanity* are actions that violate collective morality, *mala in se* (Gordon & Coneybeer, 2006). Those affecting the *environment* include the polluting of the environment and the contamination of human and non-human life. Crimes affecting *consumers* include actions ranging from theft to serious injury and death, and crimes affecting *employees* take many forms, for example, injuries, denial of wages, or restrictions regarding unions. Of these five categories, economic crime has attracted relatively little attention in Canada. There is, however, considerable research examining crimes against the economy in the United States, addressing such notable events as the savings and loans collapses of the 1980s, the large corporate frauds of the 2000s, like *Enron*, *Worldcom*, and *Tyco*, and the subprime mortgages that contributed to the 2008 financial crisis.

The harm from corporate economic crime is perhaps not as obvious as, for example, an oil spill resulting from an environmental crime, but like environmental crime, it can have a devastating effect on the economy, as evidenced, for example, by the fall-out from the Bre-X gold mine scandal. *Bre-X Minerals Inc.*, a small Canadian mining company, claimed that their mine site in Indonesia had one of the largest known deposits of gold (Williams, 2005). This claim, supported by samples taken at the site, drove the stock price of Bre-X from pennies to hundreds of dollars (Williams, 2005). Ultimately, the samples were found to have been “salted” with gold; the stock and the mine were worthless. The Calgary Herald (2007) reported that “Bre-X cost investors $3 billion, tarnished the reputation of Canada’s stock markets and sullied the junior mining sector for years”.

The Bre-X example emphasizes the importance of investor trust and confidence to Canadian stock markets. Market confidence is fundamental for a healthy economy and that health depends on more than just the activities of production and distribution (Tonkiss, 2009). That is, the economy is a social institution, and when it is undermined by special interests (e.g., the corporation), then this institution, meant to serve the needs of the society, loses credibility. Glasbeek (2003) argued that because Canada is a capitalist democracy, the government is

politically and economically dependent on the corporate sector, suggesting that if corporations are able to undermine economic policies, then the harm is to the democratic rights of Canadians. For Snider (2004), this government dependency can lead corporations to use their economic influence to shape public opinion, ideology, and law. As a result, corporate goals become normalized by Canadian society, the result being that arguments like "regulation makes industry uncompetitive, drives stock values down, and discourages investment" appear intuitive (Snider, 2004, p. 218).

The time and cost associated with litigating corporate financial crimes also has harmful effects. For the regulators, investigating these crimes requires teams with specialized knowledge (Kempa, 2010). As a consequence, "simpler" cases may be pursued because they take less time and resources to resolve; complicated[1] cases may be simplified (i.e., settling cases on lesser charges) because prosecutors are unsure that even with the full resources of the government, the case will be successful (Kempa, 2010). For example, the successful prosecution of a case by the Ontario Securities Commission was described by a newspaper reporter as a "rare win" in a tipping case "notoriously difficult to prove" (Gray & McNish, 2015). For the corporation accused of an economic crime, if its resources are limited, then the corporation may choose to settle with the regulator rather than finance a defense. Corporations with significant resources, however, can use available legal tactics to delay or challenge proceedings to mitigate potential damages. To summarize, there are two harms here with respect to litigation: the simplification of cases leading to lesser charges, and corporations with resources can further limit corporate responsibility.

Corporate crimes against the economy are the focus of the present research. As mentioned, corporate economic crimes are actions meant to circumvent the economic policies set out in federal or provincial statues; these crimes include breaches of both patent laws, and laws protecting competition, as well as violations of stock market rules (Gordon & Coneybeer, 2006, p. 89). The present research specifically considers violations of *capital market rules*, that is, violations of the provincial *Securities Acts*. Accordingly, this research includes corporations that

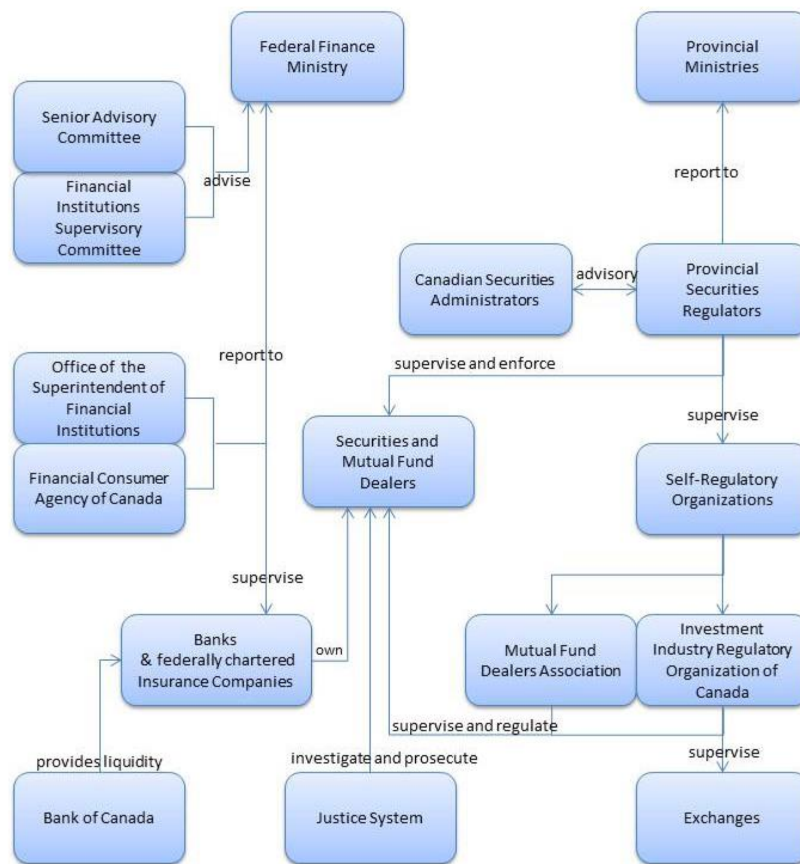
[1]By complicated, I am referring to cases that (a) include multiple corporate entities or arrangements (e.g., shell corporations), (b) involve regulators in multiple provincial jurisdictions, (c) involve regulators in other countries, or (d) are generally difficult to prove (i.e., no "smoking gun").

buy/sell/trade securities or otherwise use the capital markets in Canada. Because corporations use securities to generate or maintain capital, the present research refers to the violations of the Securities Acts as *corporate financial crimes*.

1.1 Canadian Securities Regulation System

The political-legal regulatory system in which corporate securities crimes occur provides context for the present research (see Figure 1.1 below).

Figure 1.1: Canadian Securities Regulation System



Based on a diagram by the Expert Panel on Securities Regulation (2009, p. 73)

The Canadian regulatory system has four major components: the participants, the regulators, supporting institutions, and advisors. The participants (the *securities and mutual fund dealers* and *exchanges)* function as the buyers, sellers, and facilitators of the securities industry, 70% of which is owned by the *banks and federally chartered insurance companies. Exchanges* includes

all the equity marketplaces in Canada, namely, both exchanges (e.g., TSX or TSX Venture) and alternative trading systems (e.g., Bloomberg Tradebook Canada).

These industry participants are regulated by the *provincial securities regulators*, the *justice system*, and two *self-regulatory organizations* (SROs). *Provincial securities regulators* (also includes territorial securities regulators) receive their legitimacy and mandate from the provincial (or territorial) securities-related Acts (see Appendix A for the complete list of provincial regulators and the enabling legislation). They have the authority to enforce the provincial securities legislation and apply sanctions. There are two types of securities commissions: Crown Corporations (i.e., independent and self-funding) and divisional (i.e., within another provincial ministry). (These two commission types are not pictured in Figure 1.1.) The *justice system*, comprised of the police (federal, provincial, or municipal), the prosecution, and the courts (provincial and federal), enforces the Criminal Code. The two SROs, namely, the *Mutual Fund Dealers Association* (MFDA) and the *Investment Industry Organization of Canada* (IIROC) are permitted by the provincial securities commissions to regulate certain aspects of the industry. IIROC, for example, sets and enforces rules concerning proficiency, business and financial conduct, and market integrity for members (IIROC, n.d.).

There are three supporting institutions: (a) Office of the *Superintendent of Financial Institutions,* (b) *Financial Consumer Agency of Canada*, and (c) *Bank of Canada.* The Office of the *Superintendent of Financial Institutions* is responsible for supervising banks, federally incorporated trust and loan companies, insurance companies, cooperative credit associations, and private pension plans (OSFI, 2015). Similarly, the *Financial Consumer Agency of Canada* is mandated, in part, to supervise federally regulated financial institutions to ensure compliance with consumer protection measures, monitor compliance with respect to voluntary codes of conduct, and promote consumer awareness of the obligations of financial institutions and financial services (FCAC, 2014). Finally, some of the functions of the *Bank of Canada* include collaborating with relevant Canadian and international organizations on financial-stability issues, providing liquidity to the Canadian banks, and advising the federal government (Bank of Canada, n.d.).

There are three advising organizations: (a) *Senior Advisory Committee*, (b) *Financial Institutions Supervisory Committee*, and (c) *Canadian Securities Administrators*. The *Senior Advisory Committee* and the *Financial Institutions Supervisory Committee* monitor both federally regulated financial institutions (e.g., banks) and the financial system as a whole (OSFI, 2014). Their purpose is to identify issues that destabilize the financial system, determine the potential response needed to improve stability, and advise the federal *Minister of Finance*. The *Canadian Securities Administrators* is a voluntary cooperative organization comprised of provincial regulators with advisory power.

Canada's securities regulatory system is politicized. The federal *Finance Minister* is a member of parliament appointed by the Prime Minister; at the provincial or territorial level, the *Minister*, whose mandate includes securities, is a member of the legislative assembly and he or she is appointed by the Premier. The federal Finance Minister appoints the Governor of the *Bank of Canada*; the provincial or territorial Minster for securities appoints the Commissioner for the *securities regulators* (i.e., securities commissions). The SRO directors are nominated by their Board of Directors and elected by confirmation.

1.2 Research Question

Seven factors contributing to corporate financial crime are considered in the research question: corporations, corporate officers, industry, the nation-state, regulators, technology, and investors. These factors will be reviewed in Chapter 2, but their significance will be briefly considered next.

Corporations (see section 2.1.1) are the principal actors within the current manifestation of capitalism; they, like other institutions, operate in ways that contribute to financial crime (Glasbeek, 2003). Decisions are made on behalf of the corporation by *corporate officers* (section 2.1.2). Rezaee (2005) argued that corporate officers either participate directly in corporate financial crimes or indirectly by creating a business environment that facilitates crime. Companies that share a similar primary business purpose are considered to be part of the same *industry* (section 2.1.3). According to Rosoff, Pontell and Tilman (2007) crime is more likely in some industries than in others. *Investors* (section 2.1.7) are the entities that provide the capital for corporate activities. Investors can be victims (Croall, 2009); they can also be perpetrators of

corporate financial crime (Fligstein & Roehrkasse, 2013). The inclusion of the *nation-state* (section 2.1.4) and the *regulators* (section 2.1.5) as factors is based on Snider's research. According to Snider (2001) corporate financial wrongdoing is minimized by the state, and it is the regulators that act on behalf of the state in matters related to financial securities. Nuth (2008) and Savona & Mignone (2004) both note that *technology* (section 2.1.6) makes it easier to commit certain corporate crimes; Savona & Mignone (2004) also suggested that technology has influenced the success of new types of crimes.

These factors provided the parameters for the present research and allowed for a multifactor approach to corporate financial crime, which is reflected in the research question:

How do corporations, corporate officers, industry, the nation-state, regulators, technology, and investors create the opportunity for corporate financial crime in Canada?

These particular factors were chosen because each was routinely mentioned in critical discussions of corporate crime; see for example Snider (2001, 2004, 2006, 2009, 2010), Glasbeek (2003), Johnson & Kwak (2011), Nicholls (2006), or Williams (2005, 2008). The purpose of the present research was to first add to this body of literature by linking these factors to data describing the corporate financial crime landscape of Canada. The second purpose was to challenge the accepted understanding of the impact of corporate crime on the financial markets.

As the research question and introduction suggest, I am approaching the present research from the perspective that corporations are criminogenic, an assumption that is consistent with Glasbeek's (2003, p. 130) position that "corporations, by their very nature…will engage in criminal behaviour". Second, these seven factors provide a general explanatory model of corporate financial crime. The use of a general framework is in keeping with the work of Gordon & Coneybeer (2006), who placed corporate crime within a framework that included capitalism, corporations, and corporate agents. Third, if the opportunities for crime afforded by the factors are identified and explained, then potential mechanisms for social change should become apparent and should be considered.

The use of the term *criminogenic* requires an explanation. That is, I am referring to the effects of the legal rights of corporations that allow (a) shareholders as investors to have no personal

responsibility for the corporate property used to do harm, (b) shareholders as investors not to be personally financially responsible for corporate liabilities (i.e., *limited liability*), and (c) the actions of managers, directors, and officers to be attributable to the corporation, not to the individual (Glasbeek, 2003; Hasselback, 2011). The limiting of personal financial risk and the granting of immunity with respect to responsibility for corporate actions have the potential (i.e., promotes risky behaviour of many sorts) to free investors, and corporate employees from any moral constraints regarding the corporation's primary and legitimate mandate of the pursuit of profit (Glasbeek, 2003). It is this potential for wrongdoing inherent in the legal framework of corporations which justifies the use of the term criminogenic.

1.3 Theoretical Framework and Method

A critical theoretical approach was chosen for this examination of Canadian corporate financial crime. Karl Marx, Michel Foucault, and Manuel Castells are the theorists of choice for the following reasons. Marx sought to explain how capitalism worked, and for sociologists his writings remain an important theoretical base for analyzing capitalist societies; his theorizing is helpful when discussing *industry*, *government*, and *regulators*. Foucault's work has been broadly classified as a historical and theoretical study of the *society of normalization* – how individuals and groups are regulated, classified, divided, and governed (Dean, 2006). What Foucault's work offers to sociology and to this research is a way of considering social control mechanisms, that is, a view of how power permeates society. And in particular, his work is useful for considering how power affects *investors* and *corporate officers*. Castells argues that a new social structure arose in the last quarter of the 20th century, a structure based on networks. This so-called network society is closely tied with technologies: "core economic, social, political, and cultural activities throughout the planet are being structured by and around the Internet, and other computer networks" (Castells, 2002, p. 3). What Castells offers this research is a model of how to approach social relationships (i.e., networks that include *industry* and *corporations*) and a link to the importance of *technology* to any discussion of modern society.

A critical discourse analysis is a way of "challenging systems of knowledge and power by interrogating and contextualizing dominant discourse" (Carroll, 2004, p. 225). The system of knowledge and power being challenged in this research is the securities regulatory system

employed by the Canadian provinces and territories. The discourse interrogated is the securities regulator's discourse used in the official documents attached to the *Disciplined Persons List*, which is maintained by the *Canadian Securities Administrators* on behalf of the provincial securities commissions. To ensure that the documents from the *Disciplined Persons List* were an appropriate data source for answering the research question, I conducted a small pilot study during the proposal stage of this research – the documents attached to the first ten names added to the list in 2011 were analyzed. I noted sufficient discussion of the cases to address the research question.

1.4 Thesis Outline

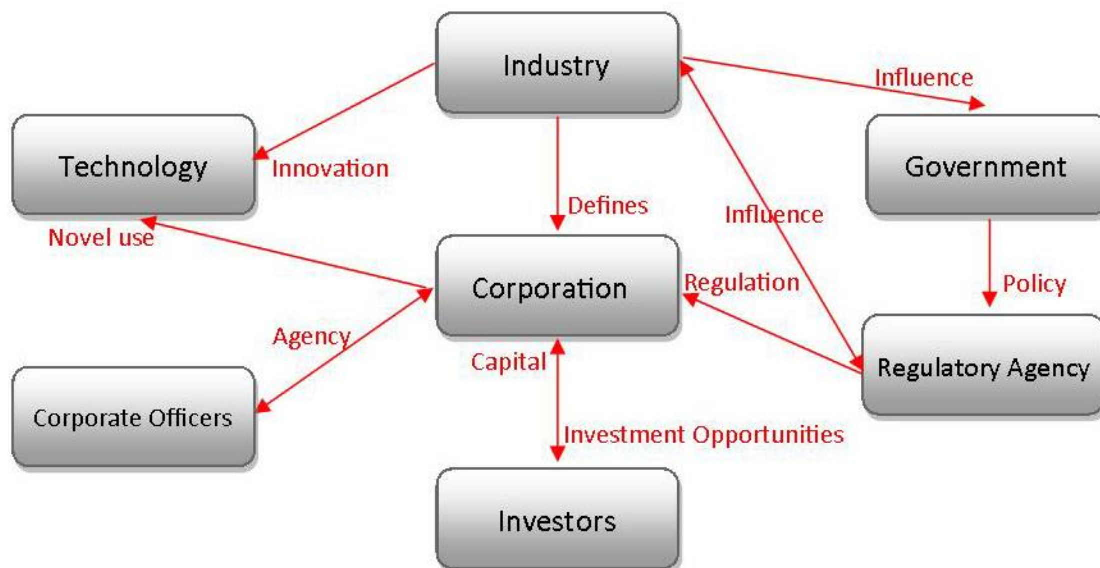
In the next chapter, the literature that links corporate crime to the seven factors identified above is considered. Because the construct that underlies these crime opportunities is power, the theories of Marx, Castells, and Foucault are used to explain how power creates such opportunities. In Chapter 3, the use of critical discourse analysis is considered, and the method I employed in my critical discourse analysis explained. The compatibility of this method with respect to the three theorists is also addressed. In Chapter 4, the findings of the analysis are considered from two perspectives: the (a) opportunity to commit corporate financial crime and the means to conceal that crime, and (b) the role each factor plays in creating opportunities for the crime. The results are then considered with respect to the seven factors pertinent to the research question. In Chapter 5, the findings are considered in a discussion of the larger social context (i.e., institutions, power, and ideology) and four solutions proposed. And in the final chapter, I consider the relevance of this research to the understanding of corporate financial crime in Canada.

Chapter 2: Literature and Theory Review

2.1 Seven Factors of Corporate Financial Crime

Figure 2.1 illustrates the links between corporate crime and the seven factors presented in the research question: *How do corporations, corporate officers, industry, the nation-state, regulators, technology, and investors create the opportunity for corporate financial crime in Canada?* The corporation is connected to the investor: the corporation uses the *capital* provided by the investors in exchange for capital gains/losses (*investment opportunities*). Corporate officers make decisions that benefit both the corporation and themselves, creating an *agency* issue. Corporations can use technology to create new, or *novel*, opportunities for crime. The industry *defines* the activities of the corporation. Government and regulatory agencies *influence* and are influenced by industry and the corporation.

Figure 2.1: Relationship Diagram of Corporate Financial Crime Influence



The connections among these entities create both the opportunity for corporate financial crime and the means for concealing it. The published research regarding the relationship between these entities is outlined in the next sections.

It should be noted that the focus on the seven factors is not meant to imply a closed system of influence; other participants can certainly be envisioned. The decision to organize the research

around these particular factors had its basis in the work of Gordon & Coneybeer; that is, their summary of the three causes of corporate crime: (a) “structural characteristics and imperatives of capitalism affecting corporate practices”, (b) “imperatives of corporations affecting the behaviour of executives, managers, and supervisors”, and (c) “behaviour of individual executives, managers, and supervisors” (2006, p. 99). What this general explanatory model offered was support for locating crime outside the corporation and the argument that the economic system was a cause of crime. Accordingly, the factors *government* and *regulators* were appropriate for point (a) of Gordon & Coneybeer’s summary; *corporations* and *industry*, for point (b); and *corporate officers* and *investors*, for point (c). The next consideration was the specifics of corporate financial crime. In this case, the choice of factors was guided by Castells’s discussion of the changes to the financial markets caused by “deregulation, liberalization, technology, and business restructuring”, which led to the inclusion of the seventh factor, *technology* (Castells, 2002, p. 79).

2.1.1 Corporations

There are three main types of businesses in Canada: corporations, partnerships, and sole proprietorships (Elash, 2011). Corporations are legally separate from their owners; sole proprietorships are owned by one person; partnerships, owned by two or more persons. There is one other type of business, *limited liability company* (LLC) -- companies which have characteristics of both corporations and partnerships. The differences between the business types relate to four properties: taxes, ownership, operations, and legal rights (Elash, 2011). The purpose of the business generally determines which business type is appropriate.

The advantage of incorporating a business entity, either provincially, territorially, and/or federally is to (a) limit liability, (b) obtain lower tax rates, (c) improve access to capital and grants, and (d) establish a legal entity (Government of Canada, 2012). A corporation can either be a distributing corporation (offers securities, therefore a *public* corporation) or a non-distributing corporation (does not offer securities, therefore a *private* corporation).

There are 1.1 million corporations in Canada, the majority of which are located in Ontario and Quebec (Industry Canada, 2013). Of these, less than 4000 are publically trading (i.e., shares are traded on a stock exchange or in over-the-counter markets) (Nicholls, 2006, p. 150). Canada’s

capital markets are characterized by (a) a small number of large corporations that are inter-listed (i.e., listed on securities exchanges in both Canada and other countries), (b) a large number of small public firms, and (c) a high proportion of controlling shareholders (Kuras, 2004).

The structure, size, and performance of corporations all create opportunities for corporate financial crime (see for example, Gooch (2014), Glasbeek (2003), Baucas (1994), and Mascarenhas, Baveja, and Jamil (1998)).

There are three structural features of corporations which relate to corporate financial crime. First, there is no proof or test of legitimacy as part of the incorporation process. A shell corporation, for example, can be incorporated for the illegitimate purposes of tax avoidance or tax evasion. That is, a legitimate corporation can buy from, or sell to, a shell corporation (a corporation with no assets but incorporated in a "tax haven") in order to avoid paying higher taxes. Second, incorporation means limited liability for the officers of the corporation (Glasbeek, 2003). That is, when investors provide capital to a corporation, it is considered the legal owner; neither the investor nor the corporate officers are considered personally liable for any of the debts or obligations of the corporation. Third, ownership need not be revealed (Gooch, 2014). For example, a so called dummy corporation is incorporated with the intent to conceal (a) other corporations, (b) particular activities of other corporations, or (c) the ownership of a particular asset. Although the dummy corporation appears legitimate, it cannot function as an independent entity; it is controlled by those it conceals.

The size and performance of corporations are also factors in criminality. Baucus (1994) found that large companies are positively related to corporate crime: there are more locations to commit an offense, employee actions are less visible, and decentralized decision and control systems may create space for illegal acts. Mishina, Dykes, Block, and Pollock (2010) considered the susceptibility of well performing firms to involvement in illegal activity. Two of their findings were that for both prominent[2] and non-prominent companies, corporate performance exceeding social aspirations[3] increased the likelihood of these firms committing criminal acts and that for

[2] *Prominence* is defined by the authors as "presence on Fortune's Most Admired Companies list" (Mishina, Dykes, Block, & Pollock, 2010, p. 708).
[3] Social aspiration is defined as a "firm's current performance relative to … the performance of others" (Mishina, Dykes, Block, & Pollock, 2010, p. 707).

prominent firms, external pressure to meet or exceed shareholder or market expectations increased the likelihood of committing criminal acts (Mishina, Dykes, Block, & Pollock, 2010). The authors interpreted their results to mean that performance above social aspirations may increase the likelihood of crime because executives either perceived there is more to lose if performance decreases or perceived that the illegal activities were less risky given the strong company performance (e.g., invulnerability) (Mishina, Dykes, Block, & Pollock, 2010, p. 717).

The experience of Merck & Co. Inc. with the drug *Vioxx* (a pain reliever and arthritis drug) illustrates how corporate characteristics, like size and performance, contribute to crime. Merck, like other successful transnational corporations, has developed core competencies of a particular type, that is, *superior technological knowledge, reliable processes,* and *close relationships with external parties*, which provide Merck with a significant competitive advantage, and like other transnationals, these competencies have allowed Merck to control productive assets, operate beyond the control of any jurisdiction, and create wealth (Mascarenhas, Baveja, & Jamil, 1998, p. 118).

Superior technological knowledge, in the form of information and communication technologies (ICTs), allows Merck to coordinate its global network and maintain strong internal controls, two factors which are fundamental for ensuring *reliable processes*. This reliability, and accompanying credibility, provides Merck with an enviable market advantage -- it obtains faster approval from the American Food & Drug Administration (FDA) than other drug companies (Mascarenhas, Baveja, & Jamil, 1998, p. 122). Its credibility with state agencies like the FDA then makes it easier for Merck to obtain drug approval in other countries. As well, Merck maintains *close relationships* with state administrations by donating to political candidates and parties. For example, in 2011-2012, Merck donated over $700,000 USD to both the Democratic and Republican campaigns in the United States and in 2011 spent $8.24 million USD on lobbying (OpenSecrets, 2012). It can be assumed that the purpose of this support was to obtain preferential treatment from the legislators, ensuring that the government remained committed to market capitalism for the pharmaceutical industry. Merck also supports humanitarian health programs through the donation of technical support, employee time, and funding (Frazier, 2012). Such programs will spread market globalism ideology beyond the West, the message being the government cannot look after the health of its people, but capitalism and corporations like Merck

can. The success of transnational corporations, such as Merck, is a function of the interconnections they can negotiate to extend their global influence and to maximize corporate core competencies.

However, this policy of enhancing basic competencies created a stage for corporate crime. In 2011, Merck settled with American authorities for $950 million USD for making “false, unproven, or misleading statements about Vioxx’s safety to increase sales and for making false statements to Medicaid agencies about its safety” (CBC, 2011). In 2012, the company settled its Canadian lawsuits for a further $37 million USD. Vioxx was not safe: it doubled the risk of heart attack and stroke in users. Additionally, despite warnings from the FDA in 2001, Merck marketed Vioxx for treatment of rheumatoid arthritis prior to its approval as an arthritis drug. Perhaps the close relationship between the FDA and Merck was a factor in the decision to allow a dangerous drug to be approved, with Merck initially receiving only a warning regarding mis-advertising.

2.1.2 Corporate Officers

The focus of the present research is on corporate officers, not middle managers or employees. This focus was chosen because the thoughts and actions of the directors, officers, and executives of a corporation are considered to be the thoughts and actions of the corporation (Glasbeek, 2003, p. 12). *Officers* and *executives* are in charge of managing a corporation while *directors* oversee the management; for clarity, however, the terms *corporate officer* or *officer* are used in the present research to refer to any of these management related roles.

Consider that it is the officers that are positioned to make the financial decisions for a corporation; additionally, the decision making power of middle managers is transferred to them by the corporate officers. Under Canadian law, the board of directors of a corporation has the power to manage the corporation as well as supervise the management of it (Lee, 2009). The boards delegate their power to manage to the corporate officers. The corporate officers, in turn, assign responsibility to managers and employees (Lee, 2009). Lee portrays the hierarchy this way: when a lower management person makes a business decision, “he or she is exercising power than can be traced back to the board and ultimately to the boards own plenary powers

under corporate law" (Lee, 2009, p. 141). Thus the responsibility for the corporation's crimes, which may have been committed by employees, belongs with the corporate officers.

Corporate officers can play both indirect and direct roles in corporate financial crime. That is, officers can create the corporate environment conducive for crime (indirect) or participate directly in the crime (direct) (see for example, Ashforth and Anand (2003) and Rezaee (2005)).

Before considering the indirect or direct roles corporate officers play in corporate crime, the relationship of corporate officers to corporations needs to be examined in order to consider the issues of agency and intentionality. That is, when a corporate officer in his or her official capacity acts, is the responsibility for that act attributed to the corporation only or to the officer as well? And although corporations are legal constructs, the Canadian *Business Corporation Act* stipulates that "a corporation has the capacity and … the rights, powers and privileges of a natural person" (Glasbeek, 2003, p. 9). Such a legal stance means that corporations are then "not, fundamentally, fictional entities" but rather "real and enormously powerful actors" (Beale, 2009, p. 1482). The purpose of these corporate rights is to facilitate business: corporations need some of the legal entitlements of a "natural" person in order, for example, to create contracts, sue or be sued, and establish a residence (Cressey, 1989, p. 34). These corporate rights are the purview of the corporate officers who make the decisions and act on behalf of a corporation. As an example of these decisions, consider the following situation: a corporate officer's annual bonus is tied to business performance, so the officer engages in crime to improve the financial results and thus increase the bonus. The crime is both a corporate crime as the company has created the conditions for criminal behavior (i.e., bonus tied to company performance), and it is an individual crime because a corporate officer was involved.

Much of the literature that has examined illegal acts by corporate officers focuses on personal crimes like insider trading (i.e., receiving non-public information that influences stock price). For example, Bhattacharya and Marshall (2012) studied senior managers indicted for insider trading in the United States. However, some researchers have considered how officers can create the corporate conditions for crime (indirect role). Ashforth and Anand (2003), for example, argued that a slippery slope leads corporations from an initial corrupt act to the normalization of the practice. Baucus (1994, p. 714) pointed out that "executives that ignore, condone, reward, or

engage in wrongdoing within the firm validate corporate illegality". Greve, Palmer, and Pozner (2010) combined the work of Brief, Buttram and Dukerich (2001) with that of Ashforth and Anand (2003) to identify the steps that lead to the institutionalization of corporate crime: initiation, proliferation, institutionalization, and socialization. In the *initiation* state, top managers decide on an illegal course of action, then, in the *proliferation* stage, direct employees to implement that action (Greve, Palmer, & Pozner, 2010, p. 75). The advice given to employees can be either explicit (e.g., direct order) or implicit (e.g., through corporate culture). The illegal action then becomes *institutionalized*, or embedded, in the organizational memory and reinforced through *socialization* as new employees are exposed to the rationality of the act (e.g., the way things are done here) (Greve, Palmer, & Pozner, 2010, p. 75). Ultimately corporate officers will fail to identify the illegality of the act because it is "stable, repetitive and enduring…[enacted] by multiple organizational members without significant thought about the propriety, utility or nature of the behavior" (Ashforth & Anand, 2003, p. 4).

