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The Right and the Wrong Way to seek Remediation Agreements

Ken Jull, Gardiner Roberts LLP[1]

Robert Frost wrote that "Two roads diverged in a yellow wood, And sorry I could not travel both." The legislation for deferred prosecution agreements (DPAs /remediation agreements) clearly sets out a permissible route, but also a prohibited route to seek such agreements. It is important to understand the roadmap to DPAs, particularly in light of the oversight by the Organisation for Economic Co-operation and Development (OECD). The OECD is monitoring the allegations that Prime Minister Justin Trudeau's government interfered in a criminal prosecution against SNC-Lavalin.[2]

THE PERMISSIBLE ROAD: INNOCENT THIRD PARTIES WHO DID NOT ENGAGE IN THE WRONGDOING

A permissible route flows from the purpose section, section 715.31(f) of the *Criminal Code*: "to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing." This road in effect has a sign that says "only those who did not engage in wrongdoing" may benefit from travel on this road.

The identification of those who did not engage in the wrongdoing requires a detailed analysis of the principles of corporate criminal liability applied to each applicant for a remediation agreement.[3] In the context of the application by SNC-Lavalin, this requires an analysis of the level of responsibility of those persons alleged to have committed acts of bribery and how widespread the allegations of wrongdoing are. I cannot stress enough that a sound understanding of corporate criminal responsibility, as set out in section 22.2 of the *Criminal Code*, is essential to undertake this analysis.[4]

It is possible for senior officers or certain middle managers acting with intent, at least in part, to benefit a corporation and acting within the scope of their authority to have committed bribery offences on behalf of the corporation. At the same time, there may be many employees who are not involved or even aware of the misconduct. Customers and pensioners are a further step removed from knowledge about corrupt practices. A similar test is used in the U.K.

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[1] Kenneth Jull is Counsel at Gardiner Roberts LLP, Adjunct Professor, Faculty of Law, University of Toronto, and author of *Profiting from Risk Management and Compliance*. Mr. Jull testified as a witness before the Standing Committee on Justice on Remediation Agreements.

[2] https://www.msn.com/en-ca/news/politics/oecd-monitoring-canadas-snc-lavalin-probes/ar-BBUDH2N

[3] See *R. c. Pétroles Global Inc*, [2012] J.Q. No 5437 (Global Fuels), leave to appeal to the Quebec Court of Appeal granted 2013 CarswellQue 9268, 2013 QCCA 1604 and then abandoned.

[4] See Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters updated annually) at chapter 5, "The Changing Face of Corporate and Organizational Liability" and see also Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters, 2018).

legislation which refers to "collateral effects" on the public, employees and shareholders or institutional pension holders.[5]

We could also learn from the United States' experience, which weighs the impact on innocent persons when considering whether to offer a deferred prosecution agreement. The following comment from the OECD Working Group underscores the division between innocence and the prohibited factor of national economic interest:

> Under section 9-28.300 ("Factors to be Considered") in the "Principles of Federal Prosecution of Business Organizations", a decision of prosecutors on whether to charge a corporation, negotiate a plea or other agreement, may consider "collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution". The evaluators questioned whether these considerations could feasibly include the national economic interest, contrary to Article 5 of the Convention. The U.S. reassured them that a decision based on "disproportionate harm" would not result in terminating proceedings. Instead, the DOJ would carefully consider whether a DPA or NPA might lessen the potential harm to innocent third parties. In addition, the DOJ would make the same kind of determination if the potential for "disproportionate harm" were to non-U.S. companies and individuals.[6] [Emphasis added]

In his testimony before the Standing Committee on Justice on the subject of Remediation Agreements,[7] Mr. Michael Wernick (Clerk of the Privy Council and Secretary to the Cabinet, Privy Council Office) stated: "My view is that the economic impacts of jobs—and it's explicitly in the Criminal Code. The impact on suppliers, pensioners, customers, communities is a relevant public interest consideration."[8]

Unfortunately, perhaps due to time constraints, Mr. Wernick did not mention that the impact on employees and others is ***only*** relevant in considering the merits of a remediation agreement where the employees or others "did not engage in the wrongdoing".

