

SNC-Lavalin: The Concluding Chapter

Presented by: Kenneth Jull



The views are those of the author and are not meant to represent the views of Gardiner Roberts LLP .

SNC-Lavalin unit pleads guilty to fraud charge, to pay \$280-million fine



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<https://www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption/>

(December 18, 2019)

- A unit of SNC-Lavalin Group Inc. has pleaded guilty to fraud, ending a legal drama that had engulfed the engineering company and the Trudeau government.
- The Canadian engineering giant and prosecutors on Wednesday unveiled a deal in which the company's construction division pleaded guilty to a single charge of fraud related to activities in Libya. It will pay a \$280-million fine and receive a three-year probation order. A more potentially damaging charge of bribery under the Corruption of Foreign Public Officials Act was dropped.

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- Legal observers noted the settlement's effect is likely similar to what a DPA would have achieved: A hefty fine, a statement of guilt and monitoring of the company for a prescribed period.
- "One could say it's a DPA through the back door," said Kenneth Jull, who specializes in corporate compliance.

SNC-Lavalin settles Libya charges, pleads guilty to single count of fraud

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Dec. 18, 2019 5:00 p.m.

- One of the biggest risks faced by SNC-Lavalin in the event of a conviction on corruption charges involving foreign officials was its ability to bid for construction projects in Canada and abroad. Under federal law, a bribery offence could result in a bidding ban for federal contracts for up to 10 years. It could also prompt a ban on bidding for projects backed by the World Bank.

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- While fraud committed against the Canadian government is covered under the public works department's integrity regime — and could thus trigger a ban — a fraud offence connected to a foreign government is not, said Kenneth Jull, an expert in financial crimes and corporate compliance at Gardiner Roberts law firm in Toronto.

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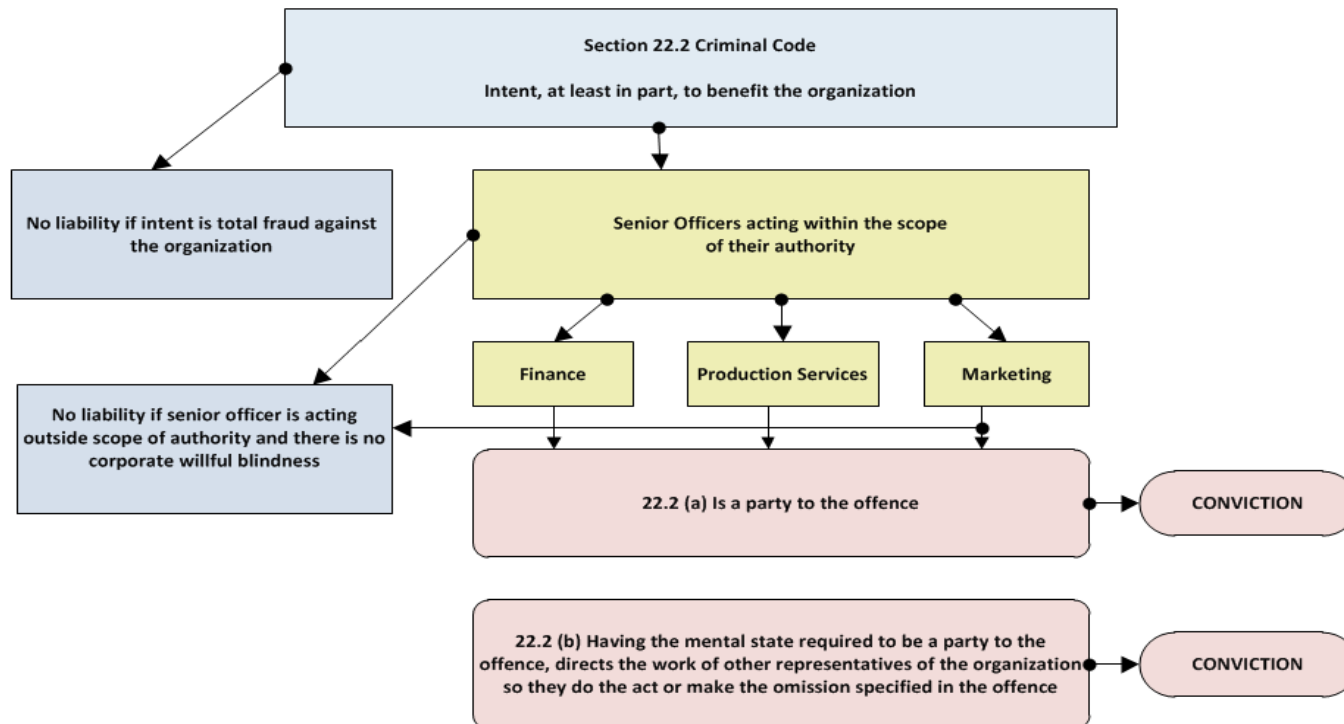
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Dec. 18, 2019 5:00 p.m.