The faulty ignition switches[4] installed in over 2 million General Motors (GM) vehicles provide an example of this institutionalization process. GM's lead switch designer has been accused of covering up the decision he made to install an apparently inferior ignition switch in GM vehicles (*initiation*), a cover up condoned by GM lawyers (*proliferation*) (Krisher, 2014). The switch problem was perceived by GM executives as a customer satisfaction issue, not a safety issue (*institutionalized*), a decision which resulted in GM sending a bulletin to dealers (*socialization*) explaining how to fix the ignition problem in the event that a customer complained (Krisher, 2014).

The participatory role of the corporate officer has been considered in some depth by researchers studying *financial statement fraud*, defined as the "deliberate attempt by corporations to deceive or mislead users of published financial statements, especially investors and creditors, by preparing and disseminating materially misstated financial statements" (Rezaee, 2005, p. 279). Rezaee (2005) uses the acronym CRIME to discuss the five interrelated factors influencing financial statement fraud in publically traded corporations: *C*ooks, *R*ecipes, *I*ncentives, *M*onitoring, and *E*nd results. *Cooks* refers to the individuals involved in creating the false

[4] The ignition switch can slip from "run" to "accessory" (engine stall), disabling the power steering, power brakes, and airbags (Krisher, 2014).

documents; for example, according to one study, in 80% of cases the CEO and/or the CFO were associated with this type of fraud (Rezaee, 2005). The majority of frauds occur with either the participation or approval of top management (i.e., board members, COOs, presidents, senior VPs, controllers, treasurers, internal or external auditors) (Rezaee, 2005). *Recipes* does not directly relate to corporate officers but is the mechanism for the fraud; for example, the fraud could refer to overstated revenue and assets or understated liabilities and expenses. *Incentives* refers to the motivation to commit fraud. Economic pressures are the common motivation; company officers want to avoid reporting loss, to meet or exceed expectations, increase stock price, obtain stock listings, cover up misappropriations, or conceal deficiencies in performance (Rezaee, 2005). A study by Harris and Bromiley (2007) found two factors that substantially increased the likelihood of fraud occurring: extremely low corporate performance relative to the industry average and a significant percentage of CEO compensation in the form of stock options. Pontell (2010, p. 18), reflecting on the Savings & Loan crisis in the United States, noted that an "emphasis on results encourages executives to engage in high-risk and illegal practices in order to obtain better compensation packages which threatens long-term stability in their companies". *Monitoring* can be either external to the corporation (e.g., securities commissions) or internal to the corporation (e.g., internal auditors). Rezaee (2005) argued that the corporate culture is the most important pro-active measure against fraud. Finally, the motivation to commit fraud must be significant because the *end result* can have serious consequences for the corporate officers (e.g., job loss, securities trading bans) (Rezaee, 2005, p. 286).

Arthur Andersen's position as external auditor for *Enron*, an American energy company that maintained the appearance of profitability through accounting fraud, illustrates direct involvement of corporate officers in a corporate crime. The *cook,* Andersen's audit team, knew Enron's cash flow did not match earnings (i.e., Enron was engaging in "risky and deceptive accounting practices" to cover considerable debt), but the audit team did not reveal that debt when conducting the external audits (Rosoff, Pontell, & Tilman, 2007, p. 297). The *recipe* to hide this debt was twofold -- Enron created many limited partnerships to shift its debt, thereby preserving its apparent financial health. And Andersen signed off on the audits. The *incentive* for Andersen to overlook this hidden debt was $52 million USD per year in auditing and consulting fees (Rosoff, Pontell, & Tilman, 2007, p. 297). American authorities had been

monitoring Andersen accounting practices; the company's credibility was in question given it had been in trouble with authorities on other occasions for approving false financial documents to *Sunbeam* and *Waste Management Inc.*[5], for example. And when the Securities and Exchange Commission began investigating Enron, three different high level Andersen employees, a lawyer, a partner, and a manager, directed employees to shred the Enron documents (Rosoff, Pontell, & Tilman, 2007). Note the clear conflict of interest for Andersen, which is dependent on the fees from Enron; consequently, its auditing team may have been reluctant to be overly critical (e.g., loss of contract) or too thorough (e.g., cuts into the auditor's profit) when assessing Enron (Pontell & Geis, 2010, p. 478). The *end result* for Arthur Anderson was the following: the CEO resigned, one partner was charged with obstruction of evidence, and the company collapsed.

2.1.3 Industry

Crime is more likely among corporations in industries that can create both the opportunities for crime and the conditions to conceal it (see for example, Rosoff, Pontell, and Tilman (2007), Pontell (2010) and Baucas (1994)).

Rosoff, Pontell, and Tilman (2007, p. 563) argued that the securities industry provides both the opportunities and the conditions to conceal crime. The authors suggested that such crimes as insider trading occur because the participants have access to privileged information and regulators have difficulty proving that the participants profited from that information (i.e., *opportunity*). Pontell (2010, p. 1) also identified the conditions for *concealing* crime in the industry when he suggested that limited government oversight of the financial sector in the United States created a "crime facilitative environment". A Canadian newspaper investigation found, for example, that in the period between the start of friendly merger talks and the public announcement of the proposed merger, share prices rose by 25% for almost half of the mergers in the sample, the implication being that insider trading was the factor driving the increase in share price (Snider, 2004, pp. 223-224).

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[5] Sunbeam, an appliance company, misstated its earnings in 1996 and 1997 on its financial statements, misstatements certified by Andersen (Manor, 2001). Waste Management Inc., a garbage and environmental services company, also misstated its earnings, misstatements allowed by Andersen (Schroeder, 2001).

A careful examination of the Canadian financial industry provides a portrait of the industry's criminogenic environment. The standard model for characterizing an industry is Porter's *Five Forces Model* (Vining, 2011; Crossan, Rouse, Fry, & Killing, 2013). Porter identified five competitive forces that influence a given industry's structure (Magretta, 2012, p. 36). Four of the forces are external to the industry: threat of new entrants, bargaining power of buyers, threat of substitute products or services, and bargaining power of suppliers. One force is internal, namely, rivalry among existing competitors (Magretta, 2012, p. 37). Porter focuses on competitive forces because in his view the fundamental equation of any capitalist industry is *profit = price – cost*, and the effect of the five forces impacts this equation (Magretta, 2012, p. 40).

Threat of new entrants refers to newcomers who if they are able to enter an industry and add to capacity will impact the profitability of existing firms by increasing supply and thereby reducing price (Magretta, 2012, p. 41). However, the Canadian financial industry is considered an oligopoly, with market power concentrated in a few companies (Glasbeek, 2003, p. 32). The largest organizations, banks, control half of the financial services industry, followed by mutual fund companies, insurance companies, and credit unions. So the threat of new entrants is perhaps not from the established traditional securities buyers/traders but from new types of buyers/traders, for example, computer based alternative trading systems (ATS) which match buyers and sellers of securities. Thirty percent of the trading volume in Canada currently moves through ATSs (Kiladze, 2010).

Bargaining power of buyers refers to the ability of buyers to push prices down or demand more value from the firms in an industry, behaviors that reduce profitability (Magretta, 2012, p. 42). In the Canadian financial industry, buyers (users of capital or *borrowers*) are individuals, businesses, and governments. Individual buyers typically require capital to finance housing or consumer purchases; business and government buyers, to finance their operations. The bargaining power of buyers is related to four factors: (a) the size of the buyer or the volume purchased, (b) availability of information, (c) switching costs, and (d) low profits (Crossan, Rouse, Fry, & Killing, 2013). The *size of the buyer* and the *volume* of securities purchased increases buyer power; powerful buyers have access to new issues and can demand preferential terms. Generally, individual buyers have little or no power (Crossan, Rouse, Fry, & Killing,

2013, p. 63). Individual investors are also dependent on public information (*availability of information*), often provided by the firms that are selling the securities. Further, they frequently require the services of industry insiders to guide purchasing decisions. S*witching costs* refers to the fees and penalties associated with moving from one security to another for a higher return. Finally, buyers have more power when the seller has a *lower profitability* or a lower credit rating compared to other investment options. In these situations, buyers can demand a higher rate of return.

Threat of substitute products or services refers to the introduction of alternative products/services that can serve the same needs as the current products/services offered by an industry (Magretta, 2012, p. 46). If the cost of switching to the alternative is low, the availability of substitutes impacts profitability by keeping prices low (Magretta, 2012, p. 41). In the Canadian financial industry, there are few substitute products for securities. This effectively creates a monopoly for the industry. That is, when companies or individuals create wealth, they look for places to invest, and there are relatively few investments beyond another type of security (e.g., real estate). For individuals, art or jewellery can be used as substitutes, but such assets have limited liquidity. More likely, individuals present a threat to the industry by having high levels of consumer debt, which limits their ability to purchase securities. With so few alternatives for securities, buyers are highly attuned to the potential return rates; a fraction of a cent difference on a large securities investment will create a significant difference in the return, making it worthwhile to investors to move their investments to securities that provide a higher rate of return.

Bargaining power of suppliers refers to the ability of an industry's suppliers to charge higher prices or obtain more favorable agreements (Magretta, 2012, p. 44). When suppliers can charge higher prices, the profitability of an industry goes down because costs to the producers increase (Magretta, 2012, p. 41). (In the financial industry, suppliers (sources of capital or *lenders*) are individuals, institutions, and foreign investors.) The bargaining power of suppliers is affected by three factors: (a) the supplier's position in the market, (b) availability of substitute products, and (c) product differentiation (i.e., uniqueness) (Crossan, Rouse, Fry, & Killing, 2013, p. 62). Large institutional suppliers of capital have power because of the significant amount of capital that they

can provide. *Facebook's* initial public offering (IPO), for example, was underwritten by *Morgan Stanley*, a brokerage firm with considerable market presence.

And *rivalry among existing competitors* refers to the competition between companies that limits profitability, the result of lower prices for products (Magretta, 2012, p. 50). Recall that the Canadian financial industry is an oligarchy where rivalry tends to be limited. Further, it is also a mature industry that is highly concentrated, and what rivalry exists will reflect changes in demand for capital and market growth. Additionally, globalization or the subsequent threat from foreign banks and markets increases rivalry for Canadian financial institutions.

As suggested earlier, the usefulness of Porter's model is that it offers an explanation of the sources contributing to the criminogenic environment in which corporate financial crimes occur. Consider the case of the Toronto based Chinese company *Sino-Forest*. A report in 2011 suggested the company was inflating the value of its earnings and assets in a Ponzi style fraud (Gray J. , 2013). The central issue was the reliability of the company reported assets, timber reserves the company owned in China. The Ontario Security Commission alleged that the accounting firm for Sino-Forest, *Ernst & Young*, was not diligent in reviewing the ownership documents for the timber reserves (Gray J. , 2013). The corporate credit rating[6] for Sino-Forest, rated by *Standard & Poor's*, was BB before the report came out and then subsequently downgraded to B+ and then B. The stock price of Sino-Forest collapsed after the 2011 report was published. (The company is now in bankruptcy protection and has no current rating or stock price.)

Sino-Forest is an example of how the *unequal bargaining power of suppliers and buyers* created the conditions for the alleged acts. Sino-Forest (seeking investment capital, therefore, a *buyer*) and Ernst & Young (intermediary between the buyer and suppliers) produced inaccurate reports that Standard & Poor's (intermediary between the buyer and suppliers) and investors (*suppliers* of capital) used when determining the company's investment potential. The investors relied on the reputations of the Ernst & Young and Standard & Poor's; these were firms with solid

[6] *Credit rating* is a measure of creditworthiness of a debtor, in particular of a company or government. The credit rating is determined by credit rating companies and is based on quantitative and qualitative assessments of the debtor. Ratings follow general grading schemes (i.e., A, B, C, D, F) from excellent (e.g., AAA, AA) to poor (e.g., C or D).

reputations. However, had investors wished to independently verify Sino-Forest operations, they would have required the services of a firm with specialized knowledge in investing in Chinese stock, one like the equity research firm that first referred to Sino-Forest as a Ponzi. The research firm reported that it took ten people with knowledge of Chinese law, finance, accounting and manufacturing two months to investigate Sino-Forest (Muddy Waters, LLC, 2011). This example also illustrates why criminologists argue that violation of trust is a central attribute of white collar crimes: the Sino-Forest Ponzi occurred because of unequal bargaining power and continued because investors trusted their information sources (Friedrichs, 2007, p. 8).

The term *industry* is used two ways in this research -- first as a method for classifying corporations and second as a collective term for the market participants who buy and sell securities. I classify corporations by industry type using the *North American Industry Classification System* (NAICS) as a guide. The term *securities industry* is operationally defined as those corporations engaged in buying, selling, and trading securities, and whose actions are regulated by the provincial securities Acts. The NAICS definition was not used again because (a) it refers to primary corporate operations, and (b) it includes corporations outside the scope of my research (e.g., *521 Monetary authorities – central bank* and *524 insurance carriers*). It should be noted that provincial securities industries are also industry specific: the capital market of British Columbia is dominated by mining corporations; Alberta, by oil and gas corporations; and Ontario, by financial corporations (Sibold, 2009).

2.1.4 Nation-state

The relationship between corporations, the economic system, and the government is a factor to consider when explaining why corporate financial wrongdoing is not treated as a harmful (see for example, Snider[7] (2001)).

Snider (2004, p. 218) argued that "the effective administration of corporate crime has been eliminated through downsizing, deregulation, and decriminalization". She uses the transition

[7] The type of Marxist critique of crime considered in Snider's work is referred to as instrumental Marxism. That is, the nation-state is viewed as a tool of the capitalist class; capitalists transform their economic power (e.g., by lobbying and campaign financing to mention only two means) into political power to protect their interests and in so doing influence the legislative process (Beirne, 1979).

from the *Combines Investigation Act* (1889) to the *Competition Act* in 1986 as an example of the federal government shift from citizen protection to the neoliberal value of unencumbered market forces. The *Combines Investigation Act* focused on maintaining citizen protection at the expense of some profitable business activities. Snider notes that the citizen oriented *Combines Investigation Act* was always weak; that is, it had limited enforcement, a limited budget, and faced significant resistance from business (2004, p. 219). Her point, then, is that a weak law meant to protect citizens was replaced with a strong law, the *Competition Act*, meant to protect business interests.

The *Competition Act* focuses on creating a stable environment for business by promoting competitiveness and enhancing business prosperity. Consider the language the Competition Bureau uses to describe its role: “ensur[ing] that Canadian business and consumers prosper in a competitive and innovative marketplace” (Government of Canada, 2012). This wording emphasizes the role of consumer, not the citizen. Hutchinson, who holds a similar view to that of Snider, has concluded that

> Canadian governments have continued to accept and even welcome the idea that their role is to be the help-mate of corporations not their task master. Within this neo-liberal agenda, there now exists a perversely symbiotic relationship between corporate business and government officials; corporations rely on government to establish a pro-business economic climate, and government depend on corporations to maintain a strong economy (Hutchinson, 2005, p. 95).

The outcome of this symbiotic relationship, according to Hutchinson (2005, p. 99), is greater deregulation, reduced taxes, increased subsidies, liberalized trade, weakened labour legislation, and privatization. Deregulation is of particular relevance to this discussion, for it has resulted in reduced oversight into the activities occurring on financial markets (Snider, 2001). Consider the following example from British Columbia where a former provincial premier was accused of insider trading: he was tipped off that a planned takeover of a lumber company in which he held shares was cancelled, prompting him to sell his shares just before the stock price dropped (Jordan, 1993). The case has been described as an “embarrassment” for Canadian regulators, with patchwork regulation being partially blamed for the lack of criminal convictions in this case (Jordan, 1993, p. 1072).

The rationale for deregulation is to unencumber the market because markets are "possessed of (most of) the characteristics and processes that lead them naturally to produce optimal outcomes" (Kempa, 2010, p. 254). In other words, the state does not need to regulate market activities; rather, the corporations and investors who use the financial markets regulate themselves through such principles as "supply-and-demand". Such beliefs, publically promoted by the power elite, serve to legitimate free market norms and neoliberal thought (Steger, 2009, p. 101).

The acceptance of neoliberalism, free markets, and more generally market capitalism suggests the influence of one class over others, an influence maintained by ideological and political methods (Abercrombie, Hill, & Turner, 2006, pp. 173-174). This hegemony is for Gramsci (2008, p. 244) the way "the ruling class not only justifies and maintains its dominance, but manages to maintain the active consent of those over whom it rules", with one result being that the harm to the individual investor from under-regulated markets generally goes unaccounted for. In 2010, for example, $15 billion was lost to securities fraud in Canada (Livesey, 2013, p. 5). Canadians are generally not aware of their victimization because the harm is displaced across time and place, or as Lynch, McGurrin and Fenwick (2004) describe the scenario, it is a *quiet crime*. Therefore, that there is a lack of public awareness of the different types of enforcement (e.g., police, securities commissions, self-regulatory organizations) and the function of each should not be surprising (Kempa, 2010).

The preceding paragraphs have considered some of the consequences of the deregulation of financial markets on corporate financial crime which represent part of a broader neoliberal policy orientation. Before proceeding further, it is worth considering specifically the term *neoliberalism.* Neoliberalism is related to *liberalism* -- a Western worldview favouring a written constitution and electoral democracy (Cowling, 2014). However, despite the obvious linguistic ties to liberalism, neoliberalism does not denote a *new liberal* or *revived liberal*; rather, the term suggests an *economic liberalism* or "the belief that states ought to abstain from intervening in the economy" (Thorsen, 2010, p. 189).

Commonly, neoliberalism is used to describe "the spread of capitalism and consumerism, as well as the…demolition of the proactive welfare state" (Thorsen, 2010, p. 188). Defined in this manner, *neoliberalism* is not used to describe the dominant Canadian ideology in a neutral or

positive way, "often describing any tendency deemed to be undesirable" (Thorsen, 2010, p. 190). However, the term is useful for this research because it allows for the critical evaluation of the underlying ideology informing much Canadian state policy in recent decades. Care is thus required to avoid the pragmatic definition, that is, using the concept of neoliberalism as an all-encompassing "evil presence". Therefore, this research is informed, and limited by, Thorsen's definition of *neoliberalism* as a

> demarcated set of political beliefs which most prominently and prototypically include the conviction that the only legitimate purpose of the state is to safeguard individual liberty, understood as a sort of mercantile liberty for individuals and corporations (Thorsen, 2010, p. 203).

2.1.5 Regulators

The opportunities for crime emerge, in spite of the regulators, because of (a) the multiplicity of provincial-level regulators, (b) an uncoordinated regulatory environment, and (c) difficulty in policing the Canadian financial markets (see for example, Kempa (2010) and Laufer (2010)). Clearly, several challenges face securities regulators. Before considering these challenges, a brief history of the Canadian regulatory environment follows.

There have been two main influences on securities regulation: American securities law and the federal/provincial division of powers. The first securities law was enacted in the American state of Kansas in 1911; based on this Kansas experience, Manitoba introduced the first such Canadian law in 1912 (Gray & Kitching, 2005). Ontario made major changes to its securities laws in 1945, 1966, and 1978 – the other provinces followed afterward (Gray & Kitching, 2005). The Canadian regulatory environment has been described as one of "sporadic legal consistency"; that is, harmonization of regulation across jurisdiction is not consistently emphasized (Gray & Kitching, 2005, p. 2).

Securities regulation has always been a provincial responsibility. Each province developed its own regulations over time, creating a *regulatory burden* for corporations seeking to raise capital in multiple provinces. Regulatory burden refers to "regulatory irritants that have a clear detrimental effect on growth, competitiveness and innovation"; examples of this burden include "duplicative regulatory requirements, high administrative costs and a lack of customer-service orientation within government in providing regulatory services" (Treasury Board of Canada

Secretariat, 2014, p. 13). For fifteen years, the provinces/territories have worked to harmonize their regulations to reduce this regulatory burden while at the same time maintaining and reinforcing the thirteen regulator system (Sibold, 2009). However, the regulators are not equal participants; the dominant regulatory body is the Ontario Securities Commission (OSC), for it is the largest, in part, because it regulates the TSX and TSX Venture exchanges. From its "dominant negotiating position" much of the regulatory policy in Canada is developed by the OSC with assistance from the regulators of British Columbia, Alberta, and Quebec (Sibold, 2009, p. 778).

The United States must also be considered: half of the companies listed on the TSX exchange are also listed on American exchanges and are therefore subject to the rules of both the OSC and the American Securities and Exchange Commission (SEC) (Kuras, 2004). This raises the following challenge: in addition to trying to harmonize their own regulations, the Canadian regulators have also been attempting to integrate their rules with those of the SEC to reduce the regulatory burden imposed on corporations listed on the Canadian and American exchanges.

One example of this harmonization venture is the *Multi-Jurisdictional Disclosure System* (MJDS). Introduced in 1991, MJDS eased the reporting and disclosure requirements for corporations and investors that had already met the requirements of their provincial regulator thereby allowing easier access to the American securities market (Mittoo, 2006). Ontario, whose capital markets are similar to those in the United States, tends to model its securities initiatives on the SEC, and because the OSC is the dominant regulator in Canada, the other provinces tend to follow its lead (Sibold, 2009).

As mentioned, there are several challenges facing regulators. First, regulation of the securities industry is a provincial responsibility; that is, each province has a mechanism to oversee the securities industry within its jurisdiction. Despite the lack of federal government oversight, there is a voluntary umbrella organization (*Canadian Securities Administrators*, CSA) whose members are representatives of the provincial securities regulators. One of the purposes of the CSA is the harmonization of the provincial policies with respect to the capital markets. For example, the CSA developed a "passport system" which allows corporations operating in multiple jurisdictions to deal with one securities regulator and one set of harmonized laws (Canadian

Securities Administrators, 2008). There is, however, a limit to the degree of cooperation that can be achieved by a voluntary organization; for example, Ontario, although a member of the CSA, is not part of the passport system.

Second, the difficulty in creating a coordinated regulatory environment is a conceptual one (Kempa, 2010). Kempa (2010, p. 252) argued that the divide between the public and private spheres contributes to the "structural, legal, and cultural obstacles to coordinating the policing of public sphere and regulating private sphere". Kempa used Foucault's theorizing to support his argument, pointing out that first, historically, to police comes from the concept of policy. Policing covered all activity undertaken by the government "to insure the integrity of policy and well-being" (Kempa, 2010, p. 254). But this policing then came into conflict with demands for (a) individual freedoms and (b) limited intervention in markets. The result of these demands was that the concept of policing was clarified: police the public sphere, regulate the private sphere. Markets were categorized as private sphere and, therefore, the domain of regulation. So, policing and regulation are "separated at the level of law, institutional structures, practices, and thus organizational cultures" (Kempa, 2010, p. 254).

Third, it is difficult to regulate and police the Canadian financial markets for four reasons. First, the complexity of the market and the investment products ensures that certain crimes (e.g., market manipulations or insider trading) will require skilled investigators to detect, investigate, and prosecute the perpetrators (Kempa, 2010). Because of the skills demanded in some of these cases, regulators have more success prosecuting "simpler" financial crimes, like frauds and money laundering (Kempa, 2010, p. 256). Second, there are thirteen government market regulators (i.e., provincial securities commissions) and a number of industry regulators (e.g., *Investment Industry Regulatory Organization of Canada* and the *Mutual Fund Dealers Association of Canada*). This "fractured and inefficient" approach to cooperation and information sharing between agencies is considered one reason for the lack of success in preventing crime (Kempa, 2010, p. 253). Additionally, the agencies tend to "plan, train and operate in isolation" from each other which limits any coordinated approach to financial crime (Kempa, 2010, p. 255). Third, investigators often "lack the status, background, and connections required to operate in the world of business", whereas the lawyers and accountants working for businesses occupy the same physical and social space as the clients they represent; they are

"authorized knowers" (Williams, 2008, pp. 323,324).   And fourth, the corporate sector is considered an "insider" in the formation of regulations; it has a stake in negotiations of the meanings of regulatory law (Bittle & Snider, 2011, p. 382). This means that attempts to restrict business activities through regulation may be limited because of the influence of the corporate sector.

The "political, social, ideological and economic capital" of the corporate sector creates an imbalance between the corporate actors and corporate regulators, an imbalance that some criminologists believe explains the cyclical nature of corporate crime legislation and enforcement (Minkes, 2010; Snider, 2010; Bittle & Snider, 2011, p. 382). Laufer (2010) also noted an episodic pattern: financial scandals lead to changes in regulations and increased scrutiny, followed by changes in priority and a relaxation of scrutiny. The effects on Canada from the 2000-2001 global market recession are an example of the cyclical or episodic nature of regulation. As a result of the recession, routinized corporate fraud became visible (Bittle & Snider, 2011). The federal government, pressured to respond to the apparent lenience of Canadian securities law, reacted with Bill C-13 (Protecting Canadians from Online Crime Acts) and created Integrated Market Enforcement Teams (IMETs) within the Royal Canadian Mounted Police (RCMP); this bill was an uncharacteristically punitive law from a neoliberal government (Bittle & Snider, 2011). The IMET program received $120 million in base funding for nine teams of specialized police, forensic accounts, and lawyers, with a mandate to investigate major cases of stock market fraud (Williams, 2008, p. 309; Bittle & Snider, 2011). There were also new tools: (a) insider trading became a criminal offense, (b) stiffer penalties, in general, for securities offenses, (c) a new sentencing provision that rejected status as a mitigating factor, and (d) third party warrants for data and documents (Williams, 2008, p. 309). However, the success of the new legislation and IMETs has been limited, for IMET was seen as being too confrontational by large Canadian corporations, corporations with the resources to find legal ways to circumvent regulations, develop sophisticated legal challenges, and introduce novel strategies (Bittle & Snider, 2011, pp. 382-383).

But in addition to this corporate backlash to punitive legislation, there is also a reluctance amongst regulators to prosecute corporate crimes; rather, they prefer to encourage voluntary compliance (Snider, 2009). According to Snider (2009, p. 191) using the law "to enforce

regulations denoted regulatory failure, not success" for the provincial regulators. Perhaps this perceived failure is manifested as well in the reluctance regulators have to moving cases to the criminal justice system (Snider, 2009, p. 188).

In addition to the reservations the regulators have towards prosecution, there is evidence to suggest that the corporations targeted for prosecution are the small more vulnerable ones, and by the time the case is resolved, there are no assets to recover (Glasbeek, 2003, p. 173). Consider, for example, the recent case in British Columbia where a former notary was ordered by the British Columbia Securities Commission to pay $44 million for an 11 year long Ponzi scheme; the notary's lawyer argued that she "has no ability to pay" (The Canadian Press, 2015, p. C9). Williams (2008) considered the difficulties in successfully prosecuting large corporations. Through interviews with IMET members, Williams (2008, p. 310) identified five procedural causes for a delay in laying charges and for not pressing charges for corporate crimes: (a) the complexity and scale of the cases (e.g., thousands of documents to consider), (b) delays in getting information from sources (e.g., difficulties in accessing domestic or foreign banking information), (c) disclosure obligations (e.g., these tend to hinder police investigations), (d) evidentiary challenges (e.g., the challenge of compelling witnesses to testify or proving intent), and (e) lack of leverage due to light sentencing (e.g., little motivation to testify against others in exchange for leniency in sentencing).

To conclude this section, one final topic needs to be considered – regulatory burden, mentioned earlier. Although regulatory burden is an often used argument against regulation, the extent of the burden on corporations due to securities regulation needs to be evidence based. That is, the empirical approach needs to be supported by research findings. Consider the findings of an American study of the economic impact of increased regulation of trading on electronic over-the-counter bulletin boards (OTCBBs) (Bushee & Leuz, 2005). In 1999, the Securities and Exchange Commission (SEC) expanded their disclosure rules to include the previously exempt companies trading on OTCBBs. The study authors identified three categories of OTCBB companies: voluntarily compliant (i.e., following the SEC disclosure rules prior to 1999), newly compliant (i.e., following the SEC rules after 1999), and noncompliant (Bushee & Leuz, 2005). Two of the findings are relevant to this discussion. First, 75% of companies not in compliance when the rules came into effect left the OTCBBs and now trade in the still exempt private market

(i.e., pink sheets). The authors note that the costs of compliance were too high for these small companies and thus they moved to less regulated markets (Bushee & Leuz, 2005). For the newly compliant companies, there were significant costs with compliance. However, both newly compliant and compliant companies experienced positive returns and improved liquidity after the implementation. The authors speculate that the OTCBBs had an improved reputation among investors.

2.1.6 Technology

Although using available technology to commit crime is not a new tactic, researchers have argued that new technologies have made it easier to commit certain kinds of corporate crime, such as document counterfeiting, frauds, thefts, embezzlements, and corporate espionage (Nuth, 2008, p. 438; Savona & Mignone, 2004). New technologies can also lead to new crimes, for when corporations come to rely on computer networks to maintain information flows, establish global networks of suppliers and consumers, and reduce costs, then these networks create a new space in which it is possible to commit an offence (Savona & Mignone, 2004; Clarke, 2004). Calavita, Tillman, & Pontell (1997, p. 20) argued that the manipulation of money is the "prototypical corporate crime of the late 20th century". Technology plays a role in such manipulations. For example, consider high frequency trading where powerful computers are programmed to use algorithms to assess market activity and then initiate the buying and selling of securities in a fraction of a second. These computers exploit millisecond time differences between trades occurring on multiple exchanges (i.e., *arbitrage*) in order to take advantage of slight price differences (Ligaya, 2014). These differences can generate considerable gains for a trader and have been criticized as "non-public information", a designation that would indicate a violation of securities law (Ligaya, 2014).