If it is possible to identify a group of innocent employees, customers and pensioners, this does not end the matter. The next step is to consider the other purposes of remediation agreements as set out in the *Criminal Code*.

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[5] Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013, Serious Fraud Office, Section 2.8.2 vii: A conviction is likely to have collateral effects on the public, P's employees and shareholders or P's and/or institutional pension holders.

[6] PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES October 2010, Paragraph 60. The OECD made the following commentary: "The evaluators welcome confirmation from the United States that the national economic interest is not a factor to be considered in investigative and prosecutorial decision-making under the FCPA, and that pursuant to the 'Principles of Federal Prosecution of Business Organizations' a decision of prosecutors on whether to charge a corporation, or negotiate a plea or other agreement, would also consider the potential harm to innocent third parties in all cases, including those involving non-U.S. companies and individuals" (at paragraph 63).

[7] Out of full disclosure, I testified as a witness about remediation agreements before the Justice Committee on February 25th, 2019. See: https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence

[8] https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-138/evidence; Pages 1550 to 1555.

THE PURPOSES OF ACCOUNTABILITY AND ENCOURAGING VOLUNTARY DISCLOSURE OF WRONGDOING

Section 715.31 sets out the objectives of the remediation regime. As noted, subsection (f) refers to innocent third parties. Other objectives include (a) denunciation; (b) accountability through penalties; (c) promoting a compliance culture; (d) to encourage voluntary disclosure of the wrongdoing; and (e) to provide reparations for harm done to victims or to the community.

I have previously written in this Journal about the purpose of deferred prosecution agreements in "Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada."[9] An important objective of remediation agreements is "to encourage voluntary disclosure of the wrongdoing". Organizations are encouraged to voluntarily come in from the zone of non-discovery: this is a zone where the government may never find out about serious criminal activity by corporate organizations in the absence of such disclosure. These are circumstances where the government ought to have sympathy for those organizations that "come in from the cold".

In the case of SNC-Lavalin, some commentators have stated that because the company did not self-disclose[10] and come in from the cold, it should not be considered for a deferred prosecution programme. It should be noted, however, that at the time there was a discovery by SNC-Lavalin, there was no safe harbour available as the deferred prosecution legislation only came into force in September of 2018. Accordingly, this is a unique situation that must be considered on its own facts.[11]

FROM PURPOSES TO THRESHOLD CONDITIONS

The next level of analysis are threshold conditions contained in section 715.32(1) and these include:

> (a) the prosecutor is of the opinion that there is a reasonable prospect of conviction with respect to the offence;[12]
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> (b) the prosecutor is of the opinion that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;
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> (c) the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances; and

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[9] Justice Todd Archibald and Kenneth Jull "Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada", Toronto Law Journal July 2018.

[10] The Company and its insurers have reached an agreement to settle two class actions, brought in Quebec and Ontario on behalf of security holders, relating to alleged disclosure misrepresentation during 2009-2011. See http://www.snclavalin.com/en/media/press-releases/2018/snc-lavalin-announces-agreement-settle-class-actions-brought-2012.aspx

[11] I have discussed the difference between bronze and gold standards in Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada", Toronto Law Journal July 2018.

[12] This may be a fluid concept that changes as a matter progresses. For example, the risk of a case being stayed as not being tried within a reasonable time will change with the time and progress of any given litigation. This factor may also be relevant to the public interest.

(d) the Attorney General has consented to the negotiation of the agreement.

I will review the role of the Attorney General as set out in the remediation regime at the end of this article.