- “It’s very clever. You could say it’s almost like a DPA through the back door,” said Jull, who has endorsed deferred prosecution agreements (DPA) — a type of plea deal that steers clear of admissions of guilt — as a way to avoid punishing innocent employees for C-suite offences.

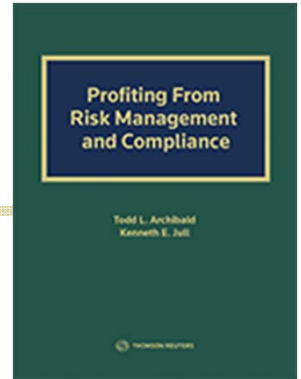
Public prosecutors also had risk, re scope of authority

Senior Officer Level



Scope of Authority

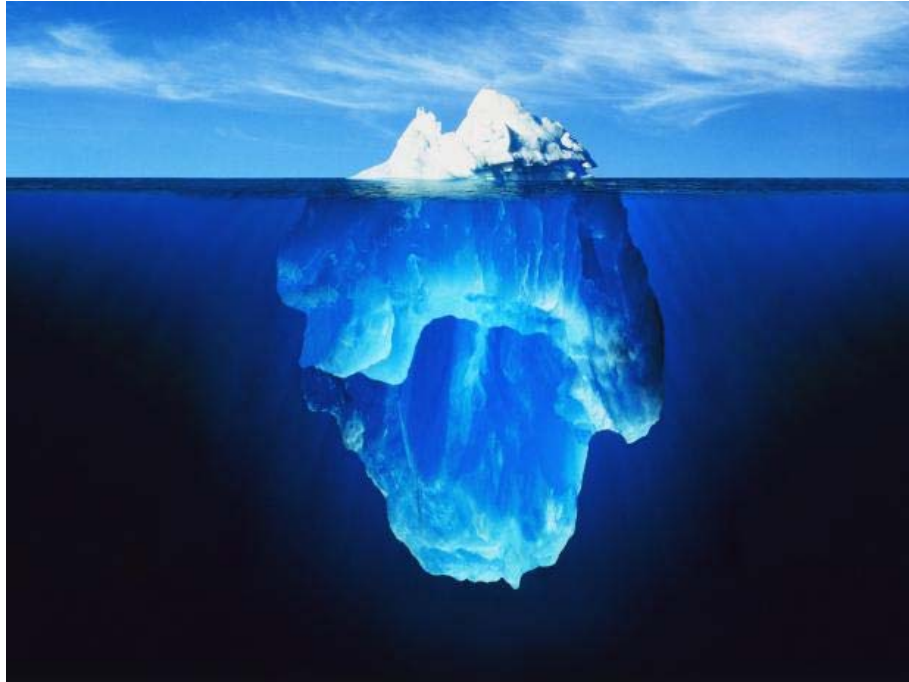
Archibald, Jull



- **The legislature chose to add the words "scope of authority" in both s. 22.2(a) and (b).** These words are presumed to make sense and to have a specific role to play in advancing the legislative purpose.
- Courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant. If the words "scope of authority" do not add a second test, these words would be redundant, contrary to this statutory interpretation presumption.

Archibald, Jull

- **We submit that the wording "scope of authority" should be narrowly construed in accordance with the concept of willful blindness.**
- For example, it is not acceptable for an organization to permit bribery by permitting the finance department to look the other way while a bribe is paid from the marketing department.
- On the other hand, where corporate due diligence establishes that an anomalous payment was made outside the scope of a senior officer's job description and without complicity from those in other departments, the scope of authority requirement may not have been met to establish criminal liability.



RISK OF A STAY OF PROCEEDINGS IN RELATION TO THE DELAY AND TRIAL WITHIN A REASONABLE TIME

R. v. Cody 2017 SCC 31

Presumptive time limits in *Jordan*:

The new framework for s. 11(b) can be summarized as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is **18 months for cases tried in the provincial court, and 30 months for cases in the superior court** (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
- *Once the presumptive ceiling is exceeded*, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.