With respect to the financial industry, new technologies have "transformed the way in which securities are traded from a manual, paper-based system to an electronic, digital system" (Stoll, 2008, p. 15). These changes include the rise of electronic communications networks (ECNs) and electronic market trading, the demutualization of exchanges, the consolidation of specialist market firms, and the globalization and consolidation of markets (Stoll, 2008, p. 15). New technology has affected securities in other ways: altering the mechanism for buying and selling,

increasing the number of people or organizations that can buy and sell, and increasing the number of markets in which to buy and sell. Because securities traders are no longer required to meet face-to-face with a buyer or seller to conduct business, the cost of establishing new market places decreases (Stoll, 2008, p. 16). New technologies have made financial transactions and transfers easier and less expensive, resulting in a noted increase in movement of securities on financial markets (Aggarwal, 1999, p. 94). Securities specialists and brokers can be bypassed, allowing non-specialists to compete directly on the markets, thus increasing competition (Stoll, 2008, p. 16). (Note that internet-based investors still require a broker to facilitate securities transactions.) Pontell (2010, p. 9) summarizes the influence of technology on the financial industry this way: "the advent of computers and their proliferation in business makes access to 'other people's money' easier than ever".

Friedrichs (2007, p. 196), in summarizing his discussion of *technocrime* (i.e., crime facilitated by any sophisticated form of technology), concluded that "it should be obvious that the problem of crimes committed in cyberspace will increase in the future and will increasingly be a key element of different forms of white collar crime". By *obvious*, Friedrichs has noted that the "cost and sophistication of high technology" is accessible to the white collar world and that 80% of American financial transactions are conducted electronically; clearly, then, the potential exists for *technocrime*, for the technology is available to interfere with electronic financial transactions (2007, p. 197). Friedrichs's view was echoed by Rosoff, Pontell, & Tilman (2007, p. 505), who observed that, "it has been suggested that within a short time, virtually *all* business crime will conform to what now is considered computer crime" [emphasis in the original]. Linden (2009, p. 525) has expressed a similar sentiment: "as more people use [the internet] to conduct economic transactions, internet crime will become more common". Bell (2002), for instance, argued that computer related financial crimes present unique policing problems, such as (a) preserving the integrity of computer evidence, (b) decoding encrypted computer files, (c) sorting through the vast amount of information stored on computers (e.g., 7 GB of data = 20 million pieces of paper), (d) identifying agents involved, given the anonymous nature of the internet, and (e) having the expertise to disseminate the computer data at the investigation and prosecution stages.

Derivative securities are an example of a security that is both technology dependant and presents opportunities for financial crime. These are sophisticated financial products that derive their

value based on the performance of another financial product; they can have any set of financial properties, for example, various yields, risks, or maturity dates (Johnson & Kwak, 2011, p. 121). They differ from traditional investments in that they are not directly tied to an asset such as stocks, bonds, or gold. A derivative investment might be based on the performance of several currencies or interest rates, or on the performance of other financial products like, mortgages and loans (Johnson & Kwak, 2011). Selling derivatives is appealing to financial institutions (e.g., banks) because these products (a) provide another option for customers, (b) are products individual investors or smaller financial institutions cannot copy easily, and (c) appeal to a wide range of investors.

Derivative sales did not become noteworthy until the 1980s; prior to that time, there was no efficient way to calculate them (Johnson & Kwak, 2011, p. 79). Mathematical formulas and computers which could quickly compute the derivatives gave the financial industry (a) the confidence to increase its offerings of these products and (b) the ability to develop a variety of derivatives (Johnson & Kwak, 2011). However, because derivatives are difficult to calculate and their values change frequently due to their vulnerability to fluctuations in multiple markets, many individual investors do not appreciate the complexities of these financial instruments and, therefore, run the risk of financial loss by investing in them. Consider, for example, a recent Canadian example of a derivative-based incident: the ongoing investigation by the Competition Bureau into the alleged price fixing of interest rates by the Canadian affiliates of JPMorgan Chase & Co., Deutsche Bank, HSBC, Citigroup, Royal Bank of Scotland, and brokerage firm ICAP (CBC, 2012). This particular interest rate (i.e., *London Interbank Offered Rate* or LIBOR) is used to set borrowing rates on international markets and some derivatives are calculated using it.

2.1.7 Investors

Investors can be both victims (see for example, Croall (2009)) and perpetrators of corporate financial crime (see for example, Fligstein & Roehrkasse (2013)).

Investor is an encompassing term for the providers of capital in the economy. Investors take several forms: individuals, institutions (e.g., chartered banks, trust and mortgage & loan companies, life insurance companies, pension plan administrators, credit unions, and *caisses*

populaires), governments, or foreign-based (individual or institutional). The purpose of investing is typically twofold; that is, the providers of capital expect to generate revenue and in times of low interest rates, to obtain a return on their investment that exceeds inflation. These expectations are relevant because in order to preserve their capital, investors must find investments that offer returns that match inflation or exceed it.

Sachs (2006, p. 476) broke down the category of "unsophisticated investors" -- investors with little expertise in securities and lacking the financial resources to weather the market volatility or potential loss of the principle investment associated with high risk investing – into those (a) with an honest and competent investment advisor, (b) with or without an advisor but trading in efficient markets, and (c) without an advisor and trading in inefficient markets. The risk to an investor is small for the first two subcategories: in the first, investors are obtaining the advice necessary to make informed investment decisions, and in the second, investors "piggy back" on market judgements (Sachs, 2006). That is, in an efficient market, the total decisions of all the market participants will accurately reflect the value of a particular entity, so investors would not necessarily need professional advice to make informed investments. It is the third condition, inefficient markets, which put unsophisticated investors at risk because the value of the particular entity would not be readily discernible to the uninformed.

Considering the role of the investors as perpetrators, Fligstein and Roehrkasse (2013) concluded that there is widespread opportunity for fraud and collusive behaviour throughout the financial industry. The authors considered the American financial crisis of 2007-2009, a crisis triggered by interacting events in the financial market, centered around what happened when interest rates went up and homeowners started defaulting on their (subprime) mortgages; mortgages that had been repackaged into new securities (i.e., collateralized debt obligations) and highly leveraged by investment banks. The authors argued that "fee-based revenue schemes, limited supply of and intense demand for mortgage debt, and minimal regulatory oversight combined to provide incentives for various actors to defraud transacting partners" (Fligstein & Roehrkasse, 2013, p. 2). The banks, in this crisis, were involved in issuing, underwriting, and trading mortgage-backed products for which they charged a fee at every stage in the process.

To illustrate how banks can engage in fraudulent investment activities, consider the LIBOR rate fixing scandal. Major international banks, including RBC, have been accused of "fraudulently and collusively" manipulating the LIBOR rate, costing investors billions of dollars (CBC, 2014). The LIBOR rate is the benchmark for loans including credit cards, consumer loans, and variable rate mortgages. Banks, like RBC, could profit from advanced knowledge of the rate.

2.2 Theory

A common feature of the seven factors contributing to corporate financial crime is the concept of power; the theorizing of Karl Marx, Manuel Castells, and Michel Foucault provides the framework for explaining the results of the critical discourse analysis.

Marxism is based on the premise that social structures exist that limit humanity's full potential (Comack, 2006, p. 34). For Marx, the structural base of society is not in culture, but in economics – the superstructure, or society, emerges from this economic base and continues to reinforce the economic base. Marx is suggesting here that the conditions and relations within a particular society are fundamentally related to production: how goods are made and distributed (*mode*) is dependent on and reinforces the skills/knowledge available (*means*) and the relationships between goods producing members (*social relations*) (Turner, Beeghley, & Powers, 2002). Capitalism, as an economic base of society, is inherently exploitive of labour potential: workers produce products, but owners have the right to any surplus. The capitalist state fosters "greed, selfishness, and unlimited desires", a condition that is both exploitive and antisocial and, therefore, conducive to crime (Brooks, 2004, p. 31).

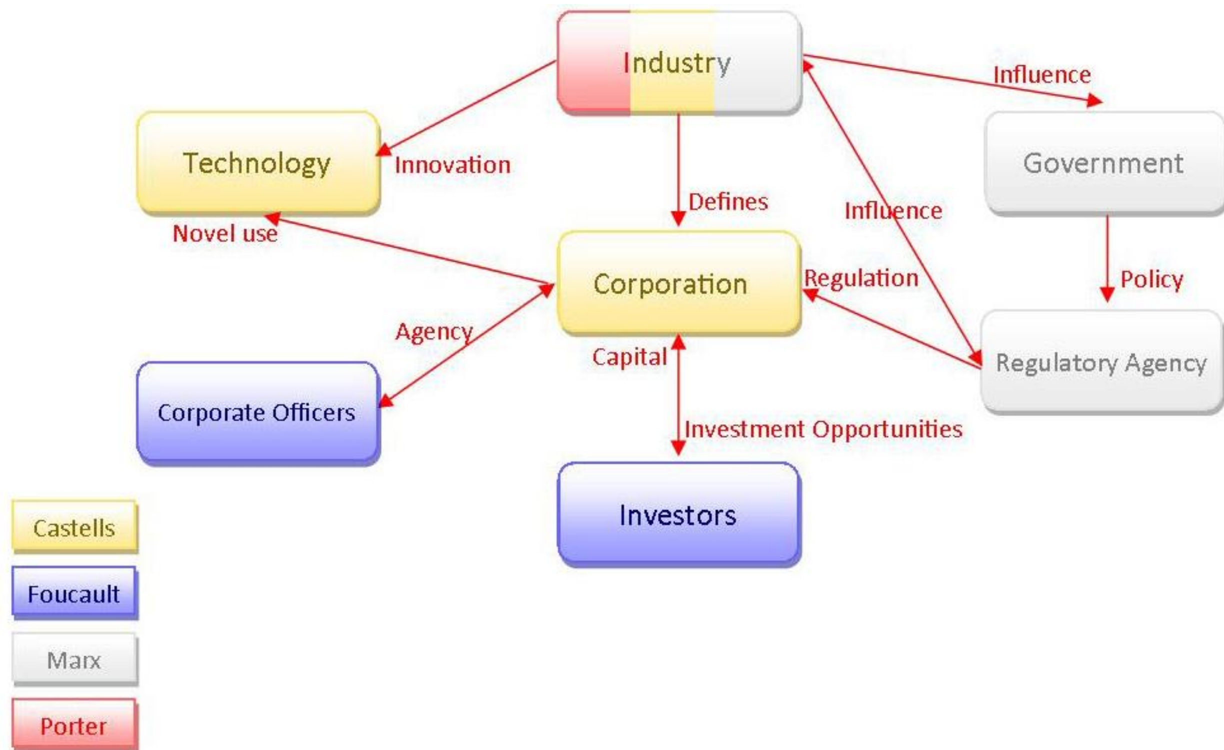
The technological changes that have impacted society over the last forty years have been substantial, and theorists are cognizant of this effect. Of particular relevance to the present research are new theoretical perspectives, specifically *network theory*. Network theorists, such as Castells, argue that a new society has emerged because of the intersection of three processes: changes to (a) capitalism and stateism, (b) technology, and (c) Western ideologies. Castells provides the theoretical support to substantiate the nexus between corporate financial crime and technology; specifically, his network theory supports the following presuppositions of this paper: (a) that capitalism and the corporation have changed over time, (b) that technology enables changes to capitalism, and (c) technology enables changes to the state and state ideologies.

Foucault, although not easily connected to a theoretical perspective, is often associated with postmoderism[8]. If modernism can be described as a worldview relying on positivism, then postmodernism is a rejection of modernism (Comack, 2006, p. 60). Postmodernists dispute the positivist idea that there is an external objective reality (e.g., the Truth); their focus is on disrupting conventional thought processes. The analytical tool of the postmodernist is deconstruction, the subject of analysis is discourse (language and communication), and the object to analyze is socially constructed categories (e.g., crime), the purpose being to consider how that worldview was created (Comack, 2006, pp. 60-61). Foucault is often associated with this perspective because his analysis focuses on the relationship between knowledges (or discourse) and power. When Foucault considered criminology, he deconstructed the root of criminological knowledge, exposing an “elaborate alibi to justify the exercise of power” (Cohen, 2009, p. 5).

Recall that Figure 2.1 (page 10) identifies the means by which each of the factors is connected. Figure 2.2 below connects the factors to the theorist best suited to explain the connection.

[8] Foucault considered himself an historian; he has been labelled a postmodernist and a poststructuralist. In this research, I refer to Foucault’s work as postmodern because I am considering his work from that perspective.

Figure 2.2: Relationship Diagram of Corporate Financial Crime Influence with Theoretical Framework



Marx's theory has utility for considering capitalism and the function of institutions for the capitalist elite; as well, Marx provides a mechanism for understanding how elite ideologies are maintained. Three of the seven factors involve the capitalist elites, namely, *industry*, *government*, and *regulators*. Additionally, industry advocates the neoliberal ideology through the influence of government, which may be able to impose this ideology on regulatory agencies through particular kinds of policies. The factors *corporation*, *corporate officers*, and *investors*, were not directly linked to a Marxist perspective in the Figure 2.2 because their relationship will reflect the economic and political power relationship of *industry*, *government*, and *regulators*.

Foucault's theory of power and governance provides a conceptual framework for considering the legal institution and its relationship to ideology. In particular, Foucault's analysis of power clarifies the actions of the relevant actors (i.e., *corporate officers* and *investors*). *Regulators* also participate in this exercise but are not highlighted in Figure 2.2 because government policy dictates their roles.

Foucault did not specifically consider *technology* in his work. For Marx, technology is used to facilitate productivity: increased productivity leads to social differentiation. For the present research, however, the work of Manuel Castells offers insight into understanding technology in relation to a globalizing world: "power increasingly functions in global networks, largely bypassing the institutions of the nation-state" (Castells, 2002, p. 142). That is, his network theorizing incorporates technology into the processes of globalization, a process that has impacted society and its principle participants -- *industry* and *corporations*.

Finally, Porter's model offers insight into the economic forces influencing the relationship of corporations within an *industry*.

2.2.1 Marx

Marx, more so than any other traditional sociologist, recognized many consequences of the capitalism he was witness to: "the power of big capitalism to …impoverish small businesses… to destroy cultures in the relentless drive to make production more efficient and to penetrate all markets" (Turner, Beeghley, & Powers, 2002, p. 156). And neo-Marxists, see for example Bittle (2013), have used his theorizing to explain aspects of crime in modern capitalism.

Marx explored how people could be repressed, or reproduce repression, without direct force by means of ideology. Ideology from this perspective can be understood as having *directionality* – it works to the advantage of some groups and to the disadvantage of others. Although his ideology displays both positive (i.e., construction of the *social consciousness*) and negative (i.e., *false consciousness*) facets, it is his negative interpretation that provides the critical tools needed in the present study to analyze capitalism (Purvis & Hunt, 1993, pp. 477-478). Marx argued that capitalists use ideologies to legitimate their position and to justify the unequal distribution of resources; more specifically, he considered ideologies as the tools capitalists use to mislead the population (Turner, Beeghley, & Powers, 2002). Because they control the means of production within society, the capitalists also partially control the societal superstructure, a position from which ideologies can be imposed on society (Turner, Beeghley, & Powers, 2002, p. 161). (Marxist sociology is often criticized for its economic determinism, free will not being a major consideration of the approach. Certainly, the state through various channels (e.g., bureaucracy) influences the behaviour of capitalists. Also, Beirne (1979) mentions structuralist Marxists who

posit that the capitalist class must occasionally forego gratification of their legislative interests in the short term.)

This control of ideology can be used to explain why laws are becoming more punitive with respect to the wrongdoing of individuals (e.g., the government's increasingly punitive policies towards crime -- *get tough on crime*), but there has not been a corresponding move for more retaliatory laws with respect to corporate crime (Snider, 2004, pp. 216-218). Rather, the opposite is occurring: laws governing corporations are inconsistently enforced (Gordon & Coneybeer, 2006, p. 88). This is the trend despite a number of high profile cases of corporate crime, particularly in the financial sector; consider, for example, the scandal surrounding Nortel's inaccurate financial statements, inaccuracies purportedly created to fund corporate officer bonuses (Snider, 2006, p. 180). Bittle (2013, p. 12) notes a regulatory "push and pull" -- serious corporate wrongdoing is often followed by the call for or development of new tougher laws, but the capitalists counter such attempts with concerns about the laws going "too far", so the laws are shelved/softened, resulting in little change to the status quo. There are three general explanations for this legislative see-sawing. First, the "unwavering commitment to the capitalist endeavor": the hegemonic ideology of market capitalism that considers laws unnecessary because the markets will respond and suitably punish corporate wrongdoing (Bittle, 2013, p. 2). Second, the priority and the purpose of a corporation is profit maximization even, according to neo-Marxists, at the expense of human rights, financial regulations, the environment, and worker safety (Bittle, 2013, p. 5). And third, it is the belief, held by some, that new laws within the same system cannot adequately address the exploitations inherent to capitalism which are allowing a power imbalance to be maintained.

Neo-Marxists have diverged somewhat from Marx's language of a power imbalance as an issue concerning two classes, the proletariat and bourgeoisie, to an imbalance within the *process of producing surplus labour*, which includes non-class processes like political, cultural, and economic factors (Bittle, 2013, p. 3). Thus, individuals become "personifications of economic categories, embodiments of particular class-relations and class interests" (Bittle, 2013, p. 4). This focus on surplus labour is a useful distinction when considering the financial industry, for the industry does not have a "real" surplus to be created by workers and sold by owners; rather, the surplus is the funds investors have to sell to corporations in the market.

Bittle (2013, p. 5) has reiterated a common argument that “the past three decades have witness[ed] an enormous increase in the power, influence and profit making capacities of the corporation”. In support of this statement, consider that thirteen of the top 100 economies in the world (based on GDP or revenue) are corporations: Royal Dutch Shell, ExxonMobil, Wal-Mart, BP, Toyota, Chevron, Total, General Electric, Volkswagen Group, ENI, AXA Group, Sinopec-China Petroleum, and HSBC Holdings (Hoomweg, Bhada, Freire, Trejos Gomez, & Dave, 2010). The post-Marxist theorizing of Castells suggests where corporations fit into the new capitalism; specifically, how modern corporations connect with the state, global financial markets, and dominant ideology (Webster, 2006, p. 99).

2.2.2 Castells

Castells argues that three processes -- the information technology revolution, the restructuring of capitalism and stateism, and the cultural movements of the West -- interacted to create the impetus for a new networked global society (Castells, 2000; Castells, 2002). The *information technology revolution* began in the 1970s when information and communication technologies (ICTs) started to diffuse rapidly into mainstream society. The ICTs connected and converged technologies[9], while simultaneously increasing in computational power and decreasing in price and size. Also beginning in the 1970s, North American companies began expanding their markets to offset domestic reductions in profitability (Castells, 2000, p. 95). But this market strategy was only successful because of ICTs and changes to *capitalism/stateism* (e.g., globalization of financial markets). And finally, *cultural movements* have supported the belief in personal freedoms and open communication, beliefs which further support ICT development and the ideologies behind the changes to capitalism and stateism.

Castells considers ideology part of the process of *globality*, a social condition “characterized by tight global economic, political, cultural, and environmental interconnections” (Steger, 2009, p. 8). Society is inundated with messages about the importance of market globalism, an ideology, which it is argued is (a) important for the liberalization and integration of markets, (b) inevitable

[9] Connecting technologies, for example, refers to an interface allowing different types of ICTs to coordinate – such as a desktop computer receiving real-time updates from a satellite tracking a Global Positioning System equipped shipping container. Converging technologies refers to multiple ICT functions – such as a smartphone that also receives the tracking information from the shipping container.

and irreversible, (c) not controlled by anyone, (d) of benefit to everyone, and (e) instrumental in disseminating democracy (Steger, 2009, pp. 102-103). This ideology is also exported to other states when transnational corporations expand or when states push for reduced trade barriers with other countries.

Castells (2000, p. 104) argues that financial markets have become interdependent and global because of the technical capacity now available to create such markets, the deregulation of national markets, and the liberalization of cross-border financial transactions. Castells (2008, p. 81) later argues that all economic and communicative activities, which include financial markets, are globalized. Financial markets are part of the *new economy*, an economy that is characterized by three processes: informational, global and networked (Castells, 2000b, p. 10). Castells states:

> In this economy, the dominant layer is the global financial market, where all earning from all activities and countries end up being traded. This global financial market works only partly according to market rules. It is shaped and moved by information turbulences of various origins, processed and transmitted almost instantaneously by tele-communicated, information systems, in the absence of institutional regulation of global market flows (2000b, p. 11).

Not surprisingly, electronic trading is at the core of this new interdependent and global financial market (Castells, 2002, p. 84). Castells (2002, p. 84) identifies several consequences of electronic trading: market volume has increased because (a) the transaction costs have dropped, (b) individual investors are by-passing financial services companies, (c) money can be mobilized in one market and invested in a different market, and (d) new market products have emerged. The market is also becoming more complex and volatile because of the number of individual investors relying on "real time" online information to quickly react to market changes, the result being the amplification of any change[10] (Castells, 2002, p. 87; Castells, 2000, p. 105). Such volatility leads Castells to consider that there is a new type of business cycle emerging – one characterized by sharp growth and equally sharp collapse. The market is oscillating between growth and collapse on a more frequent basis, with greater intensity of both the growth and collapse stages.

[10] Castells also considers an additional source of volatility, *information turbulences,* or *information volatility*, originating from political instability/uncertainty, legal developments, or technological anticipations (2002, p. 86).

With respect to financial networks, although Castells sees these globalized networks as transcending time and space (e.g., connect to any place at any time), he argues that there is still a micro network (*milieus*) of high level decision making with the power to influence the macro, or global, network (Castells, 2010, p. 2742). This is why finance is still concentrated in certain real shared spaces, like New York, London, Tokyo, or Toronto. Castells then considers how power "flows" in this network, each network having its own power relations. In market capitalism key "hubs" are financial institutions, such as the International Monetary Fund or financial rating agencies (e.g., Standard & Poors), which are supported by smaller "hubs" such as the US treasury, US Federal Reserve, Wall Street, or Bay Street (Castells, 2011, p. 775).

Castells creates four categories of power in a network: *networking*, *network*, *networked*, and *network-making* (2011, p. 773). Networking power is the ability of those in the networks to initiate power relations. Network power is the ability to control events or outcomes held by the network. Networked power is a relational power between two actors in the network. Network-making power is the power to program networks according to particular values or to switch to other networks. The effect of application of power in a network is that the network will exclude anything (and anyone) that does not add value to the network (Castells, 2008, p. 81). This presents one Marxist critique of Castells's classification system: the power focuses on inclusion/exclusion and misses another use of power, exploitation (Prey, 2012). For example, inclusion/exclusion means that those of value (i.e., included in the network) are those market participants with capital or securities; whereas, those without capital or securities will not participate (i.e., excluded). Crimes against market participants, such as fraud, are exploitive. That is, market participants with more value within the financial network (e.g., a corporation with a new financial product) can exploit participants with less value within the network (e.g., individual investor with limited financial literacy).

2.2.3 Foucault

Foucault's postmodern perspective provides additional "tools" for insight into the power behind corporate financial crime. First, in contrast to Marx and Castells, Foucault conducts a non-economic analysis of power in society (Comack, 2006, p. 61). This analysis can be applied to law, knowledge, and governance. To begin, Foucault posits that the exercise of power "can be

very subtle and difficult to recognize" in modern societies (Oliver, 2010, p. 46). When considering law, Foucault deconstructs the use of power and language for both the justice system and those academic fields that study justice (Schissel, 2004, p. 43). He is suggesting that the language of crime can be considered as a discourse created by those in power. His point, then, is that the common sense understanding of crime does not consider the structural inequalities that lead to, and reinforce, the justice system we have today. He believes language, like legal discourse, is actually a powerful tool of social control because it hides inequalities (Schissel, 2004, pp. 43-44).

The relationship of power/knowledge takes an interesting turn when applied to the role of ICTs like the internet. For example, the discourse of the professional (e.g., medical professionals) that excludes laypeople from understanding and participating (an exercise of power over them) can be mitigated when those laypeople use the internet to decode the medical discourse (e.g., an internet search of a medical condition and the treatment options). Or consider the role the internet plays in facilitating challenges to government authority by, for example, providing individuals with an electronic space to meet and organize. But access to ICTs like the internet is not universal -- ICTs can democratize knowledge by making it available, but certain groups will be excluded.

To understand Foucault's concept of power/knowledge, it is first important to understand what Foucault means by *power*. He did not conceptualize power as a commodity, but rather as a force that circulates throughout society and through all social relations by means of a net-like system. Individuals and institutions are situated in this net and can simultaneously exercise power and be influenced by power[11] (Foucault, 1980, p. 98). Foucault provides an illustration: even if revolutionaries take control of a government, the military, and the media, there will still be centers of power within the society that remain resistant to the revolution. Because power is flowing through this "social net", there will be points in the net, either institutional or individual, that support the previous social arrangement and are able to exercise resistance against the revolution.

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[11] Foucault did acknowledge state power as important but preferred to analyze how power spreads through society, and how it operates at the individual (or micro) level. He is not arguing that all power is distributed, but that the distributed power has been overlooked by other academics (Oliver, 2010, p. 165).

For Foucault, *power* cannot be entirely repressive; an entire society cannot be held under a completely repressive force. Instead, power must also be instrumental for society (Dean, 2006, p. 325). Foucault argues that one such function of power is the creation of knowledge. This function is reciprocal: the knowledge created by power then returns to the "net" and can influence the original power structures: "the exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power" (Foucault, 1980, p. 52). What Foucault is suggesting regarding how *knowledge affects power* is that the same knowledge a state uses to lend credibility to, or advocate for, a particular position can be used to either challenge or reinforce that position. It is important for maintaining power to use knowledge to reinforce that the power is legitimately applied because power can only be exercised on those who accept the authority of those applying it (Oliver, 2010, p. 49). And for the reciprocal, *power creates knowledge*, certain kinds of knowledge, in accordance with the dominant worldview of a society, will achieve dominance. Consider the following two examples of this relationship: "making a claim to be a science is an exercise of power, because in doing so the approach accords other ways of knowing (knowledges) a lesser status" (Comack, 2006, p. 61). Or consider the relationship between classic economics (knowledge) and capitalism (power) – the body of knowledge that consists of classic economics could not have come to fruition without a capitalist system in which to develop it (Gutting, 2005, p. 51).

Foucault used the relationship between power and knowledge to understand how certain knowledge systems become accepted as true within a society. (I am referring here to Foucault's *archaeology* and *genealogy* -- his technique of tracing how knowledge systems (epistemes) change and the factors influencing those changes.) Foucault refers to knowledges not accepted as *subjugated*; there are two forms (Foucault, 1980, p. 81). First, there are knowledges consisting of historical content that serve a latent function when examined within the current manifestation of power (*formal systematization*). For example, concepts such as those surrounding Halloween (i.e., the pagan, and perhaps, early Christian knowledge) which have been imbedded within the current knowledge of a secular night of costume parties and candy are considered subjugated knowledge. Second, there are knowledges that have been disqualified because the society has labeled them inadequate; in Western society these are knowledges which are considered unscientific – for example, Indigenous, women's, or local knowledge (Foucault,

1980, p. 82). Subjugated knowledges, then, offer two mechanisms for critiquing power/knowledge in a given place and time: (a) they reveal (or emancipate) the historical origins of the knowledge, and (b) they challenge the universal nature of knowledge by examining disqualified knowledges. Both forms of knowledge are considered in this study: historical or latent (e.g., the political aspects of the corporation) and disqualified (e.g., non-market capitalist or non-neoliberal). (According to Glasbeek (2003, p. 17), the inherent outcome of capitalism is unequal wealth distribution. This inequality can be justified by presenting capitalism as only an economic system, not a political one as well. Inequalities in society are rightly the domain of politics.)

Governmentality is part of Foucault's *biopower* concept for explaining how power acts on actions. There are two "poles" to biopower, the micro level processes of self control (*discipline*) and macro level processes of social control (*governmentality*) within society. *Discipline* operates on specific individuals in a specific space, and its technique of power is to collect information on individuals and to act on that information (Tadros, 1998). Discipline serves to reform individuals – allowing the individual to "be trained or corrected, classified, normalized, excluded" (Foucault, 1995, p. 191). *Governmentality* operates on groups of individuals, and its technique of power involves collecting information on groups and making adjustments to the groups by means of, for example, legislation (Tadros, 1998). Unlike the case with *discipline*, the state cannot attempt to regulate every individual in the population; instead, it creates the conditions such that when individuals act in their own self-interest, they conform to state expectations (Li, 2007). These conditions are created by "educating desires and configuring habits, aspirations, and beliefs" (Li, 2007, p. 275). For example, the *American dream* (i.e., through hard work, everyone has an equal opportunity for success) can be seen as a mechanism to persuade the American population to work hard to obtain financial and social success.

Governmentality takes the form of power exercised through *surveillance* (Foucault, 1980, p. 104). Foucault makes this point by arguing that the modern state is not as concerned with sovereignty over things (e.g., land) as it is with maximizing the productive potential of its citizens (Foucault, 1980). And this maximization relies on surveillance of those citizens; indeed,

Foucault felt that the constant monitoring of individual's bodies and minds[12] was the major manifestation of power in modern societies (Oliver, 2010, p. 41). Further, because modern Western societies have excellent information gathering capabilities, there is also less of a need for physical coercion (Tadros, 1998). Foucault is suggesting that discipline has decentralized or delocalized away from the institution and operates through society. For example, a constant state of surveillance (e.g., closed circuit television, CCTV) can function like physical force (e.g., police), ensuring that citizens behave as expected and thereby maximize their productive potential. The development of other technologies, like the internet, has further created highly effective mechanisms for monitoring individuals.