FROM CONDITIONS TO FACTORS

For the purpose of considering the public interest (referred to in paragraph (1)(c), the Code enumerates a series of nine factors in section 715.32(2). This list of factors includes several factors that would be relevant to the determination of which employees and other groups did not engage in wrongdoing, including the following:

> (c) the degree of involvement of senior officers of the organization in the act or omission;
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> (e) whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
>
> (f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;

The SNC-Lavalin case is before the courts, and the company is presumed innocent. The company has also indicated that it has sought a remediation agreement and brought an unsuccessful judicial review seeking the reasons for the refusal by the prosecution.[13] A hypothetical example illustrates the dynamic that could play out in the SNC-Lavalin case. Assume for the sake of the hypothetical that the company was prepared to admit (for the purposes of obtaining a DPA) that certain senior officers of the corporation, acting within the scope of their authority and with intent at least to benefit the corporation, bribed foreign officials. And assume that there was a group of employees who were wilfully blind to this corruption which the company also admits. For the sake of the hypothetical, assume that this group numbers 500, and many of these employees have left. Assume that 9000 jobs are at risk if a DPA is not offered and debarment from federal contracts follows for at least 5 years. [14] That would leave about 8,500 innocent employees who were not aware of or complicit in the bribery.

In seeking a remediation agreement, relevant factors would be the degree of involvement of senior officers, whether SNC had taken measures to remedy the harm and to prevent future acts of bribery, and whether SNC had identified or expressed a willingness to identify the persons in the group of 500 who were involved in wrongdoing.

Section 715.32(2)(i) is a basket provision that includes (i) any other factor that the prosecutor considers relevant. This basket section leads to section 715.32(3) which lists "Factors not to consider," "despite paragraph (2)(i)," where the offence alleged is foreign corruption.

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[13] 2019 FC 282

[14] http://www.snclavalin.com/en/clarification-statement-by-snc-lavalin. See https://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html

THE PROHIBITED ROAD: FACTORS NOT TO CONSIDER

Subsection 715.32(3) of the Canadian *Criminal Code* creates an effective "Do Not Enter" sign which is consistent with the OECD Convention on Combating Bribery of Foreign Public Officials. Section 715.32(3) states:

> Factors not to consider
>
> (3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

Three sub routes that are prohibited

In my view, the use of the word "or" in section 715.32(3) creates a disjunctive test which when coupled with the prohibitive word "not" means that the prosecutor must not consider any of the three factors listed in section 71.32(3).[15] This disjunctive approach is consistent with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was entered into force in Canada in February of 1999.[16] Article 5 of that Convention states:

> Enforcement
>
> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[17]

There are, however, contrary views to my opinion.

In his testimony before the Standing Committee on Justice on the subject of Remediation Agreements,[18] Mr. Michael Wernick (Clerk of the Privy Council and Secretary to the Cabinet, Privy Council Office) interpreted the section much more narrowly:

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[15] The New Brunswick Court of Queen's Bench states the general rule of statutory interpretation in *Windsor Energy Inc. v. Northrup*, 2016 CarswellNB 504 as follows: "The general rule is that the word 'or' in a statute carries a disjunctive meaning as stated in *R. v. Smith*, [1988] O.J. No. 1750, 44 C.C.C. (3d) 385 (Ont. H.C.) at page 114 where it states: 'as a general principle of statutory construction the connective (or) is to be construed as disjunctive and the connective (and) as conjunctive'. In *Russell v. R.* [2001 CarswellNat 1446 (T.C.C. [Informal Procedure])], CanLII 423 at paragraph 10 'in ordinary parlance 'and' is conjunctive and 'or' is disjunctive, but sometimes a departure from this rule is justified if sense is to be made of a legislative provision or to ensure that parliaments legislative intent is not defeated' and further stated that 'or' should be treated as disjunctive and not conjunctive unless with a good reason" (at paragraph 24). See also *R. v. Ahmed*, 2019 CarswellAlta 32, at paragraph 27 stating that the use of the disjunctive "or" can suggest that two separate offences are created, but the use of the disjunctive is not determinative.