R. v. CIP Inc.

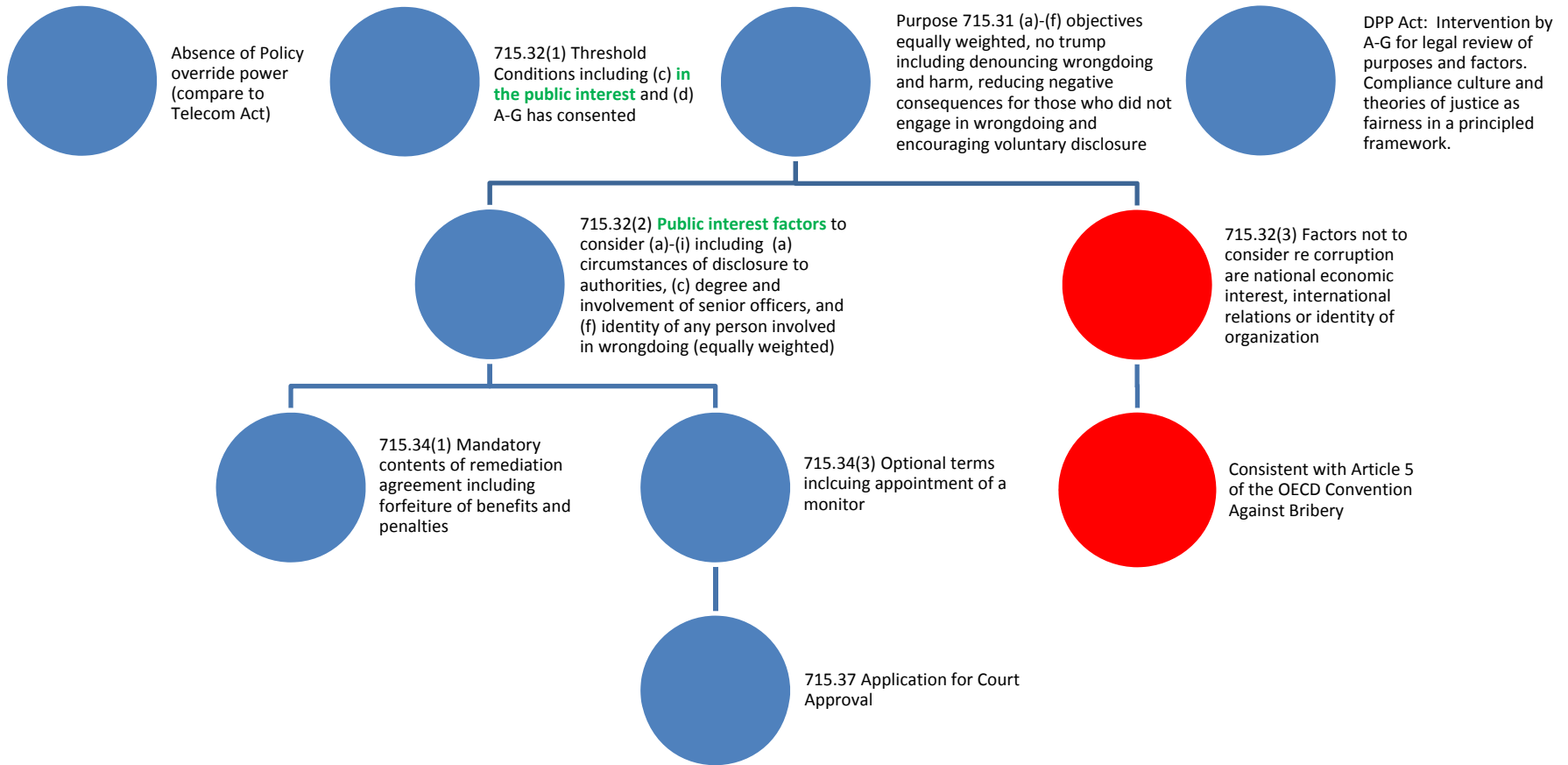
1992 CarswellOnt 82, [1992] 1 S.C.R. 843, at para. 50.

The issue becomes more complicated when a corporate accused is arguing that proceedings should be stayed. A corporation is considered a person within the meaning of s. 11 of the Charter. The Supreme Court in *R. v. CIP Inc.* confirmed that it would be unfair to suggest that the community is less interested in seeing corporations brought to trial.