The current research can be situated in Foucault's notions of governmentality and power/knowledge. Foucault locates the law conceptually between *discipline* and *governmentality* (Tadros, 1998). Law is considered one of the conduits through which *governmentality* can act upon *discipline* (Tadros, 1998, p. 79). The form that the law takes reflects governmentality, in particular the emphasis on surveillance. Foucault is conceptualizing the law not as a force created by the state to control the population, but as part of a system of unified power relations (Tadros, 1998). He does not further specify the origins of this system.

The state uses three surveillance techniques to obtain compliance (in Foucault's language to create *docile bodies*): (a) *hierarchical observation*, whereby control occurs merely through the act of watching (e.g., the panoptical prison design), (b) *normalizing judgment*, where individuals' actions are compared to those of others (e.g., individuals are ranked), and (c) a combination of *hierarchical observation* and *normalizing judgment*, defines the *examination*, where truth is obtained and behavior controlled (Gutting, 2005, pp. 82-86). It is this final technique, *examination*, where power/knowledge is of central importance: the state can use its power to compel the examination of an individual in order to establish the "truth" about him or her, the intent being to control the individual by bringing his or her behavior into compliance with established norms. The examination also serves to control large numbers of individuals (Oliver, 2010, p. 63).

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[12] Consider that for children, mental and physical growth are charted; for students, academic performance is measured and compared to other students; for workers, economic performance is evaluated; and for seniors, mental and physical decline are recorded (Oliver, 2010, p. 41)

The following *legal case* discussion of the *examination* illustrates its utility for the present research. Foucault argues that writing, social control, and individual legal cases are related (Herzog, 2002). First, it is the examination of, and subsequent documents reporting on, an individual (the surveillance) that become an object of knowledge and power. For Foucault, writing about an individual establishes a relationship between the individual and the state institution exerting power over him or her (Herzog, 2002). He argues that a network of writing (a *dossier*) situates the individual and "captures" him or her by the institution. Further, and in the case of the dossier the present research focuses on, that is, the Securities Commission reports, the publication of the Commissions' dossier on the internet reinforces the notion of hierarchical observation (e.g., the commissions are watching the securities trading) and normalizing judgment (e.g., individual transgressions are available for others to read). Second, Foucault noted that although tales of crime can serve to consolidate power, they also destabilize power (Herzog, 2002, pp. 41-42). That is, the writing of a case is an exercise of power, re-writing it could destabilize the power and offer insights into the nature and relationship of that power. For example, consider the earlier comment concerning subjugated knowledge: capitalism presents as a politically neutral economic regime by hiding its political elements through an appeal to the so-called technocratic institution of the market, a mechanism for economic efficiency (Glasbeek, 2003, p. 17). A critical consideration of the relationship between the market and capitalism counters that the political economic system of capitalism promotes the interests of a few at the expensive of the many, and the market "transforms greed from a dubious moral value into a useful technical catalyst" (Glasbeek, 2003, p. 19).

2.2.4 Three Theorists and Porter's Five Forces Model

There is a final consideration – that is, whether the four perspectives can be located in a single critical framework. Certainly, Castells and Marx are compatible: Marx argues that social analysis requires a consideration of the economic, and Castells in his perspective integrates changes in economy (i.e., capitalism and stateism). The following argument supports a common critical framework for the first three theoretical perspectives, that is, the postmodern theorist Foucault with the modern theorists Marx and Castells: (a) social theories are considered as generally complimentary, successful at addressing different social problems and answering different questions about society, and (b) society is too complex, with too many competing or

interacting elements, to be adequately explained using a single theoretical perspective. With the argument framed in this way, Marx and Foucault can be viewed as providing two mechanisms for considering corporate financial crime: Marx from within social structures and Foucault from the discourse. Castells and Foucault can be viewed as examining two different locales where corporate financial crime occurs: Castells works with the macro structures of society; and Foucault, the micro level relationships.

Finally, Porter's work is not sociological theory – his five forces model (see section 2.1.3) addresses one of the fundamental questions of business and economics, "why are some companies more profitable than others" (Magretta, 2012, p. 1)? However, his consideration of the effects of industry on business is compatible with both Marx and Castells's consideration of the economic aspects of capitalism. That is, Porter argues that there are structural forces that impact business profitability in a predictable way, namely, interactions between the five "forces" (Magretta, 2012). Two of his forces, *bargaining power of buyers* and *bargaining power of suppliers* relate to Marx's theorizing. That is, corporations (i.e., buyers) are the vehicle for power within the market capitalist society, and investors (i.e., suppliers) supply markets with their surplus labour. Two of Porter's forces, *rivalry among competitors* and *threat of new entrants* relate to Castells's theorizing. That is, globalization brought new foreign corporations to the Canadian markets (i.e., increasing rivalry). New markets, namely, alternative trading systems for Canadians to invest in, are the result of new technologies (i.e., new entrants). Clearly, corporate financial crime is open to many interpretations; a multiplicity of viewpoints provides a more comprehensive analysis and allows for the interaction of factors, the "it depends" of social research.

In summary, this chapter reviewed (a) the literature supporting seven factors relevant to corporate financial crime in Canada, and (b) the theories best situated to explain this type of crime. The next chapter outlines how the chosen method, critical discourse analysis, was applied to the data.

Chapter 3: Methodology

This research was conducted using a critical discourse analysis. Briefly, discourse is the "body of language-use that is unified by common assumptions" or in more concrete terms, the "ordered and structured framework within which people see [or know] their world" (Abercrombie, Hill, & Turner, 2006, pp. 111-112). A discourse analysis seeks to understand how a particular framework is shaped, reinforced, and subverted through its use in society. A *critical discourse analysis* challenges established frameworks by focusing "explicitly on dynamics of power, knowledge, and ideology"; the analysis is expected to "shatter the illusion of observed reality" (Carroll, 2004, p. 226; Harvey, 1990, p. 196).

Critical discourse analysis has become an established field within the last few decades (Fairclough, Mulderrig, & Wodak, 2011). The appeal of this type of analysis is that it can make visible the "the ideological loading of particular ways of using language and the relations of power" contained in the discourse (Fairclough, Mulderrig, & Wodak, 2011, p. 358). Additionally, this method allows researchers to "take an explicit sociopolitical stance: … spell[ing] out their point of view" (van Dijk, 1993, p. 252). In the present research, the critical analysis of discourse is used to examine the power relations between the seven factors; the sociopolitical stance taken is that these power relations maintain a supportive environment for corporate financial crime.

A critical analysis is also consistent with the theoretical approach guiding the present research. Marx and Foucault both used critical methods. Marx's critical evaluation of capitalism (*dialectics*) was an effort to reveal the unfairness of the capitalist system in order to create the space for a revolution. Foucault's *geneology* changed the way academics understood how power is infused throughout different sites within society. For the present research, Marx and Foucault both offer the tools to critique the neoliberal ideology expressed in the discourse.

Critical discourse analysis is not associated with Castells. However, Castells' explanations of the major social changes of the last 40 years reveal the locations, like technology, the state, and ideology, where corporate financial crime resides. Thus, Castells considers the new social structure in which neoliberal ideology operates.

3.1 Research Design

Briefly, a critical discourse analysis attempts to (a) identify the institutions that the discourse reinforces or, alternatively, subverts, (b) identify which groups of people gain or lose from the discourse, and (c) determine how the particular discourse fits with other discourses that perpetuate inequalities (Carroll, 2004).

3.1.1 Data Source

Any sense-making device, such as words, pictures, symbols, colours, or gestures, can be used for a critical discourse analysis (Fairclough, Mulderrig, & Wodak, 2011, p. 357). For the present research, the data sources were the *decisions*, *extending orders*, *orders*, *settlement agreements*, and official *news releases* from the provincial securities regulators which were obtained on the Canadian Securities Administrators (CSA) website (i.e., www.securities-administrators.ca). Government documents, like those of the provincial regulators, are considered acceptable data sources for sociological research (Bryman & Teevan, 2005, p. 126).

The data were derived from the CSA's *Disciplined Persons* list, a list which contains the names and associated documents for individuals disciplined by the various provincial regulatory agencies. Each regulator submits the names and documents to this national database. Not all the older records are digitized, but the regulators have been retroactively digitizing and submitting records from their archives. British Columbia's documents have been digitized back to 1987; New Brunswick, 1991, Ontario, 1997, Manitoba, 1999, Quebec, 2001, Nova Scotia, 2002, Alberta and Saskatchewan, 2005, and Quebec courts, 2007. No data from the Yukon, Northwest Territories, Nunavut, Newfoundland and Labrador, or Prince Edward Island were available from the disciplined persons list. Additionally, there were no corporate crime cases that fit the selection criteria from Nova Scotia. Two non-government industry regulators, *Investment Industry Regulatory Organization of Canada* (IIROC) and the *Mutual Fund Dealers Association of Canada* (MFDA), have also been submitting names and documents since 2004.

3.1.2 Corporate Financial Crime Case Construction

Beginning with the names of the disciplined persons, of which there were 2866, all of the associated documents dated between 1986 and 2012 were extracted from the site. (Duplicates

and documents incorrectly attached to a name were eliminated.) A document attached to one disciplined person could make reference to other disciplined persons (e.g., *in the matter of* "Person A", "Person B", and "Person C"), so the names were linked together and assigned a case number. At the end of this process, there were 608 cases.

The remaining documents were then screened to select those indicating corporate crime. Corporate crime cases were those in which a company was also named as a respondent in addition to the *disciplined person*, or included in the title of the document (e.g., *in the matter of* "Person A" and "Company 1"). Following this screening process, 418 cases remained.

These cases were then evaluated for content. For the case to be included in the research, the case documents needed to provide a description of the crime and how the crime was committed. Cases where (a) key documents, like the *Order* or *Decision*, were missing; (b) the documentation consisted of a news release, cease trade order, or a notification only; or (c) the key documents were only available in French were eliminated. *Orders*, *Decisions*, *Findings*, *Settlement Agreements* (wording varies slightly by jurisdiction) often contained background information on the companies and individuals sanctioned, a discussion of the violation, the position of the regulators and the position of the companies/individuals regarding sanctions, and, in some cases, a discussion of the harm to particular investors. These documents provided the information needed for the present research. Documents, like *news releases*, often contained limited discussion of the crime, focusing instead on names and Act violations. If the *Order* (or similar document) was only available in French, the remaining/available English-language documents generally did not have enough of the information needed for this research. Seventy-six cases representing 92 corporate financial crimes remained at the end of this process. See Appendix B for a list of the companies represented in the research.

3.2 Critical Discourse Analysis

The critical discourse analysis was guided by Ollman's (2004) interpretation of Marx's dialectic approach to analysis. Ollman (2004, p. 143) outlined a *dance of the dialect* to represent how to be reflective towards an object of analysis. There are four steps. First, *analyze* (one step left, two steps right, one step left). In this step, I looked for connections between the corporate crime and social conditions existing today. Second, *historicize* (one step back). Here, I looked for the

preconditions to connect the corporate crime to historical events or preconditions. Third, *visionize* (two steps forward). This required projecting the "social contractions" existing prior to the present crime, through the present to the future to estimate what could be the impact on society. Fourth, *organize* (one step back and jump!). In this final step, I considered the conditions (i.e., institutions, power, and ideology) that support the vision of the future and then used these conditions to develop a political strategy (i.e., what might be done?) (Ollman, 2004, p. 143). The following Table describes the specific actions required to complete the "dance".

Table 3.1: Dance of the Dialect

Step	Action
Analyze	Characterized each case
Historicize	Reconstructed the case histories and created relationship diagrams
Visionize	Identified the opportunities for, and the ability to conceal in each case
Organize	Examined the opportunities and developed a political strategy

3.2.1 Analyze

I read the case documents and captured the descriptive data. The information collected for each case was as follows:

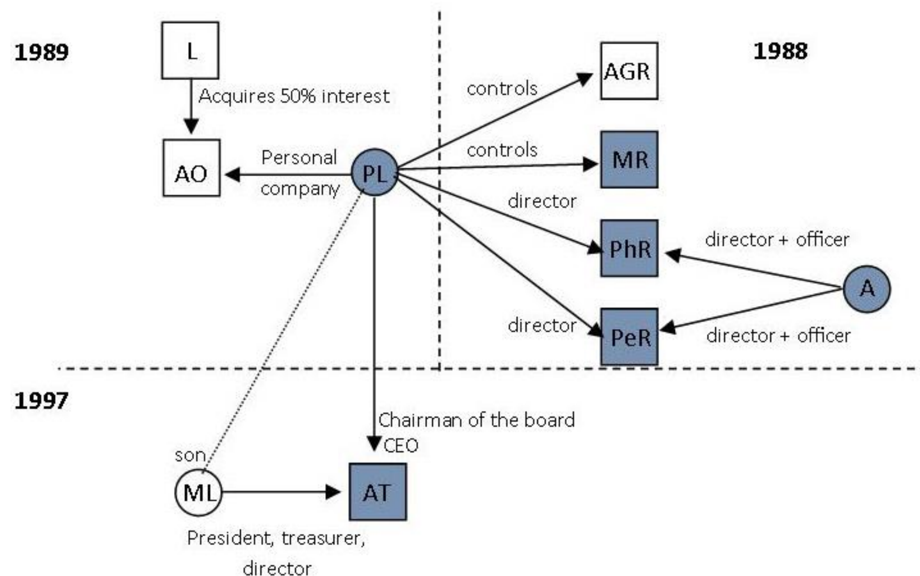
1. Titles: the titles of all individuals involved (e.g., Chief Executive Officer).
2. Type of crime: a description of the crime (e.g., Ponzi scheme). The particular provincial regulation violated was not recorded for two reasons. First, the securities legislation differs by province, and second, my study involved a non-legal analysis, so the particular violation was not germane.
3. Industry: the category of work, codified using the *North American Industry Classification System* codes (e.g., *mining, quarrying, oil and gas*).
4. Location of the crime: either the province(s) or the countries involved.
5. Jurisdictions: all the different provincial regulators involved per case.
6. Timeframe: length of time the regulators were involved (e.g., from a *temporary cease trade order* to a *decision*).
7. Technology: references to the use of technology

3.2.2 Historicize

In this step, I reconstructed the history for each case. I made unstructured notes on how the discussion associated with the seven factors changed over time. From the notes, I created case relationship diagrams, one per case. The relationship diagram contains (a) the crime(s), both

corporate and occupational, (b) all the individuals associated with the crime(s), (c) whether they were sanctioned by the regulators, and (d) any of the factors identified in the literature review (see Figure 3.1, Case 30 for an example).

Figure 3.1: Relationship Diagram (Case 30)



For this Figure, and all following case diagrams, companies are denoted by squares, individuals by circles. Individuals or companies disciplined are shaded. The company and individual names have been abbreviated (See Appendix B for the full name of companies disciplined[13]).

In this case, there were three crimes, two corporate crimes (1988 and 1997) and one personal crime (1989). The three crimes all involved companies in the *mining, quarrying, oil and gas* industry.

3.2.3 Visionize

For each case, I determined the degree (high, medium, or low) to which the circumstances of the case afforded (a) an opportunity to commit the crime, and (b) the means to conceal the crime. High opportunity was defined as a company with no legitimate business purpose (e.g., fraud scheme); medium, a legitimate business with a clear means available for crime (e.g., receiving investment money from an unsophisticated investor); low, a legitimate business without a clear

[13] The unabbreviated names of the individuals disciplined and the companies/individuals involved, but not disciplined, are not listed in this paper. If this information is required it is available through the public records.

means for the crime (e.g., mistakes or oversights by a company). High means of concealing crime was defined with reference to a company operating in a manner that made it difficult for the regulators to intervene (e.g., operating in multiple jurisdictions with the intent to conceal); medium, operating in an ineffective or flawed manner to make it difficult for the regulators to intervene (e.g., operating in multiple jurisdictions); low, operating in a manner that would be verifiable by investors or regulators (e.g., able to confirm the facts of a misrepresentation).

Two decision trees were used to guide the classification of the cases: one for opportunity, the other for concealment (see Figure 3.2 and Figure 3.3 below). All but three of the cases were classified using this method. These three (i.e., Cases 24, 42, and 66) were classified separately; their circumstances differed from those of the others.

Figure 3.2: Decision Tree for Classifying Case Opportunity

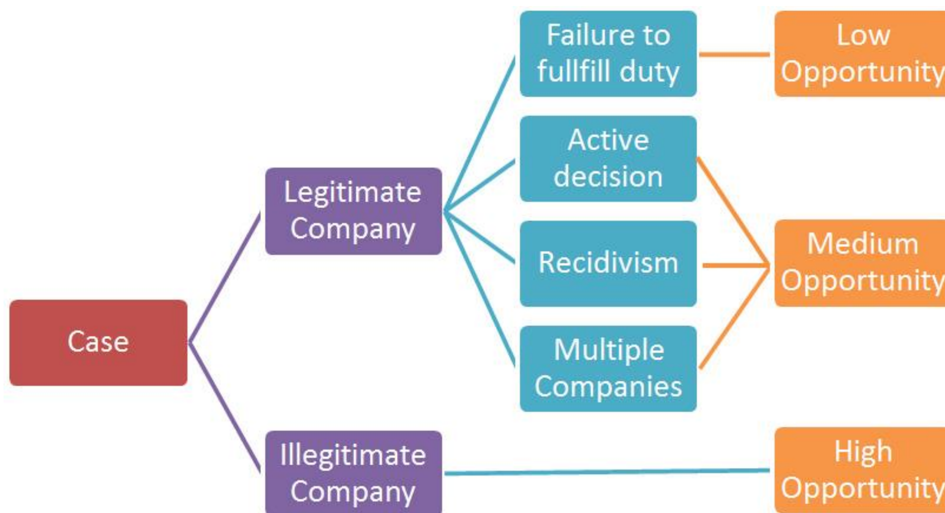
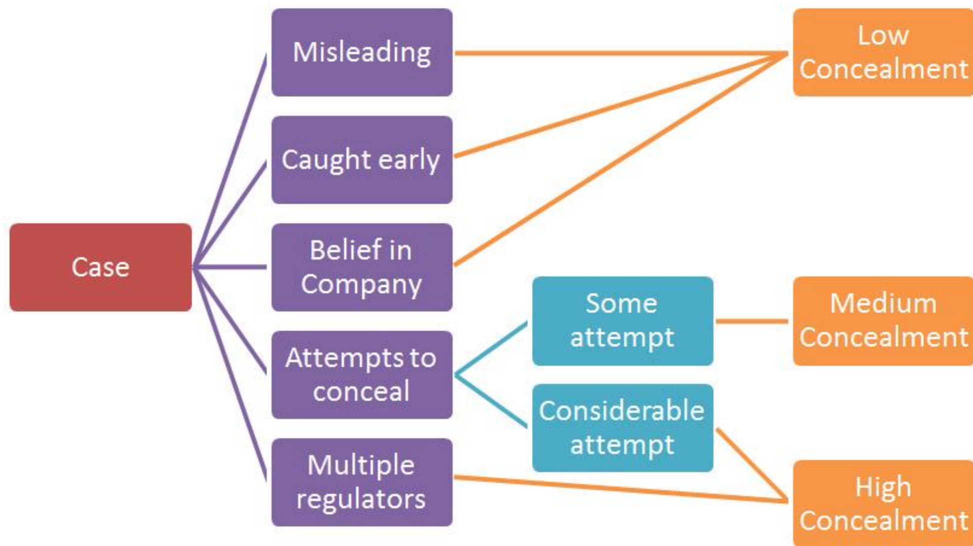


Figure 3.3: Decision Tree for Classifying Case Concealment



3.2.4 Organize

For Ollman's final step, I used a set of questions modelled on Parker's criteria for "tackling" discourse in a critical way (2004, pp. 259,260). Parker's (2004) approach was chosen because in his view discourse *supports institutions*, *reproduces power relations,* and *has ideological effects,* three important considerations in this research. The six questions I considered were the following:

1. Which institutions are reinforced in the discourse?
2. Which institutions are marginalized in the discourse?
3. Who wins and who loses from employing this discourse?
4. Who promotes and who rejects this discourse?
5. How does the discourse connect to other discourses reinforcing dominance?
6. How is this narrative justified?

The first two questions consider the role of institutions in creating opportunities for crime; the next two explore power relationships among the participants; and the last two examine the links to other discourses that serve to reinforce the status quo. Each set of questions approaches the discourse from a different perspective. These questions serve to connect the discourse to its place in the wider society.

With respect to the first set of questions, institutions embody the social practices that are sanctioned and maintained by social norms (Abercrombie, Hill, & Turner, 2006, p. 200). The two institutions under consideration here are the nation-state and industry. The nation-state and regulators are clearly connected through government, so it is useful here to treat them as a single institution (i.e., nation-state/regulators). The focus of the analysis at this point is to identify the elements of the discourse that serve to reinforce the connections between the two institutions. For reinforcing, I looked for discourse that supported the "insider" position of industry in government policy; for marginalizing, I looked for institutions which were not included in the discourse but were included in the literature concerning corporate financial crime, for example, the criminal justice system, policing, criminal courts/sanctions, or international regulatory bodies.

The second set of questions considered the power relationships among the different actors. The actors under consideration here were investors, corporations, and regulators. Note that in this context regulators are treated as separate body from the government. This split is useful given the tensions known to exist between regulators and the institution of government. The winners were those that the discourse appeared to support, or as van Dijk (2006, p. 126) describes it, *positive self presentation*. The losers were those who were not supported, *negative other presentation* (van Dijk, 2006, p. 126).

The final set of questions linked the discourse under analysis to other discourses, an approach based on the argument that there is a general knowledge that all ideologies are based on which allows understanding of a discourse between ideologically different groups (van Dijk, 2006, p. 122). With this set of questions, I looked for references to other discourses that might or might not be neoliberal but still, however, supported the criminogenic environment created.

Chapter 4: Findings

The results of the critical discourse are presented in this chapter. In the first section, the corporate financial crimes are characterized. In the following section, each of the 76 cases was considered in terms of the research question, that is, the opportunities for committing crime. The final section addresses the role of institutions, power relations, and ideology.

4.1 Characterization of the Corporate Financial Crimes

The first step in the critical discourse analysis was the *analysis*, the results of which are presented in Figure 4.1. Recall that this step captures the descriptive data of each case: titles, type of crime, industry, location of crime, Canadian jurisdictions involved, timeframe, and use of technology.

Figure 4.1: Characterization of the Corporate Financial Crimes (76 cases, 92 crimes)

Senior officers (21%), *board members* (25%), and *individuals working for* the corporation (25%) were disciplined more often than the shareholders (10%). *Senior Officers* included CEOs, presidents, vice presidents, officers, sole officers, treasurers, and managing partners. *Board members* included directors, sole directors, and chairpersons. *Individuals working for* the corporation included salespeople, office managers, contractors, or secretaries.

The most common type of corporate financial crime was the category *misleading* (29%), followed by *failure to follow the act* (27%), and *fraud* (27%). *Failure to follow Act* refers to Act violations like failure to fulfill duty, file prospectus, or register. Note that all 92 corporate crimes are failures to follow the Act in some way, but I use the phrase in the present research to refer to procedural errors. *Misleading* refers to misrepresentations of material information. *Fraud* refers to deliberate actions meant to harm investors (e.g., theft).

Two industries accounted for 80% of the corporate financial crime: *financing and insurance* (57%) and *mining, quarrying, oil and gas* (23%). Eleven percent was accounted for by (a) *real estate and rental and leasing*, and (b) *professional, scientific, and technical services* industries. The category *other* (9%) was a combination of five industries: Arts, Health, Manufacturing, Construction, and Retail trade.

Sixty-eight percent of all cases occurred in BC, followed by Alberta (34%), Ontario (19%), and Saskatchewan (14%). Note that a case could involve multiple jurisdictions and was therefore counted in each applicable province. With respect to the location of the crime, 53% were international, and of these, 42% occurred in the United States. A *Provincial*-level crime is one that occurred in one province; *national*, in two or more provinces; and *international*, one or more provinces and one or more countries other than Canada. For the category of *other,* 28 different countries were represented.

It took the regulators between one and three years to conclude a case. Involvement was determined based on the dates recorded on the earliest and latest documents in a case.

Technology was most often (55%) an *accessory* to crime. *Accessory* technologies were those not required to commit the crime (e.g., email to investors containing misrepresentations). *Material* technologies (23%) were technologies required to commit the crime (e.g., web-based fraud).

Prosecution (27%) refers to the regulator's use of technology to investigate the corporation and people involved (e.g., forensic analysis of a company computer hard drive). Note that technology could be used in multiple ways within one case.

4.2 Opportunity to Commit/Conceal Corporate Financial Crime

The results of the step to *historicize*, summarized in the case diagrams, are presented in conjunction with the results of the *visionize* step in the following discussion. The summary of the *visionize* step is presented in Table 4.1. In this table, the 92 corporate financial crimes were classified as high, medium, and low with respect to two factors: the opportunity to commit the crime and the means to conceal the crime. In the subsections following the Table 4.1 discussion, each of the different classification categories (e.g., low opportunity/low concealment) is considered. See Appendix C for the case numbers for each of the nine cells.

Table 4.1: Opportunity to Commit/Conceal Corporate Financial Crime

Crime (n=92)	Low Opportunity	Medium Opportunity	High Opportunity
Low Concealment	18 (19%)	12 (13%)	1 (1%)
Medium Concealment	3 (3%)	12 (14%)	15 (16%)
High Concealment	1 (1%)	7 (8%)	23 (25%)

In Table 4.1, there are three general observations to note. First, there is a relationship between opportunity and concealment; that is, high opportunity and high concealment (23 crimes) appear related to attempts at corporate crime. Second, when the data are collapsed across opportunity, there is little difference in the number of crimes per category of concealment (i.e., low concealment, 31 crimes; medium, 30; and high, 31). Third, when the data are collapsed across concealment, there are progressively more crimes as opportunity increases (i.e., low opportunity, 22 crimes; medium, 31; and high, 39). The main feature to note in this a table is the suggestion of a positive relationship between opportunity and crime.

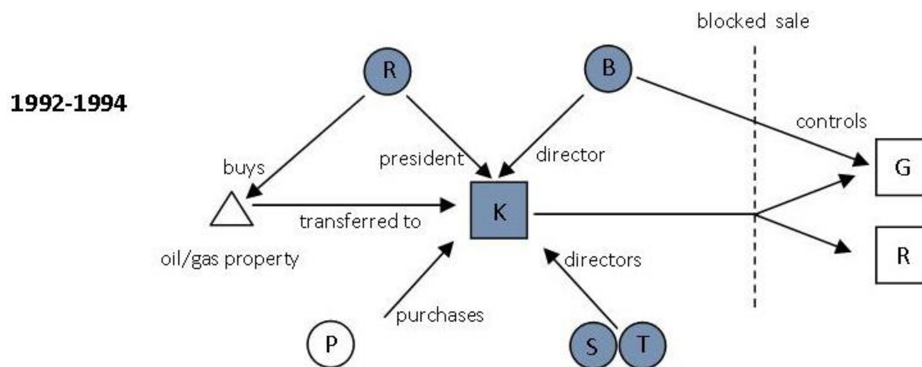
A diagram of a representative case accompanies seven of the following nine discussions. The remaining two diagrams are not representative; that is, each diagram is based on one case, the only case available. The representative cases were chosen based on the following criteria: they

were similar to other cases in the category and had the most detailed/complete discussion of the seven relevant factors.

4.2.1 Low Opportunity/Low Concealment

There were 18 crimes (17 cases) in this category[14]. Case number 9 (see Figure 4.2) was selected as representative of this category. Low opportunity crimes denoted legitimate companies without a clear means to commit a crime; low concealment crimes, companies operating in a manner that would be verifiable by investors or regulators[15]. More specifically, for cases in this category, opportunities for crime arose from the actions of corporate officers and employees; concealment was achieved through misrepresentations and disclosure violations.

Figure 4.2: Low Opportunity/Low Concealment (Case 9)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken. The triangle denotes an asset.

[Company K] "failed to disclose material changes in its affairs", and it issued a "false and misleading" information circular, quarterly report, and news releases[16]. The company was a failing oil and gas business; its president [R] made two attempts to recoup his investment: (a) turning [Company K] into a clean shell company, and creating two more shells, [Company G] and [Company R] to sell; and when this plan was blocked by the Alberta Stock Exchange, (b)

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[14] For each cell category, the number of crimes involved is followed in parenthesis with the number of cases in the category. Recall that Table 4.1 represents 92 crimes extracted from 76 cases.

[15] The discussion of each category in the opportunities/concealment table (Table 3) begins with the definition of that category to aid recall.

[16] BCSC Decisions & Orders, March 4, 1995 (no page number). Note some of the regulatory documents quoted in this chapter contain non-standard grammar and word omissions. The documents were not corrected to maintain the import of the originals.

selling [Company K] to [P]. In the BCSC's report, "each of the directors ([B], [S], and [T]) was warned that his or her suitability as a director was in question as a result of the attempts to sell [Company K]"[17].

This case was classified as low opportunity because this was a legitimate business where the actions of the directors created the opportunity for crime; "[T], [S], and [B], as directors of [Company K], each had a duty to act honestly and in good faith and in the best interest of [Company K]" [18]. Their "blind reliance on another director [R] …is no excuse for dereliction of this duty"[19]. It was classified as low concealment because [Company K] had come to the attention of the market regulators early in the history of the business due to irregularities in the original *prospectus* (i.e., a legal document detailing the investment for sale). Concealment was also limited because [R]'s only additional attempt to cover the crime, besides misleading statements, was to "use the bidding process in an attempt to create a paper [trail] to defend his loss of the leases (the oil and gas well, the major asset of [Company K])"[20].