[16] http://www.oecd.org/daf/anti-bribery/canada-oecdanti-briberyconvention.htm

[17] OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, (2011) http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

[18] Out of full disclosure, I testified as a witness about remediation agreements before the Justice Committee on February 25th, 2019. See: https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence

> The phrase "national economic interest" in the legislation is a cut and paste from the OECD code on anti-bribery.
>
> In my understanding—and you can seek advice on this from experts—it is to distinguish national economic interest from the interest of other countries. If you're part of this group in the OECD, you cannot favour or let a company off because it helps France versus Germany, or Germany versus Italy, or Canada versus the United States.
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> My view is that the economic impacts of jobs—and it's explicitly in the Criminal Code. The impact on suppliers, pensioners, customers, communities is a relevant public interest consideration.[19]

Mr. Wernick appears to have conflated several sections with the suggestion that the essence of the section is that "you cannot favour or let a company off because it helps France versus Germany or Germany versus Italy or Canada versus the United States." This testimony would appear to interpret the section as conjunctive and tied to the concept of international relations.

The Legislative summary for Bill C-74 prepared by the Library of Parliament has a focus on the prohibited factor of national economic interest: "New section 715.32(3) provides that, *except in the case of a charge of corrupting a foreign public official*, the prosecutor may consider the national economic interest in deciding whether to enter into a remediation agreement with the accused organization"[20] [emphasis added]. This highlights the fact that there is something about foreign bribery allegations that is different from other types of offences such as fraud. If the allegation is that a company bribed a government, it may be theoretically possible that the company may also attempt to bribe or influence the government that is prosecuting it. The prohibition on consideration of the national economic interest may be one mechanism to combat this potential.

Circling back to Mr. Wernick's comments, recently Drago Kos, Chair of the OECD Working Group on Bribery is quoted as rejecting the interpretation advanced by Mr. Wernick, given that Article 5 prohibits countries from dealing with criminal investigations of bribery on the basis of economic interests.[21]

(i) **the national economic interest**

In March 2017, the OECD Working Group on Bribery completed its fourth evaluation of the United Kingdom's implementation of the OECD Convention. The Working Group made some observations that might have a parallel with Canada: "NGOs believe that Brexit could increase the risk of UK companies threatening to relocate and potential loss of UK jobs as a bargaining chip in negotiations with prosecutors over charges."[22] The OECD has reiterated the view that

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[19] https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-138/evidence; Pages 1550 to 1555.

[20] Library of Parliament, *Legislative Summary of Bill C-74: An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, Economics, Resources and International Affairs Division.

[21] Globe and Mail, March 12, 2019, Robert Fife and Steve Chase, "Jobs no reason to settle SNC case, OECD says".

[22] OECD "IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: Phase 4 report: United Kingdom. See http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf. Hereinafter referred to as the OECD Phase 4 Report.

consultation with government ministers about individual criminal cases is generally not appropriate in foreign bribery cases, in which the national economic interest will frequently be involved.

Newly obtained documents show that SNC-Lavalin warned federal prosecutors last fall about a possible plan to split the company in two, move its offices to the United States and eliminate its Canadian workforce if it didn't get a deal to avoid criminal prosecution.[23] The documents, part of a PowerPoint presentation obtained by The Canadian Press, describe something called "Plan B" — what Montreal-based SNC might have to do if it can't convince the government to grant a so-called remediation agreement to avoid criminal proceedings in a fraud and corruption case related to projects in Libya. Under that plan, SNC would move its Montreal headquarters and corporate offices in Ontario and Quebec to the U.S. within a year, cutting its workforce to just 3,500 from 8,717, before eventually winding up its Canadian operations.

SNC-Lavalin confirmed that these documents were sent to the Public Prosecution Service of Canada to allow the director of public prosecutions to consider the company's request for an agreement. SNC claims that a remediation agreement remains "the best way to protect and grow the almost 9,000 direct Canadian SNC-Lavalin jobs, as well as thousands of indirect jobs."[24]

The reference to jobs in the above documents lacks the precision of language suggested in this article. Are these the jobs of innocent people, which is a permissible purpose, or is the threat to leave an attempt to ask the government to consider the improper factor of the national interest?