The factors to be taken into account are set out in standard s. 11(b) jurisprudence: (1) length of the delay; (ii) waiver of the time periods; (iii) explanation for the delay; and (iv) prejudice to the accused. In *CIP*, a 19-month delay from the laying of the charge to the ultimate trial date was held to be *prima facie* excessive. With respect to the distinction between regulatory offences and criminal offences, the court made it clear that the distinction makes no difference with respect to trial within a reasonable time.

Lessons from the SNC-Lavalin story







**BEFORE THE HONOURABLE JUSTICE
CLAUDE LEBLOND, J.C.Q.**

THE QUEEN

Prosecutor

v.

**SNC-LAVALIN CONSTRUCTION INC.
(FORMERLY SOCODEC INC.)**

Lesson (1): Compliance programmes will mitigate penalty



[6.6] Since early 2012, the SNC-Lavalin Group Inc., the ultimate parent company of the wider organization, took measures to reduce the likelihood that it, or its affiliates, including SLCI and SLII, would commit a subsequent offence. Those measures include a complete turnover of the corporate executive team and Board of Directors, the implementation of a robust Compliance and Ethics Program, the adoption of the necessary and appropriate steps to ensure that checks and balances now exist in order to prevent any similar situation or wrongful conduct from occurring again.

Lesson (2): Look for classic red flags such as offshore companies in countries such as Panama and bank accounts in jurisdictions such as Switzerland.

- [6.22] *Dinova was incorporated on October 27, 2008 under the laws of Panama. A bank account for Dinova was opened in Switzerland by lawyer KAUFMANN at EFG Bank SA. The authorized signing officer of the bank account was KAUFMANN. MUFMANN signed a declaration on January 6, 2011 that BEN AISSA had signing authority on the bank account. A letter from BEN AISSA to the bank dated February 15, 2011 indicates that sole beneficial ownership of Dinova was transferred to BEN AISSA and that BEN AISSA had beneficial ownership of the company and the bank account.*



Lesson (3): “Scope of authority” is important



- [6.35] *BEN AISSA and BEBAWI were "senior officers" and directing minds of SLCI, as defined by the jurisprudence and under section 2 of the Criminal Code. Pursuant to the theory of identification and section 22.2 of the Criminal Code, BEN AISSA and BEBAWI were acting within the **scope of their respective authorities** and were parties to an offence, had the mental state required to be a party to the offence and acted within the scope of their respective authorities to direct the work of other representatives in relation to the specified offence. They acted with the intent, at least in part, to benefit SLCI.*
(Emphasis added)

Lesson (4): Corporate “children” may be responsible for their parent



- [9.43] *The proposed Probation Order provides that **SLCI shall cause SNC-Lavalin Group** to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures. The Order aims to reduce the likelihood that the organization commit a subsequent offence pursuant to section 732.1 (3.1) (b) of the Criminal Code. (emphasis added)*

Lesson (5): Corporate subsidiaries are separate legal entities

- [10.29] *BEN AISSA set up off-shore companies with the help of a Swiss lawyer, Roland Kaufman. He then, with BEBAWI's knowledge and consent, proposed that SLCI (through SNC-Lavalin International Inc.) use the services of the off-shore companies as representatives in Libya. These companies were engaged for the purpose of providing representative services in foreign countries.*



Lesson (5): Corporate subsidiaries are separate legal entities

- *At the time of engagement and until the execution of search warrants on April 13, 2012, the executive management of SNC-Lavalin Group Inc., the ultimate parent company of SLCI, were unaware that SLCI executives owned these offshore companies. (emphasis added)*



Lesson (6): Impact on innocent employees will be considered

718.21 d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees

- *[10.36] This mitigating factor considers the impact that a fine may have on individuals who are dependent on the corporation and who are not at fault. Such individuals include employees, as well as shareholders⁴² and other stakeholders such as pensioners, suppliers and clients.*
- ⁴² T. Archibald, K. Jull and K. Roach, *The Changed Face of Corporate Criminal Liability*, 48 Crim LQ 367 2003-2004, at 390.



Lesson (7): The SNC Lavalin probation order offers a template for corporate compliance

SNC-Lavalin Construction Inc. shall cause SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program,

Lesson (7): The SNC Lavalin probation order offers a template for corporate compliance

- SNC-Lavalin Construction Inc. shall cause SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures in accordance with the directions set out in appendix A to this order.
- **Comment:** Appendix A is a good template with respect to what the government considers to be important in a compliance programme.



Questions?



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