Similarly, in Cases 28, 59, 67, and 71, the corporate officers also did not carry out their duties responsibly. In Case 28, "[CH] borrowed significant amounts…on behalf of [Company D] the majority of these loans have not been repaid as originally promised"[21]. In Case 59, "it seems that neither [L] nor [J] has significant experience in the capital market…before [Company KC] began selling securities…We have no evidence of [Z]'s experience"[22]. In Case 67 the officers of [Company R] "acquiesced in [Company R]'s contraventions", including that it would earn "revenue of $5.38 billion" when [Company R] "had not commenced commercial production", "earned any revenue", or "negotiated any contracts for the sale of its [product]"[23]. And in Case 71, in the opinion of the regulators, "[S] has been recommending…the use of leverage in client accounts without regard to his obligation of suitability and for the purpose of increasing his own commissions"[24].

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[17] BCSC Decisions & Orders, March 4, 1995 (no page number)
[18] BCSC Decisions & Orders, March 4, 1995 (no page number)
[19] BCSC Decisions & Orders, March 4, 1995 (no page number)
[20] BCSC Decisions & Orders, March 4, 1995 (no page number)
[21] NBSC Motion, December 5, 2011 (no page number)
[22] ASC Decision, August 26, 2010 (paragraphs 29, 31)
[23] BCSC Decision & Orders, January 30, 2009 (paragraphs 14, 6, 8)
[24] NBSC Reasons for Decision on Hearing and Review, June 28, 2012 (pg. 6)

As in Case 9 (the reference case), *misrepresentations* were also made in six additional cases. Misrepresentations create opportunities for crime because potential investors are not being given correct information regarding the nature of the investment. In Case 38, a real estate development, the corporate officials claimed to have completed several successful projects, when, in fact, they had not. In Case 29, another real estate development, investors were told they would be receiving a guaranteed rate on their investment but "in using the term 'guaranteed rate' they [the company representatives] had meant to convey the fact that the interest rate was 'fixed' but … acknowledge that the use of the term 'guaranteed rate' was potentially misleading"[25]. In Cases 40, 50, and 74, the misrepresentation took a different form: no *prospectus* was filed for the company in Cases 40 and 50, and in Case 74, the receipt had not been issued by the regulator.

Case 57 illustrates opportunity for concealment when the companies involved failed in their obligations to the markets due to corporate policy. To prevent the companies that were raising the capital for a mining venture from making trades based on insider information, an information barrier meant to prevent conflict of interest was created to restrict access to assay information that was relevant to investors: "[Companies] had an obligation …to make timely disclosure of material changes in their affairs" and "ought to have made disclosure of certain drilling results prior to granting or repricing options"[26]. The information barrier "did not relieve [them] from this obligation"[27].

Two cases did not involve misrepresentation, reflecting instead failure to protect the market. In Case 56, [Company C] failed to comply with trading supervision obligations because it missed suspicious trades by two of its clients: the clients RRSP accounts showed "growth was completely out of proportion to normal market returns"[28] that year. The *red flags*[29] for suspicious trading were not picked up through company monitoring procedures perhaps because the branch manager in charge of reviewing trades had delegated the task to an assistant manager. In Case 75, [Company B] failed to enter a cease trade order into its database, as a result, two

[25] ASC Settlement Agreement & Undertaking, August 20, 2009 (paragraph 24)
[26] BCSC Decisions & Orders, November 16, 1990 (no page number)
[27] BCSC Decisions & Orders, November 16, 1990 (no page number)
[28] Market Regulation Services Inc. Offer of Settlement, December 21, 2004 (paragraph 57)
[29] Market Regulation Services Inc. Offer of Settlement, December 21, 2004 (paragraph 10)

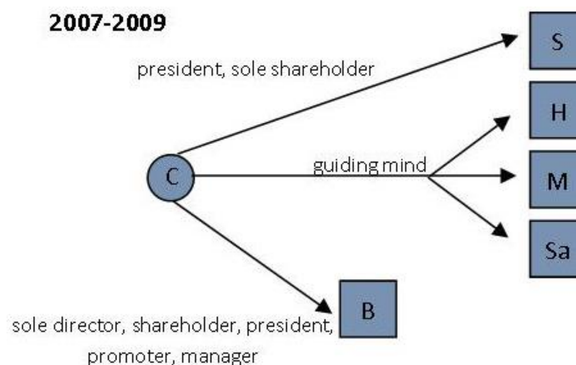
traders traded in blocked securities. In case 56, a failure in company procedures concealed the crime; in case 75, the failure in procedure created the opportunity for crime.

The final case, Case 42 in this category, was somewhat different. [C], a director and officer of [Company C] and [Company M], acquired material knowledge about [Company C] and sold shares through [Company M]. The OSC was satisfied that "it was [C]'s honest belief as to the materiality of the information"[30]. In other words, [C] made (possibly inadvertent) insider trades through his second company. (This case appears to represent individual-level insider-trading, trading which was not to be considered in this research; however, the presence of a second company associated with the insider trade indicated the case was within the purview of the present research.)

4.2.2 Medium Opportunity/Low Concealment

There were 12 crimes (11 cases) in this category. Case number 41 (see Figure 4.3) was the representative case. Medium opportunity crimes denoted legitimate companies with a clear means available for crime; as mentioned earlier, low concealment crimes, companies operating in a manner that would be verifiable by investors or regulators. More specifically, for cases in this category, the actions of corporate officers and employees created opportunities for crime (but unlike 4.2.1, these crimes are frauds). Concealment was achieved through misrepresentation and disclosure violations.

Figure 4.3: Medium Opportunity/Low Concealment (Case 41)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

[30] OSC Reasons, December 12, 2003 (paragraph 44)

In this case, the regulators found that [Company B]'s [offering memorandum] "misrepresented how investors' money would be applied" thereby depriving investors of their investment[31]. The conduct of [C], [Company B], and [Company S] was fraud. [C] used funds raised for one development, [Company B], to fund her other developments/companies, [Companies S, H, M, and Sa] or to fund projects associated with the companies of family members.

The case was classified as medium opportunity because the president had multiple real estate projects to develop, so even though the investment money was allocated for one real estate project, the funds could easily be allocated to other projects without the knowledge of the investors: "we believe [C] [sees] the function of the investors… was to hand over money…for her to spend as she saw fit, on whichever of an ambitious array of projects happened to catch her eye and need some funding at any particular time"[32]. It is low concealment because the regulators accepted that the real estate developments were genuine, "our belief [is] that [C]…truly did think she could pull it off…[to] successfully juggle all the development projects…generate profits…and deliver a return"[33].

The competency of the individuals involved was highlighted as integral to creating opportunities for crime, particularly as five of these cases were frauds. In Case 41, [C] was described variously as "hav[ing] imagined herself capable of running all these ventures successfully, attach[ing] no importance to making … truthful disclosure[s] to the investing public, and seems to have overestimated her own abilities"[34]. In Case 73, [S] "did not have the skills necessary to take the company public" and "had patents and technology that could have been a successful business in more capable hands"[35]. In Case 60, the CEO was "driven by self interest in meeting a personal financial need and used his position to dominate others in relation to financial compliance"[36].

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[31] ASC Decision, December 6, 2011 (paragraph 119)
[32] ASC Decision, March 5, 2012 (paragraph 42)
[33] ASC Decision, March 5, 2012 (paragraph 62)
[34] ASC Decision, March 5, 2012 (paragraphs 43, 44)
[35] BCSC Hearing, December 13, 2012 (paragraphs 11, 16)
[36] Investment Dealers of Canada Association Reasons for Decision, 2007 (pg. 50)

One difference in this category compared to 4.2.1 (low opportunity/low concealment) was that the corporations had ties to other jurisdictions. Cases 13, 30.1[37],30.3, 31.3[38], 41, 64, and 65 had ties to the United States; in Case 78, earnings were transferred to companies in Hong Kong. In Case 65, [Company N] was incorporated in the U.S. and registered with the SEC, but had significant connections with British Columbia" (i.e., BC mailing address and use of BC securities law firm)[39].

There were two outlier cases in this category, Case 13 and Case 46. In Case 13, [Company E] sold securities "in reliance on the accredited investor exemption"[40]. The accredited investor exemption means that a *prospectus* does not have to be filed when selling securities because the investor can find the information to evaluate the particular security and can afford the loss of the entire investment. Accredited investors can be individuals with high net worth or experience in the financial industry or institutions, like governments or pension funds. The regulators found no evidence that any of the investors in [Company E] qualified for the exemption. Hence, this case was classified as medium opportunity because using the exemption eliminated the need for a prospectus thereby creating a clear opportunity for crime. This case is low concealment because the company filed legal documents supporting accredited investor statement.

In Case 46, [Company M] was having difficulty interesting brokers in a takeover bid. When the directors found discarded trading records from a brokerage firm in the building elevator and trash, [Company M] used the inappropriately obtained records to create a computer database of potential clients to call, a violation of the regulations with respect to calling residences for the purpose of selling securities. This case was classified as a crime of opportunity, for [Company M] representatives stopped calling residences after brokers began complaining about the soliciting of their clients.

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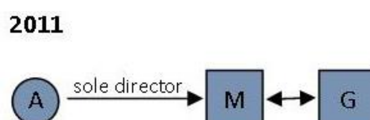
[37] There are two corporate financial crimes attached to Case 30 (30.1 and 30.3). Note: the designation 30.2 was for a personal financial crime.
[38] There are two corporate financial crimes attached to Case 31 (31.2 and 31.3). Only 31.3 was classified as medium opportunity/low concealment. Note: the designation 31.1 was for a personal financial crime.
[39] BCSC Decision, October 27, 2005 (paragraph 8)
[40] ASC Decision, May 31, 2007 (paragraph 3)

Interestingly, in Case 46 the reference to a "computerized list of individuals" was one of the earliest (i.e., 1989) references to computer technology among the cases under consideration[41]. In Case 65 (2000), [Company N] electronically distributed a press release concerning the company's plan to acquire [Company E]. This spam emailing, sent to approximate 15 million email addresses, was described as an *equity blast* – again, an early phrasing regarding the use of technology not noted in any subsequent discussions of email mass mailings or spam[42].

4.2.3 High Opportunity/Low Concealment

There was 1 crime (1 case) in this category, Case 62 (see Figure 4.4). High opportunity crimes denoted companies with no legitimate business purpose; low concealment crimes, companies operating in a manner that would be verifiable by investors or regulators.

Figure 4.4: High Opportunity/Low Concealment (Case 62)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

The sole director of [Company M] and its unincorporated subsidiary [Company G] "knowingly [made] false statements during an attempted fraud"[43]. This case was classified as high opportunity because [Company G] was created to defraud investors; [Company G] was not incorporated. It had no offices, employees, or financial resources and was considered low concealment because the advertisements for its services were posted to Vancouver's Craigslist website (*Craigslist* is similar to the classified section of a newspaper), which the BCSC was monitoring. The advertisements for [Company G] claimed, for example, that (a) "leading Wall Street investment firms …trusted [it] to manage their assets", (b) "investors [had] committed over $4.2 billion", (c) average returns of 257% per annum, and (d) that [Company G] had

[41] BCSC Decisions & Orders, February 2, 1989 (no page number)
[42] BCSC Findings, June 22, 2005 (paragraph 41)
[43] BCSC News Release, October 17, 2012

‘partnered with the World Bank and IMF”. Additionally, there would be “absolutely no risk” to investing[44].

4.2.4 Low Opportunity/Medium Concealment

There were 3 crimes (3 cases) in this category; Case 44 is representative (see Figure 4.5). Low opportunity crimes denoted legitimate companies without a clear means for the crime; medium concealment, companies operating in an ineffective or flawed manner to make it difficult for the regulators to intervene. More specifically, for cases in this category, corporate practices created the opportunity for crime and concealed the crime.

Figure 4.5: Low Opportunity/Medium Concealment (Case 44)

Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

In this case, [Company R] contravened rules concerning “client priority”, “client consent”, “order marking”, and “audit trails on numerous occasions”; the company “failed to comply with its trading obligations”[45]. This failure occurred because “[Company R]’s institution trading supervision and compliance system was not reasonably designed at any level to prevent and detect these violations”[46]. “The Manager of Compliance at [Company R] used a flawed methodology to test for client priority issues”[47]. This case was considered low opportunity because [Company R] had a compliance system to stop violations. It was medium concealment because the system itself masked the violations.

Corporate practices creating the opportunity for crime were also found in Case 77. “[Company N] has fail[ed] to maintain the required level of working capital, file[d] misleading financial statements and file[d] financial statements late”[48]. This too was low opportunity because the

[44] BCSC Decision, October 15, 2012 (paragraph 11)
[45] Market Regulation Services Inc. Discipline Notice, June 30, 2006 (pg. 2)
[46] Market Regulation Services Inc. Discipline Notice, June 30, 2006 (pg. 3)
[47] Market Regulation Services Inc. Discipline Notice, June 30, 2006 (pg. 3)
[48] OSC Settlement Agreement, February 9, 2001 (paragraph 6)

regulators were monitoring [Company N] and noted when it “failed to comply with terms and conditions imposed on its registration”, including filing certain financial documents monthly[49].

The third case in the category was unlike the other two. In Case 51, [Company I] “trades in securities of two hedge funds…by posting an offering memoranda…on a website”[50] with improper registration and relying on exemptions (e.g., accredited investor exemption) that do not apply. Although there was nothing in the case documents to confirm that the hedge fund was a fraud, the regulators were particularly concerned because the director [B] had a considerable number of criminal convictions for fraud across the country. Additionally, [B] had outstanding charges for fraud at the same time as his involvement in Case 51 and had incorporated [Company I] under a false name: “we have no hesitation in holding that [B] is not a fit and proper person to be involved in the securities business”[51]. And concerning [B]’s business partner [T], “although she does not have a criminal record…in a way she is ‘tarred with the same brush’” [as B] [52]. This case was classified as low opportunity because it was not clear from the documents exactly what had occurred; it was medium concealment because of the previous fraud convictions of the director and the false name used on the incorporation documents.

4.2.5 Medium Opportunity/ Medium Concealment

There were 12 crimes (11 cases) in this category. Case 16 is representative of this category (see Figure 4.6). Medium opportunity crimes denoted legitimate companies with a clear means available for crime; medium concealment, companies operating in an ineffective or flawed manner to make it difficult for the regulators to intervene. More specifically, for cases in this category, the repeated violations by corporate officers and employees were attributed to medium opportunities for crime. Concealment was achieved through misrepresentation, disclosure violations, and corporate activities occurring in multiple jurisdictions.

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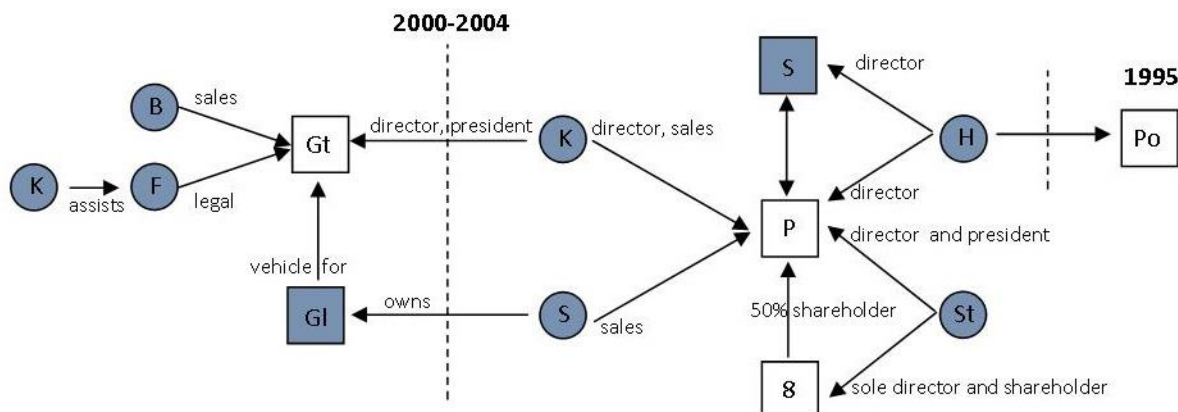
[49] OSC Settlement Agreement, February 9, 2001 (paragraph 14)
[50] SFSC Temporary Order, March 31, 2005 (no page number)
[51] SFSC Decision, May 11, 2006 (page 6)
[52] SFSC Decision, May 11, 2006 (page 6)

Figure 4.6: Medium Opportunity/Medium Concealment (Case 16)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

Case 16 profiles two individuals, [K] and [S], involved in two, very similar, corporate crimes at approximately the same time. In the first, [Company P] was distributing securities without a prospectus. The purpose of the distribution was to fund the expenses of [Company S]. In the second, "investors were instructed to send their money to [Company Gl]…in the guise of [Company Gl] investments in [Company Gt] and in the absence of registration, a prospectus, [or] prospectus exemptions"[53]. Regulators were concerned that small investments "funnelled through a conduit", [Company Gl], "give the false appearance that a single large investment was being made by a sophisticated investor"[54]. This case was considered medium opportunity because the investment capital raised by one company was transferred to another company. It was medium concealment because the investment projects were outside of Canada (i.e., Spain and U.S.). Note, there was also a personal financial crime involving [H] five years before the two crimes discussed here.

Cases 1, 2, 4, 20, 35, 37.2, 39, 48, and 63 mirror Case 16 in that there were (multiple) business ventures with repeated violations. Repeated violations suggest regular opportunities for crime exist. In Case 1, [Company C] failed to "fulfil their duties as registrants under the Act" despite two years of warning from the regulators to establish, for example, "proper compliance and supervision procedures"[55]. In Case 2, which contained two corporate crimes, one principle [A]

[53] ASC Decision, October 9, 2007 (paragraph 7)
[54] ASC Decision, October 9, 2007 (paragraph 18)
[55] BCSC Decision, November 8, 2002 (paragraphs 3, 4)

was involved in two different illegal distribution of securities schemes. In Case 4, regulators saw a pattern of activity from the directors and the company involved that was not in the investing public's interest[56]. In Case 20, representatives of [Company S] and [Company L] continued to call prospective investors from their offices in Mexico in contravention of two [regulator] Orders. In Case 35, one principle [H] who had been disciplined "for inappropriate trading advice and excessive trading commissions" in 1997 was involved in a lawsuit for fraud with a second company in 2001, and, then, in 2009, was cited for misrepresentations[57]. In Case 39, the de facto director's background led the regulators to conclude "that the [product] story is one he has pitched in the past and unless stopped will continue to pitch in the future"[58]. In Case 48, having been told that [Company C] was in violation of the act, the owner/operator [E], in a fax to the [regulator], stated "we have temporarily suspended any operations that might be subject to OSC regulations"[59]. The regulators monitored [E]'s behaviour and found [E] was still in violation of the act. In Case 63, the company involved was selling securities without registration or a prospectus and "then all of the respondents breached the temporary orders"[60]. And in Case 37.2, two of the three individuals involved in a Ponzi scheme had been sanctioned previously for both individual financial crimes and corporate financial crimes. (The Ponzi scheme is considered in a later section of this chapter.)

The one remaining case in this category, Case 58, presented unique features that created medium opportunity: an investment product that neither the salesperson nor the investors appeared to fully understand. A real estate development company illegally distributed securities that were *undivided interests* (UDI) in the development project, a type of investment the salesperson [R]'s "grasp of...[was] less than solid" and so too were the investors': "most did not seem to have a clear understanding … of exactly what they were buying"[61]. As the investors did not understand the investment and [Company T] did not file a preliminary prospectus or a prospectus, the opportunity for crime was classified as medium. Concealment was also medium because the individuals involved solicited funds from family, friends, and church members. Further, "the

[56] BCSC Decisions & Orders, November 25, 1988 (no page number)
[57] NBSC Settlement Agreement, 2010 (paragraph 5)
[58] BCSC Decisions & Orders, December 17, 1999 (no page number)
[59] OSC Reasons for Decision, July 25, 2002 (paragraph 6)
[60] BCSC Decision, March 20, 2006 (paragraph 19)
[61] ASC Decision, February 9, 2011 (paragraphs 30, 55)

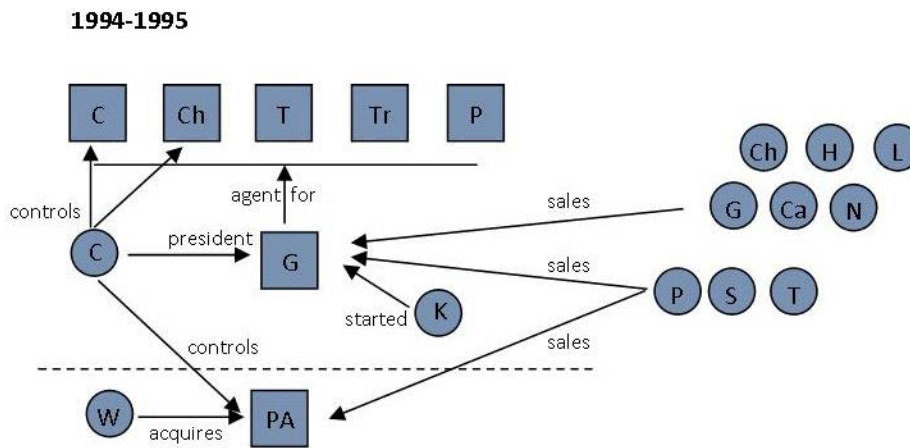
presence on the [Company T] board of directors of some prominent area individuals was seen as a further indication of credibility”[62].

4.2.6 High Opportunity/ Medium Concealment

There were 15 crimes (10 cases) in this category; Case 14 is representative (see Figure 4.7). High opportunity crimes denoted companies with no legitimate business purpose; medium concealment, companies operating in an ineffective or flawed manner to make it difficult for the regulators to intervene.

This category contains two cases (Cases 24 and 66) which are unlike other cases, high opportunity or otherwise. That is, the corporations involved are legitimate businesses, but stressors were placed on employees, stress that was considered motivational. The cases were classified as high opportunity because the employees were highly motivated to reduce stress.

Figure 4.7: High Opportunity/Medium Concealment (Case 14)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

Case 14 contained two corporate financial crimes. In the first, [Company G] and the associated companies illegally distributed foreign exchange (*forex* or currency market) contracts; that is, the company acted as an agent for the other companies. And in the second, after [Company G] was shut down, president [C] operated a clandestine and fraudulent forex contract trading operation, [Company PA]. This case was classified as one of high opportunity because [Company G] was

[62] ASC Decision, February 9, 2011 (paragraph 55)

dealing in forex contracts for two years before the BCSC "concluded that trading in forex contracts constituted trading in securities and therefore required registration"[63]. It is medium concealment because the concealment originated from one individual. The president [C] "concealed from employees, account executives and clients of [Company G] that he [also] controlled [Company C]" one of the foreign forex dealers for which [Company G] served as an agent[64]. [C] also took "steps to ensure his activities were difficult to detect by keeping virtually no client or company records"[65]. And, again, in the case of [Company PA], [C] was concealing the misappropriation of investor funds.

In this category, all the cases were primarily frauds. They were categorized as high opportunity because the sole purpose of these businesses was to provide opportunities to commit financial crime. They were medium concealment because concealment was generally restricted to misrepresentations and poor record keeping. Case 19 was a stock manipulation scheme where trading was manipulated for three companies by means of 13 brokerage accounts. In Case 31.2 "[Company E] encouraged investors, many of whom were unsophisticated, to trust [Company E]"[66]. In Case 61, two companies illegally sold securities to Canadian and American investors and misrepresented the nature of the investment. In Case 69, [Company C] claimed in the offering memorandum to be a hedge fund; the company committed fraud because it used most of the money for other purposes. There was no evidence that [Company R] "was a legitimate business enterprise or that investors would recover their investment" in Case 70[67].

Two cases involved corporation-employee relations as the source of the opportunity for crime. In Case 24, four traders were manipulating stock prices through artificial bids, trades that were not picked up by supervisors. [Company T] "failed to comply with its trading supervision obligations"[68]. The regulator noted that this case was "not a typical stock manipulation case" for two reasons[69]. First, [Company T] traders were made aware of the expectation of 6 million dollars in revenue from the trading office. Second, the trader's conduct was subtle – "day after

[63] BCSC Decisions & Orders, April 4, 1997 (no page number)
[64] BCSC Decisions & Orders, April 4, 1997 (no page number)
[65] BCSC Decisions & Orders, April 4, 1997 (no page number)
[66] BCSC News Release, February 18, 2000 (no page number)
[67] BCSC News Release, June 22, 2011 (no page number)
[68] Investment Industry Regulatory Organization of Canada, Reasons & Decision, April 30, 2011 (paragraph 394)
[69] Investment Industry Regulatory Organization of Canada, Reasons & Decision, April 30, 2011 (paragraph 78)

day … the [traders] made closing bids … with the intention that the bids would not trade but instead would stand as the closing bid at the end of the trading day thereby increasing the value of their inventory positions… and increasing their compensation and access to capital”[70].

In Case 66, an employee [M] made a mistake that resulted in a loss for a client. [Company L] and the *Ultimate Designated Person*[71] [P] refused to assist [M], “thus leaving him solely in charge of dealing with this complaint and to bear the costs on his own”[72]. [Company L] and [P] “wait[ed] until [M] had sufficient funds to pay on his own the cost of the settlement, before proceeding to cancel the transactions in question and compensate the client”[73]. That is, the client would not be compensated until [M] personally produced the settlement money. Pressured by the client and [Company L] to raise the money, [M] committed fraud. (The fraud was not detected by [Company L] or [P].) In both cases, the opportunity for crime arose from possible stressors placed on employees: in Case 24, corporate revenue expectations, and Case 66, costs of an error. The concealment was the same in both cases; internal supervision systems did not detect the crime.

There was one outlier case in this category, Case 12 (see Figure 4.8). The opportunity for crime and concealment was the same as the other cases in this category. What sets this case apart from the others was the size: it included six corporate crimes and two personal crimes (not pictured) and involved 39 disciplined persons and 11 companies. The crimes were linked together through the actions of 6 key individuals; the corporate crimes identified were misleading investors, using high pressure sales tactics, and fraudulent investment schemes.

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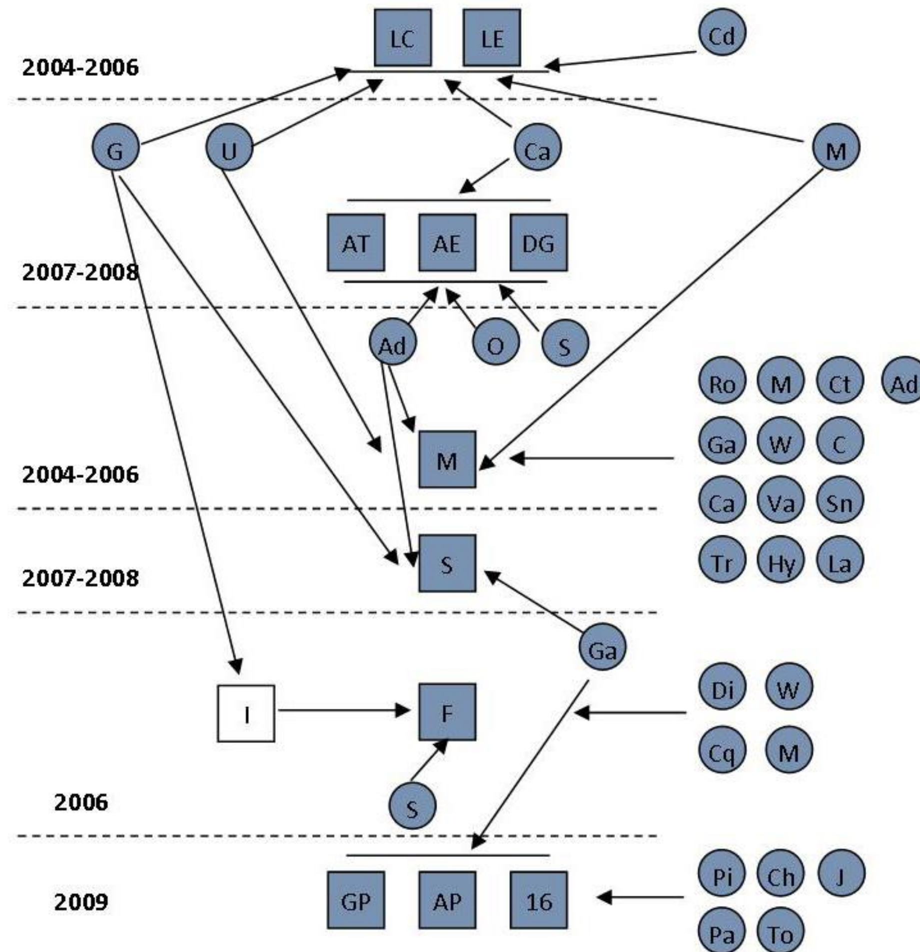
[70] Investment Industry Regulatory Organization of Canada, Reasons & Decision, April 30, 2011 (paragraph 78)
[71] The role of the ultimate designated person within a company is to oversee the company’s compliance system, as required under the particular securities Act.
[72] Investment Dealers Association of Canada Notice of Hearing and Particulars, May 30, 2003 (paragraph 10)
[73] Investment Dealers Association of Canada Notice of Hearing and Particulars, May 30, 2003 (paragraph 12)

Figure 4.8: High Opportunity/Medium Concealment (Case 12)

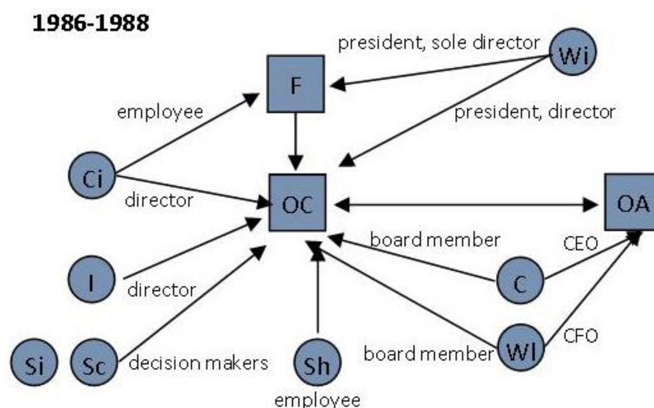


Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

4.2.7 Low Opportunity/High Concealment

There was 1 crime (1 case) in this category, Case 15 (See Figure 4.9). Low opportunity crimes denoted legitimate companies without a clear means for the crime; high concealment, companies operating in a manner that made it difficult for the regulators to intervene.