The OECD Working Group review of the UK with respect to Article 5 indicates that the Convention is binding under international law on the UK as a State but falls short of stating that it is also binding on individual prosecutors and investigators or the Attorney General.[25] In this respect, Canada has more robust protection than the United Kingdom, as Canada has put the Article 5 criteria "not to consider" into the Criminal Code as binding in section 715.32(3).

In March of 2019 the OECD Working Group published a follow up report with respect to their review of the UK.[26] "The Working Group regrets that the UK has not taken steps to address most of the Working Group's concerns – some of which date back to Phase 3 – regarding conformity with Article 5 of the Convention, which seeks to protect foreign bribery investigations and prosecutions from undue interference."[27] More specifically, the Working Group notes that "No evidence has been provided that would address the use of Shawcross exercises in foreign bribery cases, which the Working Group recommended should be publicised and transparent, as the circumstances permit."

It appears that the prohibitive factor of the national economic interest is a concern and challenge on an international scale.

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[23] https://www.cbc.ca/news/politics/snc-lavalin-warned-of-move-abroad-1.5075840
[24] https://www.cbc.ca/news/politics/snc-lavalin-warned-of-move-abroad-1.5075840
[25] OECD Phase 4 Report, paragraph 87.
[26] http://www.oecd.org/corruption/United-Kingdom-phase-4-follow-up-report-ENG.pdf
[27] http://www.oecd.org/corruption/United-Kingdom-phase-4-follow-up-report-ENG.pdf at 7.

(ii) **the potential effect on relations with a state other than Canada**

Mr. Wernick appears to suggest that the essence of section 715.32(3) is that "you cannot favour or let a company off because it helps France versus Germany or Germany versus Italy or Canada versus the United States." As noted above, my view is the use of the word "or" in section 715.32(3) generally creates a disjunctive test which when coupled with the prohibitive word "not" means that the prosecutor must not consider any of the following three factors.[28] In my view, this disjunctive approach should be favoured, and is consistent with the OECD Article 5 as it applies to Canada.

(iii) **the identity of the organization or individual involved.**

The third prohibitive factor listed in section 715.32(3) that should not be considered is the identity of the organization or individual. An analogy could be made to a Hollywood star who says "Do you know who I am?" when pulled over by the police. Celebrity is not an appropriate factor to consider for individuals or corporations. This factor ensures a level playing field that treats all applicants on the same footing in the application of the criteria set out in the Criminal Code remediation scheme.

THE REMEDIATION LEGISLATION REQUIRES ATTORNEY GENERAL CONSENT ON THE WAY UP THE LADDER BUT NOT ON THE WAY DOWN

Assuming that the prosecutor agrees to a remediation agreement, section 715.32 (1)(d) of the *Criminal Code* explicitly requires that the Attorney General consent to the negotiation of the agreement. This might be described as the "ladder up" scenario, with the rung above being judicial approval, which is also required.

In the reverse "ladder down" scenario, where the prosecutor does not think that a remediation agreement is appropriate (which was the case in the SNC-Lavalin matter) the legislation for remediation agreements does not explicitly give power to the Attorney General or Cabinet to override the prosecutor. Comparison with other legislation shows that the drafters could have put in such a power but chose not to. For example, section 12 of the *Telecommunications Act* gives the Cabinet power to vary or rescind a decision of the CRTC:

> Section 12 (1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.[29]

Justice Sexton of the Federal Court of Appeal has described section 12 as giving the power to Cabinet to implement policy decisions: "In my view, it clearly was open to the Governor in Council, in deciding to vary the CRTC decision, to refer to policy considerations. By giving the variance power to a polycentric body such as the Governor in Council, Parliament signalled its intent that the decision to vary could incorporate broader policy concerns."[30]

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[28] See above, footnote 14.

[29] See *Telecommunications Act*, S.C. 1993, c. 38, section 12(1).