Figure 4.9: Low Opportunity/High Concealment (Case 15)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

In this Case, the activities of [Company OC] were misrepresented and [Company OC] failed to disclose material information. Further, there were "irregularities in the exercise of director and employee options"[74]. The case was focused around the relationship between American [Company OA] and Canadian [Company OC] -- a shell company trading on the VSX originally used to raise the capital for [Company OA]. The misrepresentations by [Company OC], [Company OA] and [Company F] (which provided administrative services) created the impression that [Company OA] had a fully operational production system with millions of dollars in potential sales when, in fact, the company did not have this potential and ultimately collapsed. It was low opportunity because there was a legitimate business trying to raise capital for its product. It was high concealment because two jurisdictions were involved, the United States and Canada, and two regulators, the American Securities and Exchange Commission (SEC), and the British Columbia Securities Commission (BCSC).

4.2.8 Medium Opportunity/ High Concealment

There were 7 crimes (4 cases) in this category. Case 5 is representative of this category (see Figure 4.10). Medium opportunity crimes denoted legitimate companies with a clear means available for crime; high concealment, companies operating in a manner that made it difficult for the regulators to intervene.

[74] BCSC Decisions & Orders, December 19, 1989 (no page number)

Figure 4.10: Medium Opportunity/High Concealment (Case 5)

Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

In Case 5, there were four similar corporate crimes. Between 2001 and 2002, [Company G] acted "contrary to the public interest by failing to disclose in the required time as a material change in its business that [Company G] (through its subsidiary) would not acquire rights to [Company GK]"[75]. Between 2004 and 2005 no prospectus was filed and prohibited representations were made about American [Company I] to Canadian investors. Between 2006 and 2008 the "officers traded and distributed securities of [Company C1] or [Company C2] (or both) … [and some officers made] misrepresentations or contravened a … cease-trade order"[76]. [Company D] solicited investors for [Company C1]. "[Company CA] provided management services to [Company C1] and was the general partner of [Company C2]" [77]. There was a cease-trade order given to [Company C1] which prompted a transfer of investment funds to a successor vehicle [Company C2] [78]. And in 2004 [L], [Company L], and [Company LF] distributed shares "without registration, without a prospectus, and, in some cases, in purported reliance on

[75] ASC Decision, January 25, 2008 (paragraph 88)
[76] ASC Decision, August 13, 2008 (paragraph 1)
[77] ASC Decision, August 13, 2008 (paragraph 6)
[78] ASC Decision, August 13, 2008 (paragraph 22)

…exemptions…and distributions to 'accredited investors' [who]… did not qualify as such of [Company E]"[79]. This case was considered medium opportunity because these were legitimate businesses that failed to follow the rules of securities distribution. It is high concealment because three of the crimes had foreign ties, and with respect to the 2006-2008 case, considerable effort was made to circumvent the regulators.

The cases in this category all involved crimes where there was significant attempt to conceal activities or circumvent regulators. In Case 18, for acting contrary to the public interest, selling securities without a prospectus and without being registered, [Company 5] was advised by the Saskatchewan regulators to refund Saskatchewan investors. The investment money, $1.5 million, was placed in a trust account. Then, surprisingly, [P] facilitated the reinvestment of $1.3 million from the Saskatchewan investors to [Company 5] using out-of-province addresses on the share purchase documents.

In Case 27, [Company U] "failed to develop and implement adequate compliance systems to ensure effective supervision of activity at the firm"[80]. Of particular interest to the present research was [Company U]'s response to the IIROC industry wide notice that "if they [member companies] were not registered in the US jurisdiction where a client resided and were not eligible for exemption with that jurisdiction they must close the account by …2002"[81]. Although [Company U] closed the accounts held by Americans, it also informed its American clients to incorporate in the Yukon, so they could continue to do business with [Company U], for "at the time Yukon was unique in that there was no residency requirement for the directors of a Yukon corporation"[82].

The final case in this category was Case 31.1. [Company E] and its corporate officers traded and distributed securities without registration or filing a prospectus, made misrepresentations, and committed fraud: "investors were seriously misled about the nature of their investments, the level of risk associated with the investments and how their money was being invested and spent"[83]. It was medium opportunity because the company was funding mortgages and real estate using

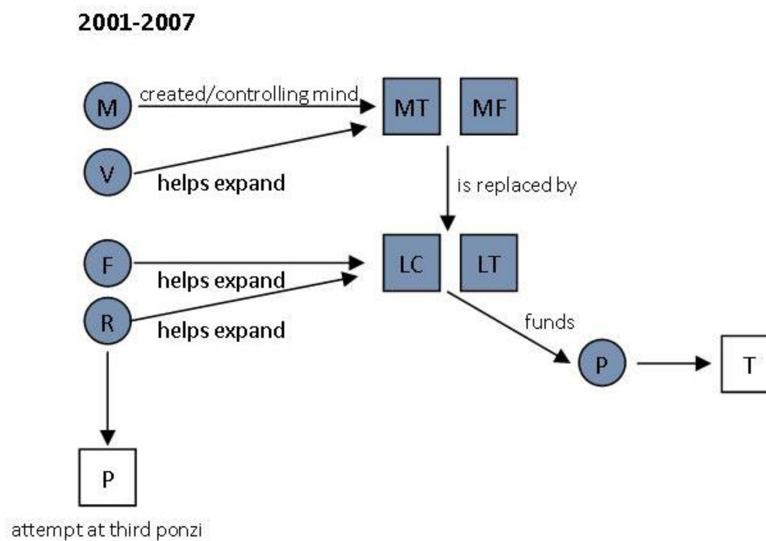
[79] ASC Decision, February 7, 2008 (paragraph 7)
[80] Investment Industry Regulatory Organization of Canada bulletin, April 18, 2006 (no page number)
[81] Investment Industry Regulatory Organization of Canada bulletin, April 18, 2006 (no page number)
[82] Investment Industry Regulatory Organization of Canada bulletin, April 18, 2006 (no page number)
[83] BCSC Decisions & Orders, February 18, 2000 (no page number)

funds from unsophisticated investors, investors who did not consider misrepresentations, like promises of 15% return in 6 months, as cause for concern. It was high concealment because the regulators attached considerable responsibility to the actions of the president, [S] who "knew everything that was going on at [Company E]; he insisted on tight control over all aspects of [Company E]'s business"[84].

4.2.9 High Opportunity/ High Concealment

There were 23 crimes (21 cases) in this category; Case 26 was representative (see Figure 4.11). High opportunity crimes denoted companies with no legitimate business purpose; high concealment, companies operating in a manner that made it difficult for the regulators to intervene.

Figure 4.11: High Opportunity/High Concealment (Case 26)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

Case 26 was a Ponzi scheme. Note, there were four entities involved (MT, MF, LC, LT) in the scheme "but in reality [there was] a single sham investment scheme…referred to as the [Company M] scheme"[85]. Investors thought they were dealing in an investment club and that their money would be placed with "experienced traders who had a long history of producing

[84] BCSC Decisions & Orders, February 18, 2000 (no page number)
[85] BCSC Findings, August 4, 2009 (paragraph 11)

double-digit monthly returns through foreign currency trading"[86]. Instead, "[Company M] fraudulently used the investments of later investors to fund the promised returns to earlier investors, to pay commissions to the affiliates and consultants, to invest in an online gaming business…to buy real estate in Costa Rica…and enrich [the principles]"[87]. Some of the funds went to [P] for his business venture, [Company T]. This case was high opportunity because [Company M] was not a legitimate business; it was created to defraud. The case was high concealment because secrecy, in the form of non-disclosure agreements with investors, was part of how [Company M] operated: "the non-disclosure agreements…all required prospects to keep absolutely confidential any and all information about [Company M] for a five-year period"[88].

There were two other Ponzi schemes, Cases 3 and 37.1, in this category. Case 3 was an internet based scheme where the investors were led to believe that the company was involved in forex trading, but was not. Concealment was also a part of how [Company G] operated: it was incorporated in Panama and based in the American state of Nevada. In Case 37.1, investors took part in an asset growth program where they purchased (fictitious) "1st tier medium term banknotes, a business [the investors were told was] conducted by major banks all over the world, including Canadian banks, but kept a secret because the banks did not want to share this profitable business with 'ordinary people'"[89]. Prime bank instrument frauds are similar fictitious secret investment schemes; there were two such schemes in this category, Case 10 and 17. This type of fraud was connected by the regulators with technology: "the internet has greatly facilitated the proliferation of prime bank instrument frauds throughout the world" because those involved can "peddle their fraudulent investment scheme to anyone with access to their website"[90].

There were three market manipulations, Cases 11, 22, and 45. A market manipulation as described by the BC Securities Commission is "intentional or wilful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"[91]. In Case 22,

[86] BCSC News Release, August 7, 2009 (no page number)
[87] BCSC Findings, August 4, 2009 (paragraph 17)
[88] BCSC Findings, August 4, 2009 (paragraph 43, 44)
[89] BCSC Decision, February 20, 2008 (paragraph 24)
[90] BCSC News Release, November 21, 2001 (no page number)
[91] BCSC News Release, September 24, 1993 (no page number)

for example, the price of [Company A]'s shares on the Vancouver stock exchange was manipulated, so the stock could be sold at inflated prices to Ontario investors.

Three cases involved mining ventures, Case 6, 8, and 52. In case 6.1, for example, funds were raised for a gold mine in Oregon. Independent sampling of the site could not replicate the reported amounts of gold. Much of the investor funds went to pay for the lifestyle of the president, a man described by the BCSC as the "ultimate con man"[92].

Cases 21, 23, 33, 34, 49, 53, 54, and 72 were frauds based on misrepresentations. A commonality was the claim of high returns and very safe investments. In Case 21, the company claimed 20% annual returns; in Case 53, 3% monthly returns; in Case 49, a four year average of 25% annual returns. In Case 23, investors were told to expect rapid share price increases in their stocks. In Case 72 [Company C] convinced foreign investors to open accounts for the purpose of investing in low risk gold futures and forex. [Company C] went to considerable effort to appear legitimate, sending falsified account statements to investors and creating a *virtual office*; that is, [Company C] was listed on a building directory and when enquires were made, either by phone or in person, standard excuses (i.e., person they wanted to meet was out of town) were made. It is unclear what the misrepresentations were in terms of investment returns for Cases 33 and 34.

4.3 Considering the Research Question

How do corporations, corporate officers, industry, nation-state, regulators, technology and investors create the opportunity for corporate financial crime in Canada? The preceding review of the cases considered the degree to which the circumstances of each of the cases afforded the opportunity to commit and to conceal crime. In this section, the contribution of each of the aforementioned factors is discussed, beginning with the corporation.

4.3.1 Corporations

The ability to create multiple corporate entities and link them together across multiple jurisdictions created an opportunity for crime. There were 188 corporations named in the 76 cases; the average number of named corporations per corporate crime was 2 (range from 1 to

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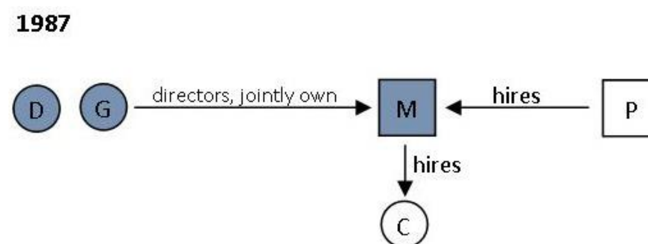
[92] BSSC News Release, February 14, 1997 (no page number)

11). Fifty-six of the corporate crimes occurred in one Canadian jurisdiction; 36 in more than one jurisdiction (range from 2 to 4 jurisdictions). Of the 50 international level crimes, 30 took place in one other jurisdiction (range from 1 to 7 jurisdictions).

These opportunities emerged in one of three ways: a company could act as a market intermediary for another (e.g., buying/selling of securities on behalf a second company) or take advantage of the general business relationship (e.g., hiring another company or owning another company); the decisions of the controlling person(s) could direct the actions of the corporation; and a company could take over the operations of another company which had come to the attention of the regulators.

The majority of cases involved corporate intermediaries: buying/selling securities (19 corporate crime cases) or general business relationships (26 corporate crime cases). *General business* was a broad term for any regular activities between two corporations: (a) hiring another company, for example, for administrative work (e.g., Case 15) or as a consultant (e.g., Case 2), (b) transfers between a parent corporation and its subsidiaries (e.g., Case 20), and (c) interactions where one corporation had (partial) ownership of another (e.g., Case 38). Case 46 (see Figure 4.12) is an illustrative example of an intermediary type of corporate crime:

Figure 4.12: Corporations with intermediaries (Case 46)



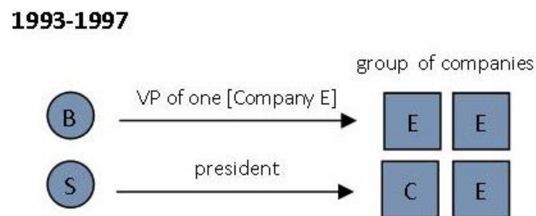
Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

In this example, [Company P] hired [Company M] to provide public relation services for [Company P]. [Company P] wanted to raise $27 million to finance a take-over of another company, and [Company M]'s job was to contact financing companies and brokers on their behalf. [Company M] subsequently hires [C] to conduct the promotion. However, the promotion was not particularly successful and [C], under direction from [D] and [G], began calling

investors directly (i.e., cold calling). These "cold calls" were a violation of the provincial Securities Act, but the actions of the hiring company [Company P] were not considered violations of the Act.

The second most prevalent type of crime opportunity -- the decisions of the corporate officers directed the illegal actions of the corporation – was represented by 44 cases. This category highlights the control the officers had over the actions of the corporation. For example, in Case 31.2 (see Figure 4.13), "the [president] saw … the companies were all his, he was entitled to his share of the brokerage fee, it mattered not whether the funds flowed to the projects first so a proper accounting could be made"[93].

Figure 4.13: Corporations and Corporate Officers (Case 31.2)

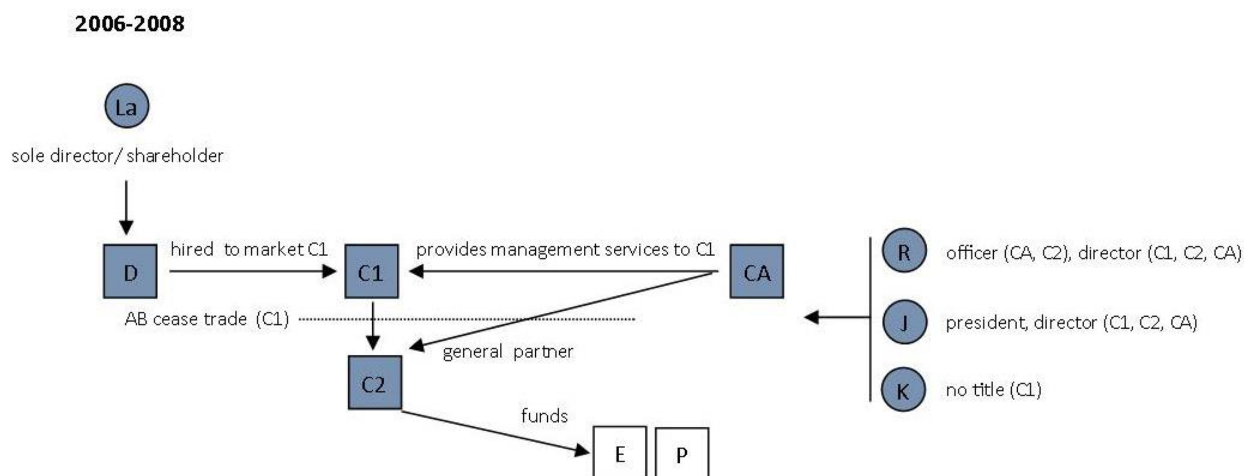


Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

There were three cases in which a company took over when one company came to the attention of the regulators. In Case 5.3 (see Figure 4.14), funds from one company under a cease-trade order were transferred to a second to allow the "investment program" to continue operating.

[93] BCSC Decisions & Orders, November 26, 1999 (no page number)

Figure 4.14: Corporations transfer operations (Case 5.3)



Note: Squares denote companies, circles denote individuals, and shading that disciplinary action was taken.

In this case, an Alberta cease trade order did not stop the operations; instead, the funds from [Company C1] were transferred to another [Company C2] (a limited partnership) and the operations continued, for example, a transfer of funds to [Company E] and [Company P]. [Company C1] was marketed as an investment program but was not registered to sell securities in Canada and did not file a prospectus. When the Alberta interim order banned all trading and selling of [Company C1] securities, the principles [R] and [J] transferred the investment money to [Company C2].

The second aspect of the data to consider is concealment. Concealment occurred through multiple joint-ventures, partial ownership, subsidiaries, and corporate investments in other entities. Consider again case 5.3 discussed above; operations were concealed when [Company C2] took over from [Company C1]. In Case 8, "the facts of this case are complex, involving a tangled web of corporate and personal relationships and a complicated flow of investor and corporate money. Indeed, we are of the view that some of this complexity was aimed at obscuring or concealing certain conduct by the Respondents"[94].

Another form of concealment was poor record keeping as in Case 41: "the books and records were sufficiently deficient as to 'significantly' prolong its investigation, and even then, some

[94] ASC Decision, March 30, 2012 (paragraph 33)

banking and financial information was missing a 'significant payments' had yet to adequately explained"[95].

4.3.2 Corporate Officers/Employees

Fifty-six percent of disciplined persons were senior officers, board members, or shareholders, supporting the earlier argument that corporate financial crime involves senior management. (*Shareholders* are included here because in all but one case (Case 31.3, person [E]), shareholders had additional official roles within the corporation or with case related corporations.) It seems the exploitation of personal connections among these individuals provided opportunities for crime. Although not all cases included a discussion of what, if any, particular personal connections corporate officers took advantage of, the regulators appeared to have an interest in highlighting these connections. In Case 23, "the trust placed in them by the clients they brought into [Company E], largely their own family and friends, doubtless made it easier for them to promote the [investments]"[96]. In Case 58, "[investor] seemed so convinced of [R]'s honesty as to deny the possibility that [R] could have told an untruth"[97]. And even after the regulators began investigating a company and its officers, the personal trust remained; for example, from Case 1, "several clients wrote letters expressing their support of [B] and [L], their belief in their honesty and integrity and their satisfaction with the investments and service. Many of them believed that "[B] and [L] would take care of them…if only the [regulator] would stop interfering"[98]. In several cases (see, for example, Cases 1, 23, 37, 53 and 58) the personal relationships of church members were used to support investment soliciting of the congregation. Other groups, such as a chiropractor's patients and an investing class hosted by the Vancouver school board, were also solicited using the same tactic (see Case 6).

Corporate officers/employees often had a history of involvement in previous corporate financial crimes, personal financial crimes, and criminal code violations (for fraud). There were 76 cases involving 276 disciplined people; 49 people had committed additional financial crimes. Committing crimes in other regions, such as outside of Canada, was treated as relevant

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[95] ASC Decision, December 6, 2011 (paragraph 74)
[96] BCSC Decisions & Orders, March 20, 2000 (no page number)
[97] ASC Decision, February 9, 2011 (paragraph 53)
[98] BCSC Findings of the Commission, January 29, 2002 (paragraph 155)

information in the discourse. It appears this experience was an incentive for further wrong doing. For example, in Case 31, vice president [B] was sanctioned for his role in a fraudulent company (operating 1993-1997), but the regulators noted that [B] "was a young man and we do not believe it will service the public interest to permanently deprive him of career opportunities that will bring him in contact with participants in the public market"[99]. However, in 2002, [B], while still under a ten year ban on trading in securities and engaging in investor relations, managed a "phone room" selling securities to investors in Canada and the United States. In addition to violating the conditions of his ban, [B]'s "cold-calling" residences to sell securities was also a violation of the provincial securities acts. In another example, some documents made reference to investigations or convictions external to Canada. In Case 6 it was revealed that the president of a fraudulent mining venture "had left England several years previously in the wake of a seed-stock-gone-sour scandal surrounding a company called [Company]"[100].

4.3.3 Industry

Eighty percent of the corporate financial crime cases in the data set occurred in one of two industries: finance or mining (mineral, oil and gas), industries that present unique opportunities for crime and crime concealment. Participation in the finance industry requires specialized knowledge, which puts investors at a disadvantage, as does the introduction of sophisticated investment products, such as derivatives; this lack of investor expertise creates opportunities for crime. In Case 78, the company sold forex contracts, but "the manner in which business was conducted ensured that, on average, clients would lose money"[101]. The proliferation of investment products that few understand outside the industry creates an investment environment where fraudulent products are not readily detected; for example, *1st tier medium term banknotes* (Case 37), *prime bank instruments* (Cases 10 and 17), *bank purchase orders*, *promissory bank notes*, and *zero coupon books* (Case 10). Not only were investors unfamiliar with these products, so too were the regulators: "this case [Case 78] involves trading in securities in a form not previously dealt with by the [regulator]"[102].

[99] BCSC Decisions & Orders, February 18, 2000 (no page number)
[100] BSC Decisions & Orders, February 7,1997 (no page number)
[101] BCSC Decisions & Orders, June 7, 1995 (no page number)
[102] BCSC Decisions & Orders, June 7, 1995 (no page number)

The *mining, quarrying, oil and gas* industry created opportunity in a different way: all of the (legitimate) companies involved in this research were small and exploratory and needed to raise capital to fund their exploration activities. In this industry,

> you can look at 1,000 properties to find 100 worth spending a day on. Of those 100, you can do the next round of work to whittle it down to 10 that are worth a serious drilling job…and of those 10 maybe one of them will turn into a mine – *President of a junior exploration company* quoted in (MacDonald, 2002, p. 19)

This comment suggests the industry is inherently risky as most ventures will not turn into a revenue producing mine. Perhaps this explains why, in Case 52, when the principles had three different reports concerning the estimates of the gold deposits on a site, they preferred to use one that "present[ed] the best possible picture"[103]. When asked by the regulators why, the reply "was to put out a good news release or press release, I guess"[104].

4.3.4 Nation-State

The cases in the data that related to opportunity suggested inter-jurisdictional cooperation as a mechanism to coordinate regulation of corporations operating at a super-provincial level. This cooperation highlighted two features of the nation-state. First, in cases where the corporations operated in multiple provinces, reciprocal orders were issued in the secondary provinces. For example, in Case 70, the BCSC took enforcement action against [Company R] for selling securities over the telephone. However, because the company was calling residences in Alberta and Manitoba, as well as British Columbia, two additional orders were issued against [Company R]. The provincial regulators appear to accept the evidence and findings of their counterparts in other provinces.

Secondly, there was evidence of information sharing between provincial regulators and the American SEC. Some regulatory documents (e.g., Cases 1, 3, 49, and 52) referenced findings and actions of the SEC that the regulators felt were relevant to the crime in the province. For example, in Case 30, "in an effort to forestall further activities of this type, we direct Commission staff to provide copies of this decision to the relevant securities and mining

[103] BCSC Findings, June 26, 2012 (paragraph 68)
[104] BCSC Findings, June 26, 2012 (paragraph 69)

authorities in the United States"[105]. In Case 37, "Commission staff brought the results of its investigation to the attention of the SEC, which sought and obtained a court-ordered freeze of the [Bank] accounts"[106]. However, it was not apparent from this narrative that the inter-provincial and international cooperation was effective in reducing opportunities for crime.

4.3.5 Regulators

The regulators appeared to have some difficulty preventing sanctioned individuals from continuing to participate in the financial industry, thus inadvertently contributing to a disrespect for the law. In addition, when these disciplined persons (e.g., those with trading bans) were found to be violating the orders and continuing to work in securities, they remained unsupervised and able to continue misleading investors as well as challenging the credibility of the regulators (see previous discussion of recidivism in section 4.3.2).

One observation that emerged from the analysis was the nature of the relationship between the regulators and the corporate officers. The regulators highlighted many instances where the individuals involved seemed to disregard their authority: from Case 62, in response to an email concerning enforcement action by the regulator against [Company G], "frankly I could care less … enforce away, just another waste of taxpayer dollars" [107]; a voicemail from Case 77, when the CEO was ordered to send a notification letter to his company's clients: "I am not gonna be told how to word my letters. And let's make that clear... if you people are so irresponsible I have to take the action at a different level. So please leave me alone"[108]; and in Case 53, when the regulators commented that the sole director felt he was "not treated by the Commission with the level of respect and trust he desired"[109].

4.3.6 Technology

Technology was most often an accessory to crime. In most cases, technology did not change the substantive nature of the crime opportunity; in other cases, however, technology was used to create novel opportunities.

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[105] BCSC Decisions & Orders, January 20, 1998 (no page number)
[106] BCSC Decision, February 20, 2008 (paragraph 54)
[107] BCSC Decision, October 15, 2012 (paragraph 15)
[108] OSC Settlement Agreement, February 9, 2001 (paragraph 16)
[109] ASC Decision, May 11, 2011 (paragraph 21)

Consider that in Case 30, the "[Company] used the modern technology of the internet for an old-fashioned purpose…promoting its shares with outrageous misrepresentations"[110]. In other words, the opportunity for crime did not change. Examples of this included contacting investors over the telephone (e.g., "boiler rooms" or "phone rooms" of Cases 15, 19, or 34) versus contacting investors via email (e.g., Case 28 or 65). Websites represent a more passive but wide reaching way of connecting with investors (e.g., Case 10, 13, or 21). Regulators appeared cognizant, however, of the effects of technological change. In Case 30, from 1998, the regulators considered the ownership and intention of the content of websites:

> [Company AT] was responsible for the content of the Web site. [L] provided [Company S] with a diskette containing information in a word processing format. [Company S] converted it to the "hyper text" format used in Web sites. The site was easily accessed from British Columbia and contained nothing to suggest that it was not directed at investors in this province. The Web site displayed two telephone numbers, both in British Columbia… On this basis, we find that, in communicating to potential investors through the Web site, [Company AT] was engaging in investor relations activities[111].

In Case 10, from 2001, the regulators in some of the documents named the corporation's website (i.e., [Company].com) as a respondent. This was the only case found in the present study to specifically name the website as a respondent. This case highlights, however, how frauds like Ponzi schemes and prime bank instrument operations are facilitated by technologies such as the internet, websites, and emails: Case 10 involved hundreds of investors and $30 million USD in investment capital; Case 17, an unknown number of investors and $34 million CD; Case 26, 800 investors and $16 million USD. Additional SEC documentation suggested that Case 8 involved a Ponzi worth $300 million USD.

There was one other use of technology that did present new opportunities for crime: electronic trading platforms, such as over-the-counter bulletin boards (OTCBB) market (e.g., Cases 30, 43 or 45). The American National Association of Securities Dealers (NASD) oversees these regulated OTCBBs. There are no listing requirements on OTCBBs except, in some situations, to file financial information with the appropriate regulator (e.g., SEC). Micro-cap companies (low market capitalization) may not need to be registered with the SEC to trade on an OTCBB. Since there are no listing requirements, most of the companies trading are small and unstable; investing

[110] BCSC Decisions & Orders, January 20, 1998 (no page number)
[111] BCSC Decisions & Orders, January 20, 1998 (no page number)

on OTCBBs is considered risky. This means information about the companies is often limited. A common opportunity for crime occurs because the NASD also oversees the Nasdaq, so sales personnel may take advantage of investor confusion between NASD's OTCBBs, and the Nasdaq. For example, in Case 2, the company traded on the OTCBB but claimed to be listed on the Nasdaq.

4.3.7 Investors

In the literature review, two types of investors were considered, institutional investors (e.g., banks) and individual investors. The case documents focused exclusively on the latter investor type; no case documents dealt with institutional investors. The one source of opportunity that emerged from the cases was investor desire for low risk, high return investments, an investor preference that corporations used to their advantage. In Case 31, minimal or zero risk investments promised returns in 6-12 months of 15-24%; in Case 37, 6% return monthly; Case 39, 150% projected returns; Case 53, 3% monthly returns; Case 62, 9.8% monthly; Case 63, 50% returns; and Case 70, 37.5% first year return. Investors appeared oblivious to the fact that the higher the returns, the higher the associated risk. In other words, low risk, high return investments, such as the ones advertised in the Cases listed above, are improbable and are more likely an indication of a fraudulent investment. A university professor in finance commenting on Case 10, a case with 10% monthly returns stated that "no borrower with low risk would ever…[have] such a high cost of capital…borrowers willing to pay 10 percent a month are likely to be most desperate…the association of this type of return with zero risk makes no sense"[112].

A related issue that emerged in some of the cases was that in order to fund their investment in such promising schemes, individual investors would draw from their other assets, a decision which further supports schemes to defraud investors. For example, in Case 17, "[investors] were encouraged to mortgage their homes, draw down their lines of credit or collapse their RRSPs in order to invest"[113]. An investor in the Ponzi of Case 26, remortgaged his home to invest and had to sell his home when the scheme collapsed. And in the same case, one investor used her RRSPs and educational trust fund to invest, and another borrowed on her line of credit. When considering the Ponzi scheme in Case 37, regulators noted that [these schemes] "are particularly

[112] BCSC Decisions & Orders, October 24, 2001 (paragraph 22)
[113] OSC Reasons and Decision on Sanctions and Costs, June 4, 2010 (paragraph 369)

sinister form of fraud because those lucky enough to get in at the beginning do in fact earn the promised returns, and lend the credibility to the scheme that it needs in order to lure investors"[114].

4.3.8 Summary

The opportunities for committing corporate financial crime and the means of concealing that crime were considered first in this chapter. The second part of the chapter focused on the seven factors in the research question. Each factor created different opportunities for committing financial crime, from changing jurisdictions (4.3.1) to technology enabled forex trading (4.3.6). The next chapter connects this analysis to wider social considerations.

[114] BCSC News Release, February 21, 2008 (no page number)

Chapter 5: Discussion

Based on Ollman's (2004) *dance of the dialect*, the final step of the dance is to *organize*. Parker's (2004) work provides a mechanism to accomplish this by considering three aspects of the discourse: *institutions*, *power*, and *ideology*.

5.1 Support Institutions

Parker (2004) asks two key questions related to institutions: first, which institutions were reinforced in the discourse, and second, which institutions were marginalized in the discourse?

The relationship between business (i.e., industry) and government typically reflects a neoliberal approach to economic and political organization. That is, the predominant focus of regulation is to safeguard corporate and investor economic liberty. This relationship was reinforced by the regulator discourse as evidenced by the regulators' concern for market integrity and investor confidence.

The institution of law as it relates to economic organization in Canada was marginalized. There appeared to be a lack of respect for the regulators on the part of the corporate officers as evidenced by recidivism and deliberate efforts to circumvent regulator authority.

The language used by the regulators reflects the strong ties between industry and government, the regulators' goals being (a) to keep investors investing in the market (e.g., provide capital), (b) enable responsible issuers to raise capital (e.g., offer securities for sale), and (c) protect the integrity of the market so (a) and (b) occur. The following statements illustrate this concern on the part of the regulators for the market:

> The harm caused by the Respondents' misconduct is not limited to that directly suffered by the Alberta investors. The Respondents' misconduct also harmed the integrity of the Alberta capital market generally. The Alberta investors in [Company G] are likely to be wary about pursuing other investments in future, and any prospective investor learning of their experience with the [Company G] Offering is likely to suffer a similar loss of confidence in our capital market[115]. (Case 3)
>
> Because the [Company S] distributions took place in the "exempt" market, the integrity of that portion of the capital market was put at particular risk. This jeopardizes both investors' willingness to put

[115] ASC Decision, June 18, 2010 (paragraph 35)

> their money into that market and the resulting ability of responsible issuers to raise capital there[116]. (Case 8)
>
> Staff further noted that [M] had used and harmed Alberta market participants – registrants – in furtherance of his schemes. Staff argued that [M] had demonstrated a disregard for securities laws and sanctions in multiple jurisdictions[117]. (Case 11)

What is significant about these quotes is the regulators relate the harm to the investors with the harm suffered by the market, even intimating the harm to the market is greater. This extrapolation is consistent with the ideology concerning the social good that arises from efficient capital markets:

> If the system works well, a virtuous cycle is created – new ideas get funded, new products and services are provided to customers, new employment opportunities are created for the labor force, and new wealth is generated for investors who in turn can reinvest their returns in other new ideas. In sum, the system is a vehicle for delivering economic growth (Healy, 2005).

In reinforcing market capitalism, respect for the law was compromised. Most of the cases in the data set were small and involved few investors. The median number of investors in the fraud cases for which data were available was 97. And when the regulators levied fines, the probability of collecting all of the outstanding amounts was low. Between 2007 and 2012, only 35% of the $444 million in financial penalties levied against individuals and corporations was actually collected by the provinces; $285 million remained outstanding as of 2012 (CBC, 2012). Reasons cited for the low collection rates included individuals leaving the jurisdiction, individuals or corporations not physically located within the province, or a lack of assets to seize (CBC, 2012). Given the importance of the capital markets to the Canadian economy, apparently it is not in the best interests of the nation state to support a punitive regulatory regime.

Marxist theorists have argued that the law in capitalist societies has three functions: *repressive*, *facilitative,* and *ideological* (Burtch, 2003, p. 6). Repressive functions are the coercive powers of the state (e.g., arrest, incarceration, and use of force). The facilitative function is used to assure predictability and certainty in individual's behavior – the social contract. Finally, the ideological function refers to the belief systems embedded in the legal structure, systems useful for "domination, legitimation, and hegemony" (Burtch, 2003, p. 7). All three functions can be discerned from the discourse.

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[116] ASC Decision, July 10, 2007 (paragraph 43)
[117] ASC Decision, March 23, 2006 (paragraph 21)

The securities regulators do not have the same coercive powers to compel individuals to submit information the way other government agencies do; for example, individuals may not be required to be present at their disciplinary hearings, and there are few repercussions for not paying fines or costs, or even respecting decisions limiting participation in the markets. This lack of coercive power suggests securities law does not, in fact, serve to repress unlawful behaviour; rather, it appears to serve as a facade. For the second function, facilitative, the securities acts do not lead to predictable or consistent corporate behaviour: the goals of the corporations are at odds with the goals of the regulators. The legitimate "single-minded goal" of corporations is "profit-maximization" which "makes it rational" to commit crime (Glasbeek, 2003, p. 130). It would seem that the hegemonic nature of market capitalism has led to the acceptance of such an ineffective regulatory regime. Although securities Acts are neither coercive nor facilitative, the Acts remain because of the ideological function they serve of maintaining the impression that corporations are not above the law. Recall that corporations are also political actors and have acted to influence government perspectives on relevant topics, like regulations, to the point that "people come to see the marginalization of government as inevitable, natural, and appropriate" (Glasbeek, 2003, p. 111).

In addition to Marx, a complimentary explanation of the marginalization of the law is possible by considering a variation of Porter's Five Forces model. Although businesses use their "insider" status to improve the regulatory environment for their own benefit, the regulators can be seen as constrained by their "insider" status; that is, *threats of political influence* limit regulatory activity. Vining (2011) modified Porter's Five Forces model for use with public agencies, replacing the *rivalry* force with *threats of political influence*. Vining's argument is that the structural arrangements of some public agencies make them more or less susceptible (or permeable) to the control of political actors. Consider the securities commissions discussed in the present research: five of the six (BC, Alberta, Manitoba, Ontario, and New Brunswick) are independent agencies or crown corporations and are self-funding (e.g., through fees collected and investments). This apparent independence from the provincial government should allow the regulators the autonomy to make regulatory decisions without fear of government reprisals. However, this autonomy is constrained as the commissioners (i.e., heads of the securities commissions) are appointed by their respective provincial or territorial government,

and the commissions' mandates are dictated by the provincial Acts that created them. An additional concern is that the provincial governments will reassert control over the commissions; consider, for example, that the federal government has been working on changes to employee negotiations at crown corporations to give the government more influence over collective bargaining (Curry & Ibbitson, 2013). Thus, the threat of political interference remains.

5.2 Reinforce Power

The two questions to be considered from the perspective of power are (a) who wins and who loses from employing the regulator discourse, and (b) who promotes or rejects this discourse? Recall that discourse reinforces, reproduces, and is structured by the dominant power arrangements. From this perspective, then, winners reinforce the criminogenic environment and at the same time benefit from that environment; whereas, losers reinforce the criminogenic environment but do not benefit from it. Applying this interpretation to the regulator discourse, in general, the corporations won; the investors lost.

Corporations "win" because there is no strong incentive for them to abide by the regulations. It is relatively easy to create another corporation, to transfer assets between corporate entities, to register in another jurisdiction, or to declare bankruptcy to avoid further penalties. Canada is ranked third worldwide in a measure of the ease of *starting a business* (The International Bank for Reconstruction and Development/ The World Bank, 2012). The rankings are based on the complexity and cost of incorporation; in Canada, it takes one procedure, five days, and no minimum amount of capital to create a corporation. Several of the cases in the data illustrate the ease with which corporations can circumvent the regulations:

> Shortly after the [Company K] order was issued, an Alberta numbered company…with [J] as sole director, was incorporated, which according to evidence before us in the Merits Hearing apparently continued at least some of the business activities of [Company K], including [Company K]'s [product][118]. (Case 59)

> [Company R]'s institutional trading supervision and compliance system was not reasonably designed at any level to prevent and detect these violations[119]. (Case 44)

> [Investor] said that when she signed the [Company C] subscription agreement she indicated that she was a close personal friend of [Director and shareholder L] even though she was not. She did this

[118] ASC Decision, August 26, 2010 (paragraph 44)
[119] Market Regulation Services Inc. Discipline Notice, June 30, 2006 (pg. 3)

> because [L] advised her that it was the only way she could invest[120]. (Note: [L] was incorrectly applying the *private issuer exemption*.) (Case 1)

Corporations, although named in the discourse as respondents and sanctioned in similar ways to individuals, are not discussed in the same manner as individuals. The law reifies corporations, treating them as persons, which explains the similar sanctions (e.g., fines and trading bans), but it was noted that the discourse shifted between technical discussions of specific elements of the securities Acts that were violated by the corporations-as-persons and more narrative discussions of the specific crime with corporations-as-entities. For example, in Case 40, "the clear conclusion to be drawn from the evidence and the law is that [Company B] and individual [C] knowingly, consistently, and blatantly breached the basic principles of the securities laws of British Columbia"[121]. But it was [C] who "purchased a 'seasoned investors' list" and "called those individuals" to solicit them to buy securities, thereby causing [Company B] to be in violation of the securities Act[122]. This conjunction of a reified concept with a sentient being is consistent with Glasbeek's (2003, pp. 145-146) argument that treating corporations as individuals is a distortion of reality, with the result that a reluctance has emerged from the regime of law to actually treat corporations as a culpable person.

By focusing on the individual actions of corporate officers and employees, it is easier to advance the perspective that a few *bad apples* commit crime instead of the more troubling perspective that corporate crime is systemic in capitalist nation-states. For example, the title bar of the enforcement overview webpage on the CSA website states "Upholding the Law enforcing the rules, holding people to account" (CSA, 2009).

Treating individuals involved in corporate crime as an aberration among corporate officers and employees perpetuates a belief that the markets are safe for investment. It is worth noting that when I was determining which of the individuals on the *disciplined persons list* were associated with corporate crimes, I found that the non-governmental regulators, Investment Industry Regulatory Organization of Canada, and Mutual Fund Dealers Association of Canada were diligent in keeping a name of the member company out of the documentation. By this I mean

[120] BCSC Findings of the Commission, January 29, 2002 (paragraph 173)
[121] BCSC Decisions & Orders, May 31, 1988 (no page number)
[122] BCSC Decisions & Orders, May 31, 1988 (no page number)

that for occupational crimes, the sanctioned individual's name was prominent, whereas the name of the company which employed the individual was "buried" in the documents and generally not included in the news releases. This selective use of names appeared to be another mechanism of separating individual actions from corporate responsibility.

The presence of three of Canada's major banks on the disciplined persons list further supports the argument that corporations win; that is, there has been no strong government condemnation of their criminal behaviour. Seventy percent of the total assets of the financial services industry in Canada belongs to banks, and these institutions have assets in the tens of billions of dollars (Government of Canada, 2002; Griffin, Ebert, Starke, Dracopoulos, & Lang, 2014). Banks are also fundamental to the stability of Canada's financial system and should, according to the former Governor of the Bank of Canada, therefore, behave in ways that are above reproach: "The real economy relies on the financial system. And the financial system depends on trust. Indeed, trust is imbedded in the language of finance" (Carney, 2013). The implication of the Governor's statement is that trust and Canadian banks are inseparable.

Banks are recent participants in securities, having entered the securities market when the *Bank Act* (1871) was amended. The 1980 amendment allowed banks to own subsidiaries in different financial areas, such as venture capital; the amendment of 1987 eliminated the barriers to bank involvement in securities; and finally, the 1992 amendment allowed them to engage in portfolio management and investment counseling. Banks have benefited from these amendments, so when they violate securities Acts, their highly visible misbehaviour should bring into question the wisdom of the nation-state's commitment to opening up the financial industry to them.

Banks have a unique, opportunistic position in the markets that can be further explained by considering Porter's Five Forces model, in particular the *bargaining power of buyers* and the *bargaining power of suppliers*. Banks act as both buyers and suppliers in the market: banks buy investment products from their clients (e.g., corporations, governments, municipalities, and public agencies) and sell to their clients (e.g., individual consumers). The creation of a mutual fund, for example, includes the buying of investment products in order to create the fund and then the selling of units in the fund. Canadians appear to trust the banks; the largest Canadian

banks control half of the long-term mutual funds (i.e., pooled stocks, bonds, and securities) in Canada (Kiladze, 2013).

However, this creates an opportunity for victimizing investors: the banks can afford to invest in riskier securities because the risk will then be passed on to their clients or to third parties (i.e., retail brokerages). The opportunity increases when interest rates are low as investors may choose higher risk investments to get higher returns. This argument is consistent with the data from the present research: the behaviour of all three disciplined banks, that is, a failure to enter a cease-trade order into their computer system, missing suspicious trades ordered by clients, and a stock price manipulation, were related to the buying and selling of securities.

Individual investors or those with limited investment capital lose in the discourse. (As mentioned earlier, none of the cases in my data referred to institutional investors, such as pension funds.) Harm to investors is framed in terms of funds lost and inability to continue participating in the markets (i.e., reluctance to invest again). Besides financial harm, there was little discussion in the discourse of any other type of harm, emotional or physical, for example.

Croall (2009) argued that the ideology rationalizing consumer victimization is *caveat emptor* (let the buyer beware). The Canadian Securities Administrators (CSA) oversees the Investment Industry Regulatory Organization of Canada (IIROC) and certifies all dealers in the equity and debt markets. Yet both the CSA and IIROC provide on their websites resources for investors aimed at protecting investors from unscrupulous dealers, certified or otherwise. Investors should not "be too greedy" and should remember there is no "free lunch" when considering a potential investment (Muhtaseb & Yang, 2008, p. 203). The point of these comments seems to be the support of a *blame the victim* approach to crime.

Investor victimization can also be understood using Porter's Five Forces model. Recall that investors are both *suppliers* (i.e., investing in corporations) and *buyers* (i.e., receiving returns on investments from corporations); corporations are both *suppliers* (i.e., paying out returns to investors) and *buyers* (i.e., soliciting investors). So there is a reciprocal but also unequal relationship that can lead to investor victimization. Three sources for this inequality are (a) size of investment, (b) lack of alternatives, and (c) switching costs. First, individual investors may

also be minority shareholders, so they cannot influence the business decisions of the corporations in a way to either improve the returns or prevent inappropriate use of investment funds. Second, there are a limited number of convenient alternatives to investments in securities (e.g., real estate, art, or jewellery). Third, there are fees attached to buying/selling, transaction fees which may influence investor decisions.

With respect to the second question posed earlier (who promotes or rejects this discourse), the securities regulatory discourse is promoted by those, for example, corporations, with something to gain from the current manifestation of market capitalism. To understand how corporate power is promoted, Castells network analysis is instructive. Castells argues that networks, for example, corporate, financial, political, are the dominant structure of capitalism. Power in these networks comes from either programming the network or the ability to switch to different networks. Recall that Castells identified four types of network power: networking, network, networked, and network making. Corporations involved in the financial markets use three types of power: networking, networked, and network making. By networking, corporations control the information (or message) entering the network. Control over the release of material information about a corporation's financial situation is one example of this controlled release. Failure to disclose material information was one type of financial crime discussed in this research. By networked, corporations (and perhaps industries) act like a node in the financial markets and can use their power over other nodes, such as regulators. Lobbying against additional regulation as a policy insider is an example. By network making, corporations can leave one financial market for another, changing jurisdiction, for example, if the conditions are not conducive for business.

Individual investors, however, do not have these types of power in the financial networks, meaning they will lose in this discourse, for they do not control any relevant node from which to influence business or government (i.e., networked power) nor are there many alternative financial networks for investors to consider (i.e., network making). Corporations, however, have the Canadian Federation of Independent Business (CFIB), which proclaims the following: "for over 40 years, we have represented the interests of the small business community to all three levels of government in their fight for tax fairness, reasonable labour laws and reduction of regulatory paper burden" (CFIB, 2014). Additionally, each industry has an association to lobby on their behalf. For example, the Mining Association of Canada (MAC), "tracks relevant

legislation, monitors emerging regulatory issues, and participates in policy development so that industry perspectives are adequately represented" (MAC, 2014). Investors are represented by the Small Investor Protection Association (SIPA). SIPA is a national non-profit organization with the mission to "aid awareness of how the investment industry operates", "provide guidance to members who have a complaint about investments", and "to pursue improvement of industry regulation" (SIPA, n.d.). These comparisons indicate that there is an emphasis in the business associations on having a strong voice in government, a voice not echoed in the investor association.

The present research supports the notion that there is a "weak" investor voice in matters of market regulation. In particular, van Dijk's (2006) "negative other presentation" [123] describes the presentation of investors in the regulator's discourse. That is, in certain cases, most commonly the fraud schemes, there was discussion of the characteristics of the individual investor that led the investor to make his or her particular, and unfortunate, investment choice:

> [Investor I] invested over $300,000 in [Company E]. A short term investment was important to her because she needed the money to build a house and to fund the education of her special needs child. She expects to recover little, if any of that money[124]. (Case 31.2)

> Investor A is devastated by his loss. He says he thought he was "dealing with gentlemen" but instead now feels he was dealing with "criminals, lying people." He testified "I started from scratch, and I lost everything; just my – everything – my ten years of work"[125]. (Case 37.1)

> [Investor C] came to trust [S] because he introduced her to an individual he described as his "prayer partner". She formed the impression the individual was a pastor, and he turned out to be an investor in the scheme. [S] also described [B] as a prayer partner. The term "prayer partner" was significant to [Investor C] who, as a Christian, took comfort in the fact that the people she was dealing with were also Christians[126]. (Case 37.1)

There are two additional *negative other* presentations to consider from these examples. First, the discussion of [Investor I] is, in part, a justification of her participation in the market. But the acceptance of market capitalism, and therefore participation, is a dominant perspective in Canadian society. That is, it should be unnecessary to consider [Investor I]'s motivation in

[123] This is a reference to the *us/them* or *insider/outsider* nature of discourse. Discourses may focus on the negatives of "outsiders" (e.g., investors) and ignore or mitigate the positive aspects of the outsiders to the particular ideological system. The opposite, "positive self-presentation" will focus on the positives of the "insiders" while ignoring/mitigating the negative aspects.

[124] BCSC Decisions & Orders, December 3, 1999 (page 46)

[125] BCSC Decision, February 20, 2008 (paragraph 67)

[126] BCSC Decision, February 20, 2008 (paragraph 71)

investing; the implication here is that [Investor I] is an outsider. Second, the discussions of both [Investor A] and [Investor C] suggest that their investment choices were not made using sound business principles; that is, they relied on the "wrong" attributes when dealing with the investment salespeople, namely, gentlemen status or religious affiliation. The point here is these attributes, which normally might be valuable in addressing the credibility of a source, were used by the salespeople to present a fraudulent investment opportunity.

The regulators' discourse suggests a power deficit for individual investors. That is, although the corporations have access to the capital they require, the investors are not obtaining the expected return on their investment, perhaps indicating a failure in the market system. By focusing the discussion on the specifics of the individual investor, a feeling of "other" is suggested, as if corporate crime is an uncommon event, rather than a systemic problem.

Finally, the securities regulators discourse was not rejected by any participant in the financial market network. There are two possible explanations for this. First, according to Castells's network power logic, dissenting participants (i.e., those who reject the regulators discourse) would have been excluded from the network because they offer no value to the current financial market. Second, dissenting participants might have been able to influence through other existing networks (e.g., cultural or political) a dominant participant within the financial networks (i.e., the nation-state), but the ideology that supports the financial networks is hegemonic, meaning alternative views would be rejected. The concept of ideology is further explored in the following section.

5.3 Ideological Effects

Ideology is more than just a system of beliefs, it can also be considered a "description of relationships and effects" (Parker, 2004, p. 260). The securities regulator discourse functions in an ideological way in that it reiterates the importance of market integrity and market freedom as the dominant economic and social worldview. Thus the regulator discourse reinforces the 'truth' claim of neoliberalism through language and its delegated power (from the nation-state). Truth in this context reflects Foucault's critique of ideology. For Foucault, ideology presupposes Truth; in rejecting the concept of underlying Truth, he exposes "regimes of truth"; that is, there are other ways of thinking about markets and economies that can be experienced as true.

Foucault's focus on identifying alternative discourses is useful for critiquing the discourse of the nation-state, which is projected through the narrative of the regulators, a narrative which appears to mitigate the harm of corporate financial crime.

The final two questions in Parker's stepwise method of discourse analysis were used to connect the regulator's discourse to other related discourses and then to consider how dominant groups justify the narrative found in the discourses. Specifically, the connection between the regulatory discourse and other discourses that sanction the dominance of the financial market with respect to individual investors (the "losers" from the analysis) is considered.

The central argument presented here is that the regulator discourse connects with other discourses in support of the financial markets and that these discourses serve to pressure Canadians (i.e., domination) into market participation. The pressure on Canadians is justified using a "common sense" approach (i.e., it's the Canadian way) indicative of a hegemonic ideology. The nation-state supports an investing environment where a range of investments risks provides most Canadians with opportunities to take part in the capitalist narrative. Success, or the opportunity for success, in this narrative operates at multiple levels from simply saving money in a bank account (i.e., low risk, low return) to the luxury of taking investment risks few would consider and "winning" (i.e., high risk, high return). It could be argued that this range of opportunities for investment success is what makes the capitalist narrative attractive --there is something for most Canadians. Thus participation is not framed as domination, but as choice (the coercion/consent balance of hegemony); that is, Canadians consent to participate by choosing their most appropriate market entry.

The following sections consider three examples where this market participation (i.e., the common sense approach) can be analyzed, namely, interest rates, pensions, and funding social programs; they are useful starting points for understanding the subordination of Canadian investors and the justification for that subordination.

First, the Bank of Canada (a crown corporation) sets the key policy interest rate, and in keeping with concerns about protecting the markets, this rate is adjusted to maintain inflation goals (1-3%). When inflation drops, the interest rate will drop to promote economic growth: "low rates

are meant to curb saving and promote spending and borrowing" (Carrick, 2015, p. B11). However, for investors, low interest rates can be problematic. For example, over the last 16 years, the average high-interest savings account return rate has been 2.8% with an inflation rate of 1.9%, representing a 0.8% return on investment (Carrick, 2015). When the low risk rate of return (e.g., savings accounts, government bonds, or guaranteed investment certificates) falls to or below the rate of inflation, investors feel compelled to look for other investment opportunities to preserve their capital, and these alternative opportunities are inherently more risky. And this is a scenario where Canadians are pressured by government intervention into investing while at the same time, the government is reluctant to protect them adequately once they make an investment decision. The reluctance is justified because nation-state policies focus on "liberalization, deregulation, privatization, depoliticization and monetarism" (Mudge, 2008, p. 704). The present research findings support this summary statement because the regulator discourse chastised unwary investors for considering high return/low risk investment opportunities as credible scenarios; for example, "the asset growth program, which was the purported source of the astronomical returns they promised to investors, was a fairy tale" [127].

Second, Canadian pensions are affected by changes in the market. The majority (87%) of public sector employees have registered pension plans in contrast to 24% of the private sector employees, but the majority of Canadians (76%) are employed in the private sector (Milke, 2013, p. 10; Statistics Canada, 2015). What this means is that most Canadians are relying on private pensions. Most (94%) of the public sector registered pension plans are also defined benefit plans, which guarantee employees a fixed amount of retirement income for as long as they live. In addition, should the pension fund investments not provide sufficient monies to pay out the pensions, the government uses public money to cover the shortfall[128]. Only 52% of private sector plans are of this type (Milke, 2013, p. 10). The remaining plans are defined contribution plans that carry no such guarantee, and retirement income from a plan of this type depends on the performance of the market (Milke, 2013). For the Canadians with no company pension plan (6 of every 10 workers are without a company plan), finding high yield investments becomes

[127] BCSC Decision, February 20, 2008 (paragraph 136)

[128] In guaranteeing public sector worker pensions, all Canadians are taxed when these pensions do not perform as expected. Thus some Canadians, namely those that work for the government, are afforded more pension protection than other non-government employees.

imperative to ensure they have sufficient funds for their retirement[129]. That is, the low interest rate policies supported by the government pressures workers into the capital markets in search of better returns than those offered by the banking institutions. From the present research, those involved in one fraud (Case 17) took advantage of this need by encouraging some investors to take their money out of their RRSPs and invest in the no/little risk investment scheme. Investors involved in this fraud were looking for similar investment protection as RRSPs but with higher rates of return.

The final example is in the funding priorities of the government. In 2013, 15% of the Canadian population was over 65; by 2030, older adults are expected to represent 24% of the population (CBC, 2014). The available workforce (Canadians between 18 and 65) will drop from 69% to 60% (CBC, 2014). The government has repeatedly acknowledged the difficulties of supporting social programming for an aging population when the workforce is declining; thus, cuts to social programming will be justified as the result of this decline. What may be created is a fear that the services Canadians expect will no longer be covered by taxes, and they will become responsible for paying for some of the services. Again, this can create the impetus to invest what savings Canadians have in the capital markets where the returns may be better than those offered by the banking institutions.

5.4 "Clumsy" Solutions

The findings of the critical discourse analysis suggest possible solutions for reducing corporate financial crime and for protecting Canadian investors from harm, an approach in keeping with Stanbridge's (2014, p. 393) suggestion that sociologists should use the results of their research to offer "clumsy solutions" (a term Stanbridge borrows from Khan and Neis (2010)) that may help. Four of these follow: effective regulation, reallocate funds from enforcement to education, a national/international regulator, and empower minority shareholders.

[129] For Canadians with little savings at retirement, their major source of income will be the Canadian Pension Plan (CPP) and Old Age Security (OAS), paid for during their working careers and from taxpayer funds. The average CPP payment in 2014 was $610.57 per month (Service Canada, 2014). The maximum OAS payment in 2015 is $563.74 per month (Service Canada, 2014).

5.4.1 Effective Regulation

This research has demonstrated that regulators convict small corporations of financial crime and that the regulators appear to be unable to prevent recidivism or mitigate investor harm (i.e., recovery of investment funds). With respect to the tools available to regulators, namely policy and regulation, three changes could be considered: (a) increased monitoring of corporations and disciplined persons, (b) establishment of whistle-blower policies, and (c) an asset recovery program which can be applied to corporations and/or corporate officers convicted of unlawful behaviour.

As a mechanism to reduce recidivism, regulations can be introduced which increase the monitoring of individuals and corporations convicted of corporate financial crime. The American SEC proposed several types of post-conviction monitoring that would help protect investors from habitual corporate wrongdoing: (a) unscheduled office visits, (b) access to phone and bank records, (c) access to income tax and corporate tax returns, and (d) periodic self-reports (Aguilar, 2012). The American proposal could serve as a template for a Canadian plan.

This monitoring would not increase the regulatory burden on compliant corporations. That is, corporations that have not been sanctioned would not be required to provide any additional information. Certainly, the harm to investors is significant enough to warrant increased burden on corporations not in compliance. The burden on the regulators from additional monitoring might be substantial; for example, additional staff and equipment may be required. Framed in a similar manner to the successful catchphrase “get tough on crime” perspective, a campaign which politicians found attracted public support, this increased monitoring may well garner public approval.

A second option for effective regulation is to encourage the reporting of corporate financial crime by employees. The lack of leverage over employees was cited as one reason regulators and police have difficulty obtaining testimony against corporations (or corporate officers) (Williams, 2008). Compensating so-called whistle-blowers may well circumvent this reluctance; the United States is trying the compensation approach. That is, recognizing that whistle-blowers face company or industry backlash (e.g., firing), the American SEC, under the Dodd-Frank law,

can pay individuals for information leading to a conviction (Milstead, 2015). The Ontario Securities Commission is currently considering this approach (Milstead, 2015).

The final aspect of this effective regulation solution is to improve asset recovery for investors. This approach would not necessarily prevent corporate financial crime but may lessen investor harm. As the present research indicates, it is difficult to recover investments lost to corporate crime; it appeared that in many cases there were no corporate assets left, and the fines and penalties paid to the regulators were not used to reimburse investors. Perhaps expanding the regulator mandate to allow the seizure of the personal assets of corporate officers would assist investors and deter corporate officer criminality.

The template for this asset recovery initiative is based on British Columbia's civil forfeiture laws and the procedures of the Canadian Revenue Agency (CRA). The civil forfeiture laws are used to target the "tools and proceeds of crime"; in 2010, for example, $5 million in assets were seized (CBC, 2011). Perhaps these same laws could be used to prosecute corporations and their officers. The CRA has the authority to request the financial status of corporations and the personal financial situation of corporate officers; furthermore, the CRA has multiple tools available, such as holding a third party responsible, to recover taxes and fines. It is possible, then, to consider the corporate officer as being the third party and thus responsible for the financial obligations of the corporation.

5.4.2 Reallocate Funds from Enforcement to Education

The second clumsy solution is premised on the argument that investing is an inherently risky activity and cost prohibitive to fully regulate. That is, the cost of enforcement is greater than the benefit to society; therefore, instead of increasing enforcement, the resources allocated to enforcement might be better used to increase the knowledge of Canadians, (i.e., allocate funds to education) as market participants (i.e., *caveat emptor*). Education should focus on two general mechanisms Canadians have for entering the market: (a) direct investing, and (b) indirect investing. That is, Canadians can directly invest in an issuers' securities or indirectly invest through an institution investments (e.g., mutual funds, retirement plans, or professional account management) (Langevoort, 2009).

An in-depth understanding of the capital markets should help investors to critically assess investment opportunities and perhaps avoid investing in inappropriate or fraudulent schemes. A recent newspaper article quoting an investor in a -failing- hotel development in Victoria, B.C. highlights the role of education for investors:

> Bondholder [M]…said he did his due diligence prior to investing $250,000. He received independent advice and understood that the investment was high risk. "It is like any gamble. Lots of times, they don't pay off". (Wilson, 2015, p. A1)

Additional funding for public education would also allow the regulators to reach more members of the investing community. And this education is important, for financial literacy, even in developed markets like Canada, is low (Lusardi & Mitchell, 2011). Lusardi and Mitchell (2011) found that gender, age, and education affected literacy: women, young people, older adults, and individuals with limited education have greater financial illiteracy, suggesting funding programs to improve Canadians understanding of markets and finance should be a priority. For example, the Ontario Securities Commission's *Investor Education Fund* (IEF) in conjunction with the provincial education ministries supports programs which instruct students on how to "manage their debt and look at financial products and assess them realistically" (CBC, 2013).

Awareness of the skills and biases of investment professionals (e.g., investment dealer or broker) should help institution-investing Canadians to critically assess the advice from these professionals. Recent regulatory changes have reflected a move to provide this information. In 2011, new regulations came into force requiring banks to create short summary documents (i.e., "fund facts") in plain language to introduce transparency to their mutual funds rhetoric (CBC, 2013). And in 2015, regulators introduced new regulations that require disclosure of the fees investors pay for the services of their financial advisors (e.g., flat fee per transaction, percentage of portfolio, commissions, or salaried) (Kiladze, 2014). Understanding the fee structures should assist investors in determining which investments best fit their financial goals.

5.4.3 A National or International Regulator

Seventy percent of the cases in the present study were national or international in scope, suggesting a role for a national or international regulator.

A national regulator might be more effective in prosecuting national level crimes by preventing recidivism and by liaising with other national regulators to prosecute international level crimes. Additionally, there should be a single set of rules for business to follow, thereby preventing corporations from changing jurisdictions to avoid particular rules or prosecution. Such a move would also reduce the regulatory burden on corporations.

The obstacles to instituting a national securities regulatory agency, as discussed earlier, remain significant. The *Cooperative Capital Markets Regulatory System*, a type of national regulator, is expected to be operational in the fall of 2015. This cooperative faces two serious challenges: first, Alberta and Quebec have not agreed to join, and second, the federal government must consider the 2011 Supreme Court decision that ruled a national regulator is unconstitutional. Despite these issues, a national level regulator remains one mechanism for curbing corporate crime.

Another possible solution for policing the global sales of securities is an international securities regulator. This regulator would have the same reach as the transnational corporations, would prevent corporations from jumping national jurisdictions, and would streamline the regulatory process. Consider the following example: the United States is working to extradite a British trader for his (alleged) criminal activities that contributed to the 2010 American flash market crash (BBC, 2015). The trader was entering "spoof orders" on futures. The orders caused the price of the futures to drop at which point the trader cancelled the order; he would then buy the futures at the now lower price. The American government alleges he did this type of transaction thousands of times for $40 million USD profit (BBC, 2015). American markets and market participants world-wide were harmed by this crash, an incident which should garner support for international scrutiny of the securities market.

Despite the significant challenges to gaining acceptance for international regulations (i.e., pre-existing regulatory systems and threats to sovereignty), a ubiquitous monitoring system of corporations that operate internationally remains a potential mechanism to control corporate financial crime. This type of solution is used in the European Union (EU); that is, the European Securities and Markets Authorities (ESMA) has had success creating a "single rulebook" for all participants in the EU markets (ESMA, n.d.). ESMA is one organization in a wider system of

organizations included in the *European System of Financial Supervision,* which assists in the coordination of EU-level market regulation and national securities supervisors.

5.4.4 Empower minority shareholders.

This solution represents a more open-ended approach aimed at modifying the power relationship between investors and the corporation. Lee (2009, p. 149) suggests that shareholder voice (i.e., "the power of shareholders to act as a body at shareholders' meetings") is a collective force that could be used to influence corporate decision making. Hutchinson (2005, p. 174) clarifies the situation minority shareholders face: "how to ensure that some shareholders do not treat corporations as their personal fiefdoms"; and how to ensure that these majority shareholders to not "treat the bulk of investors…as convenient and relatively cheap sources of equity financing". Further, minority shareholders are not involved in the daily business of the corporation and have no real control over business decisions (Cheng, 2012). However, stock price is directly related to minority shareholder confidence in the corporation, indicating it is important that the needs of these shareholders be considered (Cheng, 2012). Currently, the only recourse for these investors, besides selling their shares, is to appeal to the courts if they feel that the corporation is being operated in an oppressive or prejudicial way.

Empowerment of these shareholders could take three forms. First, improve shareholder voting by (a) restricting the number of votes of majority shareholders, (b) distributing voting rights to more classes of shares, and (c) allowing for online voting in order to reach more of the minority shareholders. Second, a requirement for all corporate boards that they include an additional independent (i.e., hold no company shares) board member or board members with the authority to act on behalf of, or protect the rights of, minority shareholders. Third, Hutchinson suggests that institutional investors[130] (who may be majority shareholders) could be effective in pressuring corporations to maintain policies that benefit the corporations and their shareholders, not the officers or board of directors. He has framed his solution this way: "[institutional investors] offer one of the best vehicles to advance…a democratic agenda that is more conducive to the

[130] Institutional investors represent many smaller investors, for example investments made on behalf of a pension fund.

interests of those ordinary Canadians who contribute substantially to such funds and to corporate profitability" (2005, p. 198)[131].

5.4.5 Summary

Four possible solutions for reducing corporate financial crime have been suggested. The proposed solutions support neoliberal ideology, an ideology the present research critiqued. The justification for this support is that solutions which are a radical departure from neoliberalism are unlikely to be adopted by the nation-state; accordingly, a pragmatic approach, such as that suggested by the clumsy solutions regarding harm reduction for investors, is indicated. There are three particular neoliberal rationalities to consider. First, Canadians are individually responsible for their investment risks: "the [neoliberal] emphasis is increasingly placed on individuals to manage contemporary risk generated by economic deregulation" (Lavrence & Lozanski, 2014, p. 80). Improving *education* is a way to prevent victimization and is consistent with this perspective of individual responsibility. Second, Canadians should participate, or enact their freedom, in the market economy by using both the negative aspect of personal liberty (i.e., freedom from unwanted interference) and the positive (i.e., freedom to participate) (Lavrence & Lozanski, 2014, p. 79). *Effective regulation* and improved *shareholder rights*, mechanisms to protect investors that create a willingness to participate in the markets, are consistent with this perspective. Additionally, increasing willingness to participate will help replace social programs (e.g., Canada Pension Plan) with individual investing, again consistent with a neoliberalist agenda. Third, through self-governance, the requirements for government regulation should decrease: the "intention is to produce citizens who enact their obligation to freedom through self-fulfillment and, in so doing, displace the requirement for active government control" (Lavrence & Lozanski, 2014, p. 81). A *national regulator* or an *international regulator* would harmonize regulation; this approach, combined with the trend towards principles-based regulation[132], would mean less government involvement and would be consistent with this perspective of reduced regulation.

[131] Hutchinson's suggestion has its detractors (see The Economist (2015)).
[132] A principles-based approach to regulation articulates high-level principles and expected outcomes; businesses have more freedom to develop the specifics of their internal systems to meet these outcomes. Such an approach is in contrast with rules-based regulations, which articulate a body of rules for business to follow (Expert Panel on Securities Regulation, 2009, pp. 18-19).

Although the neoliberal ideology can support the clumsy solutions, two challenges to implementation remain: federal/provincial division of power and provincial priorities.

The division of power between the provinces and the federal government creates jurisdictional issues (Recall Figure 1.1, pg. 4). There are three that impact the four clumsy solutions: (a) securities regulation is a provincial matter, (b) education is a provincial matter, and (c) business corporation legislation is both federal and provincial.

First, creating a *national* or *international-level regulator* will move authority for securities regulation away from the provinces (and territories). But, as considered earlier, the proposed *Canadian Securities Act* (i.e., national securities regulator) is not within the legislative authority of parliament. It is also unclear if the provinces could adequately represent their securities interests at an international level. Currently, four provinces (British Columbia, Alberta, Ontario, and Quebec) are ordinary members of the *International Organization of Securities Commissions* (creates international standards for securities legislation), an indication that provincial cooperation is possible.

Second, reallocating funds for *education* creates two jurisdictional issues. First, as mentioned earlier, the funding mechanisms for the regulators are different; that is, some are self-funding (i.e., Crown Corporations), and others are funded through the budget of larger government ministries (see Appendix A). The funding variations indicate regulators may have varying autonomy for reallocating funds for education. Second, education is a provincial matter, and securities education may not be a priority for every province. This issue of potentially unequal education funding may be partially circumvented by the upcoming federal strategy to improve *financial literacy* of Canadians, meaning Canadians (a) understand "personal and broader financial matters", (b) have the skills to "apply that financial knowledge in everyday life", (c) have the confidence and "self-assurance to make important decisions" and (d) "use the knowledge, skills and confidence…to make choices appropriate to their own circumstances" (FCAC, 2013). As part of the strategic development, in 2014 the federal Finance Minister created a *Financial Literacy Leader* to "collaborate and coordinate activities with stakeholders to contribute and support initiatives to strengthen financial literacy of Canadians" (Department of Finance, 2014).

Third, increasing *shareholder rights* would require changes to both provincial and federal legislation, that is, changes to the provincial business acts (e.g., *British Columbia Business Act*) and the federal *Canadian Business Corporations Act*. The federal government has recently been examining shareholder rights; for example, *Industry Canada*, which oversees federal incorporations, is considering some improvements to shareholder rights, such as the ability to select and remove corporate directors (Leblanc, 2015).

The challenges discussed here are not insurmountable. As indicated, the federal government is presently attempting to protect Canadian investors from harm through education and perhaps through shareholder rights, initiatives that may well prompt an equal interest in harm reduction from the provinces. Certainly the membership of four provinces in the *International Organization of Securities Commissions* indicates a provincial interest in wider governance.

5.5 Sociological Implications and Final Considerations

The goal of this research was to take a critical approach to interpreting the criminogenic environment in which corporate financial crime exists. In this section, the findings are considered in relation to previous research.

The results of the present study suggest that organizational structure enables crime. This statement is consistent with Glasbeek's (2003) argument that the lack *proof of legitimacy* at incorporation and *limited liability* are two regulatory mechanisms enabling corporate criminality. Also, Baucas (1994) found that large corporations had more opportunities to commit crime because, in part, of low employee visibility and decentralized control. His findings appear consistent with those of the present research. That is, the small corporations in this research had low visibility, for they operated at the periphery of the securities industry (i.e., not listed on exchanges) -- taking advantage of personal relationships to sell products, failing to provide required documents (e.g., prospectus), or relying on exemptions to avoid registering the securities product. With respect to decentralized control, the corporations did not have a corporate officer policing the actions of the other officers. Baucas's research and the present research illustrate the role of corporate structure with respect to criminal behaviour.

The findings also suggest that corporate officers either failed to fulfill their duty (e.g., through incompetence) or were active participants in criminal activities. This contribution of the officers to the creation of a criminogenic environment is consistent with the work of other researchers (Baucas, 1994; Ashforth & Anand, 2003; Greve, Palmer, & Pozner, 2010).

Rosoff, Pontell, & Tilman's (2007) and Fligstein & Roehrkasse (2013) found that certain industries, namely, financial, automobile, and education, were criminogenic in nature; the present research has identified two more: (a) mining, oil, and gas, and (b) real-estate industries.

There was no substantive difference in the discourse between provinces concerning corporate financial crime. These similarities support the view that the neoliberal perspective in securities discourse is hegemonic, a finding consistent with the work of Snider (2004; 2009).

The present research provides novel insight into the nature of corporate financial securities crime in Canada. It raises the awareness of (a) how the Canadian market system creates both opportunities to commit corporate financial crime and to conceal the crime, (b) the degree of effectiveness of regulations to control corporations, and (c) the investor position against fraud. That is, the criminogenic nature of the securities market was substantiated by identifying the trends in opportunities created and the methods of concealment chosen by the corporations punished for financial crimes. The effectiveness of regulation was evaluated by considering the regulators actions against the corporations. And the investor position was determined by considering the harm experienced by the victims of crime.

5.6 Limitations

Five general limitations of this research are acknowledged. First, all of the cases from the Quebec securities commission (*Autorité des marchés financiers*) were excluded because the case documents were not available in English translation. Often, the press releases were translated but contained insufficient information for the case to be included in this research; there were approximately 19 cases that were not evaluated for this reason. Second, some of the hyperlinks to documents in the *Disciplined Persons List* were "broken" (i.e., document not available) or incorrectly linked (i.e., approximately 24 cases from Ontario and 6 from Saskatchewan). Third,

an unknown number of cases that fell within the research parameters have not yet been digitized by the provincial regulators.

The final two limitations concern the method: (a) the issue of methodological rigor regarding critical discourse analysis and (b) the imposition of meaning. Methodological rigour refers to the difficultly establishing a clear (or point-wise) method for the analysis of the discourse. For example, when deconstructing text, a tool in critical analysis, the analyst is creating openings to reveal "what is often taken for granted in texts that form our cultural environment" (Carroll, 2004, p. 227). However, it is difficult to extract what is taken for granted reliably and consistently such that other analysts could replicate the analysis. To address this limitation, I followed the established and accepted methods of Parker (2004) and Ollman (2004). Imposition of meaning refers to the bias which arises from applying my own worldview to the data. To address this issue, I identified my underlying assumptions regarding the narrative (e.g., corporate crime is widespread); in addition, I supported all of arguments with representative examples from the narrative.

Chapter 6: Conclusions

The purpose of this research was to answer the question, *How do corporations, corporate officers, industry, nation-state, regulators, technology, and investors, create the opportunity for corporate financial crime in Canada based on a discourse analysis of regulator documentation.* Four observations emerged from the characterization of the corporate financial crimes that constituted the date set: (a) officers, board members, and employees were equal participants in crime, (b) two industries, finance and mining, represented most of the cases, (c) regulators were involved in a case for one to three years, and British Columbia's securities commission was the most common regulator involved, and (d) technology was most often an accessory to the crime. It seems reasonable to conclude based on this analysis that employees at any level in a corporation have opportunities for crime; opportunities for crime are greatest in particular industries; and technology may or may not be material.

The characterization also captured the nature of corporate financial crime. Approximately two-thirds of the crimes involved only failures, deliberate or otherwise, to follow the securities acts; frauds and fraudulent schemes accounted for the other third. And half of all the crimes were international crimes, which is not surprising given the globalization of corporate business. Thirty-two countries were represented in the data, a dispersal which puts corporations beyond the reach of any one provincial securities regulator. That the United States was the country most likely to be paired with a Canadian firm found to be in violation of the securities regulations confirms the high level of integration that exists between the two economies.

When the cases were classified by the opportunity presented for criminal acts and for the ease of concealment, it was noted that high opportunity crimes involved fraudulent schemes while low opportunity crimes involved failure to follow the Act. High concealment involved crimes operating in multiple jurisdictions and corporate officer actions meant to deceive; low concealment involved misrepresentations or inappropriate financial decisions. There were two general observations of note: the largest category of crimes was high opportunity/high concealment (23 crimes), and opportunity for crime appeared more important than the ability to conceal crime.

In terms of the seven factors considered in the research question, each factor was found to operate differently in terms of corporate financial crime. For *corporations*, the key observation was the use of multiple corporations in crime, a circumstance that was attributed to the ease with which corporations can be created in Canada. A second observation was that poor record keeping on the part of the corporation was a mechanism of concealment. For *corporate officers*, there was often a history of corporate and personal financial crimes. The unique characteristics of the finance and mining/oil *industries* created opportunities for crime. That is, the lack of specialized knowledge among investors allowed finance companies to take advantage of the investors, and the use of difficult-to-verify preliminary drilling/ore results provided disreputable oil/mining companies with the opportunity to misrepresent the value of the well/mine. The limited powers granted the *regulators* by the *nation-state* created opportunities for companies to consider crime. There was some cooperation between regulators in multiple jurisdictions. Technology, although seldom material to the crime, was a novel feature of fraudulent investment schemes. And finally, *investors* were found to be disadvantaged in market participation, a situation that created opportunities for companies to exploit investors. The conclusion for part three of the analysis was that the only reason suggested for punishing corporate financial crime was to preserve market integrity; restricting corporate activity would be counter to free market principles.

And finally, institutions, power, and ideology created a milieu in which preservation of the integrity of a free and unencumbered market was paramount to the health of the Canadian economy. The maximization of shareholder wealth that drives corporate decision making also makes financial crime an option for the unscrupulous, and the penalties, if the perpetrator is caught can be seen as the cost of doing business. In addition, there appears to be a reluctance among the regulators and the judiciary to treat corporations as persons despite their legal standing as having some of those rights. Corporate interests are clearly represented in policy discussions (e.g., industry associations) and justified based on the neoliberal belief in the value of free markets. Investors do not have such representation and are thus at a disadvantage when entering the markets, a disadvantage that places them in a vulnerable position. Acceptance of such disparity in representation and the overwhelming acceptance of market rules as good for society are justified within the neoliberal ideology.

Taking a critical approach, I applied the theorizing of Marx, Castells, and Foucault to the data for the seven factors influencing corporate financial crime in Canada. I applied (a) Marx's discussion of law to explain how the nation-state, regulators, and corporations influenced the institution of law; (b) Castells network theory to explain how the power relationship between the corporations, industry, regulators, and investors creates harm; and (c) Foucault's discussion of Truth to explain ideological effects of the regulator discourse. With these three explorations – institutions, power, and ideological effects – the research may be considered action research. By this I mean that by challenging the discourse, it is altered "and so permits different spaces for manoeuvre and resistance" (Parker, 2004, p. 260).

Four "clumsy" solutions were proposed to address corporate financial crime in Canada: effective regulation, increased emphasis on education, national or international regulators, and changes to shareholder rights. The solutions are viewed as being consistent with the neoliberal perspective, suggesting that one or more could attract government support. Although two difficulties in implementation remain, that is, federal/provincial division of power and provincial funding priorities, there have been initiatives by the federal government with respect to education and shareholder rights. The provinces may find these initiatives instructive.

It is hoped that this research will contribute to the corporate crime literature in three ways. First, 92 corporate crimes were critically analyzed, providing an evidenced based sociological rather than legal perspective of the Canadian features of corporate wrongdoing. Each of the seven factors of the multifactorial model considered in the research question contributed to this perspective and each provided a unique approach to addressing corporate financial crime. Other factors could be considered in future research. Second, characterizing each of the 92 crimes with respect to the opportunity to commit the crime and the means to conceal the crime provides a possible categorization of crimes for future research. And third, the clumsy solutions suggest four approaches for addressing the criminogenic nature (i.e., the potential for wrongdoing) of corporations. The analysis of the corporate crimes indicated that recidivism, financial illiteracy, jurisdictional changes by transnational or multinational corporations to avoid prosecution, and the viewing investors as only a source of equity.

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Appendix A: Provincial and Territorial Securities Regulators

Name	Type	Legislation
British Columbia Securities Commission	Independent provincial government agency; self funded	Securities Act (1996)
Alberta Securities Commission	Industry funded provincial corporation	Securities Act (2000)
Saskatchewan Financial and Consumer Affairs Authority (Securities Division)	Treasury Board Crown Corporation	Securities Act (1988)
Manitoba Securities Commission	Division of Manitoba Financial Services Agency; Independent agency of the provincial government	Securities Act (1968)
Ontario Securities Commission	Self-funded Crown corporation	Securities Act (1990); Commodities Futures Act (1990)
Autorité des marchés financiers (Quebec)	Body mandated by the provincial government	Securities Act (2004); Derivatives Act (2008)
New Brunswick Financial and Consumer Services Commission	Arm's-length self-funded independent Crown corporation	Securities Act (2004)
Nova Scotia Securities Commission	Administrative tribunal and agency of the provincial government	Securities Act (1989)
Prince Edward Island Office of the Superintendent of Securities	Division of the Department of Justice and Public Safety	Securities Act (1988)
Newfoundland and Labrador Office of the Superintendent of Securities	Consumer and Commercial Affairs branch of Service Newfoundland and Labrador	Securities Act (1990)
Nunavut Office of the Superintendent of Securities	Within the Department of Justice	Securities Act (2008)
Northwest Territories Office of the Superintendent of Securities	Within the Department of Justice	Securities Act (2008)
Office of the Yukon Superintendent of Securities	Within the Department of Community Services	Securities Act (2007)

Appendix B: Company List by Case

1 Canadian Global Financial Group Ltd. (C)
Canadian Global Investment Corporation (C)
Global Canadian Financial Group Ltd. (C)
Global Canadian Investment Corporation (C)
Private Ventures Investment Limited
Columbia Ostrich (VCC) Limited

2 Oxford Investments Holdings Inc.
InstaDial Technologies Corp.

3 Gold-Quest International Corp. (G)

4 Capital Reserve Inc.

5 Genoray Advanced Technologies Ltd. (G)
Innovative Energy Solutions, Inc. (I)
Coadum Capital Fund 1, LLC (C1)
Coadum Capital Fund II, LP (C2)
Coadum Advisors, Inc. (CA)
Lavallee Financial Corporation (LF)
Lavallee Financial Inc. (L)
Daystar Holdings Inc. (D)

6 Mindoro Corporation (incorporated in Nevada)
Mindoro Corporation (incorporated in Oregon)
American Gold Mining Corporation

7 Synergy Alliance, LLC
Synergy Alliance Two, LLC
Synergy Alliance Fourteen, LLC
Synergy Alliance Group, LLC
Synergy Capital Group, LLC
Synergy Equivest Group, LLC
Synergy Financial Corporation
Synergy Investment Corporation, LLC

8 Capital Alternatives Inc.
Strategic Metals Corp.
Arbour Energy Inc.
The Institute For Financial Learning, Group of Companies Inc.
Merendon Mining Corporation Ltd.

9 Keywest Resources Ltd. (K)

10 Tri-West Investment Club
Haarlem Investment Corporation

11 H & R Enterprises Inc.

12 Limelight Capital Management Ltd. (LC)
Limelight Entertainment Inc. (LE)
Al-Tar Energy Corp. (AT)
Alberta Energy Corp. (AE)
Drago Gold Corp. (DG)
Maitland Capital Ltd. (M)
Shallow Oil & Gas Inc. (S)
First Global Ventures, S.A. (F)
Global Partners Capital (GP)
Asia Pacific Energy, Inc. (AP)
1666475 Ontario Inc. (16)

13 Euston Capital Corp. (E)

14 Chinamax International Investment Ltd. (Hong Kong) (Ch)
Chinamax International Investment Ltd. (B.C.) (C)
Goldman Stanley Consultants Inc. (G)
Top Rank Investment (International) Ltd.
Top Rank (Macau) Investment Co. Ltd.
Peregrine Finance Ltd. (PA)

15 O.E.X. Electromagnetic Inc. (OC/OA)
Four Star Management Ltd. (F)

16 Solid Resources Ltd. (S)
Glen Lochton Management Inc. (Gl)

17 Sabourin and Sun Inc.
Sabourin and Sun (BVI) Inc.
Sabourin and Sun Group of Companies Inc.
Camdeton Trading Ltd.
Camdeton Trading S.A.

18 526053 B.C. Ltd. (5)

19 Atlantic Trust Management Group

20 Landbankers International MX, SA de CV (L)
Sierra Madre Holdings MX, SA de DV (S)

21 Voyageur Foundation

22 Aatra Resources Ltd. (A)
Durham Securities Corporation Limited

23 Excel Asset Management Inc. (E)
Excell Asset Management Inc. (E)
Excel Funding Inc. (E)
Excel International Investment Corp. (E)
Diomondmark Investments Limited
Canaccord Capital Corporation
24 TD Securities Inc. (T)
25 Currency Specialist Ltd.
AA Management & Services Inc.
London & Global Ltd.
London & Global FX (Canada) Ltd.
26 Manna Trading Corp. Ltd. (MT)
Manna Humanitarian Foundation (MF)
Legacy Capital Inc. (LC)
Legacy Trust Inc. (LT)
27 Union Securities Ltd. (U)
28 Donat Robichaud Residence Inc. (D)
29 Foundation Capital Corporation
Spruce Ridge Capital Inc.
Spruce Ridge Estates Inc.
Beyer Consulting Ltd.
Foundation Capital Corporation
Foundation Mortgage Corporation
Railside Capital Inc.
Railside Industrial Park Inc.
30 Marco Resources Ltd. (MR)
Philco Resources Ltd. (PhR)
Peppa Resources Ltd. (PeR)
American Technology Exploration Corporation (AT)
31 Eron Mortgage Corporation (E)
Eron Investment Corporation (E)
Eron Financial Services Ltd. (E)
Capital Productions Inc. (C)
33 Option One International
34 Tri-Star International Inc.
Crown Securities
35 Briand, Harrison & Associates Corporation
36 Strategic Equity Corp.
37 International Fiduciary Corp SA
Nuspar Resources Ltd.
38 Keystone Real Estate Investment Corp.
39 EVC Resources Ltd.
40 Boulder Creek Development Limited
41 Shire International Real Estate Investment Ltd. (S)
Hawaii Fund (H)
Maples and White Stands Investment Ltd. (M)
Shire Asset Management Ltd. (Sa)
Bearspaw at 144th Avenue Ltd. (B)
42 M.C.J.C. Holdings Inc. (M)
43 XRAYMEDIA Inc.
44 Raymond James Ltd. (R)
45 Berkshire Capital Partners, Inc.
Commonwealth Associates, Ltd.
Dottenhoff Financial, Ltd.
Galton Scott & Golett Inc.
46 Morgan-Taylor International Inc. (M)
47 Edwards Securities Inc.
Clansman 98 Investments Inc.
48 Create-A-Fund Incorporated (C)
49 Klytie's Developments Inc.
50 Adcapital Industries Inc.
AD Capital U.S. Inc.
51 Ives Business Services Inc. (I)
52 Brookmount Explorations Inc.
53 Planned Legacies Inc.
Redeeming Health Inc.
RightHedge Chrono-Logic Fund, Limited Partnership
RightHedge Investments, Inc.
RightHedge Investments, LLC
Righthedge Investments Inc.
54 Seisma Oil Research, LLC
Seisma Energy Research A.V.V.
Seisma Energy Research, LLC
SXC Stock Exchange of the Caribbean A.V.V
Seisma Mckenzie Draw #1 Joint Venture
56 CIBC World Markets Inc. (C)
57 Calpine Resources Inc.
Prime Resources Corporation
58 Trident Properties Ltd. (T)
59 Kustom Design Financial Services Inc. (KC)
Kustom Design Group Inc.
Hightide Management Inc.
Synergy Group (2000) Inc.
60 Jory Capital Inc.
61 Ultimate Ventures Inc.
Trivera Investments Inc.

62	Gaia Equity Investments (G)
	Midas Group Holdings Ltd. (M)
63	Corporate Express Inc.
	Fortress International Ltd.
	Great American Gold Ltd.
64	West African Industries Inc
	101065273 Saskatchewan Ltd.
	101076568 Saskatchewan Ltd.
	Life Systems Corporation
65	Nano World Projects Corporation (N)
66	Leduc & Associés Securities Canada Ltd. (L)
67	Canadian Rockport Homes International Inc. (R)
68	Statik Sports Inc.
	592087 B.C. Ltd.
	Sniper Sports Ltd.
69	Chivas Hedge Fund Ltd. (C)
70	Royal Crown Ventures Group Ltd. (R)
71	Keybase Financial Group Inc.
72	Canada Pacific Consulting Inc. (C)
73	Global Response Group (GRG) Corp.
	IMC – International Marketing of Canada Corp.
74	University Lab Technologies Inc.
75	BMO Nesbitt Burns Inc. (B)
76	Gold Vault Metals, LLC
	Worth Bullion Group, Inc.
77	Noram Capital Management Inc. (N)
78	Yuen Chow International Group
	Yuen Way Hang Lung International Foreign Exchange Co.
	Yuen Chow Equities Limited
	Hang Lung Market Data Information Services, Inc.

Note 1: Two case numbers, 32 and 55, do not appear in the case count. These two cases were assigned to other cases.

Note 2: In some cases, there were multiple corporate entities sanctioned, but the regulators felt the multiple corporations acted as a single entity. The abbreviation for each corporation is thus the same.

Note 3: There is no difference between the designations Inc., Corp., or Ltd.

Appendix C: Opportunity to Commit/Conceal Corporate Financial Crime by Case Number

Opportunity	Low			Medium			High		
Concealment	Low	Medium	High	Low	Medium	High	Low	Medium	High
	9	77	15	41	20	5.1	62	12.1	3
	28	44		60	4	5.2		12.2	6.1
	29.1	51		64	16	5.3		12.3	6.2
	29.2			65	35	5.4		12.4	6.3
	38			68	37.2	18		12.5	8
	40			73	39	27		12.6	10
	42			78	48	31.3		14.1	11
	43			30.1	58			14.2	17
	47			30.3	63			19	21
	50			46	2.1			24	22
	56			7	2.2			31.2	23
	57			13	1			61	25
	59							66	26
	67							69	33
	71							70	34
	74								36
	75								37.1
	76								45
									49
									52
									53
									54
									72