[30] *Globalive Wireless Management Corp. and Attorney General of Canada and Public Mobile Inc. and Telus Communications Company and Alliance Of Canadian Cinema, Television And Radio Artists, Communications,*

In order to override the prosecutor, the Attorney-General must rely on a different piece of legislation, the *Director of Public Prosecutions Act*. Under section 10 of this Act, the Attorney General can issue a directive respecting specific prosecutions and that directive would be published in the Canada Gazette to ensure transparency.[31] The Attorney General can also take over the prosecution under section 15.[32] To date, no Attorney General has ever issued any directives in respect of specific cases under s. 10(1). There have been two 'general' directives issued under s. 10(2), which deal with terrorism and HIV non-disclosure. To date, no Attorney General has ever assumed conduct of a prosecution under s. 15.[33]

Interestingly, the U.K. Attorney General does not have the power to give directions to the Director in a given case,[34] but can appoint and terminate the Director of the SFO.[35] In the United States, there are safeguards with respect to the use of national security in foreign corruption cases,[36] but there is academic debate concerning the wisdom of the power generally of the President to dismiss Attorney Generals.[37]

In my respectful submission, in the absence of an explicit power in the remediation regime for Cabinet to override a decision to not negotiate a remediation agreement, the Attorney General's power to override the prosecutor should be read restrictively and not permit a wide policy override. The legislation does not give the Attorney General or the polycentric Cabinet variance power which could incorporate broader policy concerns. Such an interpretation would be consistent with the prohibition to consider factors such as the national economic interest, which raises political-economic considerations.

In my view, if the Attorney General must resort to the *Director of Public Prosecutions Act*, the reasons for such an intervention should relate to the legislative criteria in the remediation scheme and a purported failure of the prosecutor to properly consider or apply that criteria. For example, if a prosecutor did not properly consider the reduction of the negative

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Energy And Paperworkers Union Of Canada, and Friends Of Canadian Broadcasting 2011 FCA 194 at paragraph 45. The author of this article was counsel for Telus in this case.

[31] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html; 1.1 Relationship between the Attorney General and the Director of Public Prosecutions. Public Prosecution Service of Canada Deskbook: Directive of the Attorney General Issued under Section 10(2) of the *Director of Public Prosecutions Act*, March 1, 2014. See 2.2. The power of the Attorney General to issue directives to safeguard the DPP's independence, s. 10 requires that directives respecting specific prosecutions and respecting prosecutions generally be in writing and published in the Canada Gazette. Mandatory publication of the directive assures transparency, and enables the Attorney General to be accountable for his or her decisions.

[32] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html; 2.5. The power of the Attorney General to assume conduct of proceedings.

[33] HONOURABLE JODY WILSON-RAYBOULD MEMBER OF PARLIAMENT for VANCOUVER GRANVILLE, Letter dated March 26, 2019 to Mr. Anthony Housefather, M.P. Chair, Standing Committee on Justice and Human Rights.

[34] See OECD Phase 4 Report, paragraph 96.

[35] See OECD Phase 4 Report, ii. Power of the Attorney General over the SFO Director. For NGOs, the concern remains that, were a Director to refuse to end an investigation or prosecution on the instruction of the AG, his or her appointment could be terminated. According to the UK, it is inconceivable in practice that an AG would dismiss the SFO Director because of a disagreement about an individual case as the roles and responsibilities of both are clearly defined in the 2009 Protocol and that none of the Directors of the SFO have ever been dismissed because of a disagreement about the investigation or prosecution of an allegation of bribery. See Phase 4 Report, at paragraphs 97-98.

[36] PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES October 2010, Paragraph 62.

[37] Laurence Claus, "The Divided Executive" Research Paper No. 18-333 2018 https://ssrn.com/abstract=3110496. See "Trump and the Contested Legacy of the Saturday Night Massacre" by Michael Koncewicz ,https://www.ucpress.edu/blog/39744/trump-and-the-contested-legacy-of-the-saturday-night-massacre/

consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, or consider the relevant factors, that might be a valid reason to intervene.

My suggested test of intervention by the Attorney General on the basis of legislative criteria would still leave a great deal of room for such intervention, given the wide nature of the purposes and factors. For example, promotion of a compliance culture as set out in section 715.31(c) is a rich area for debate. In my own writing I have argued that companies can and should use a framework such as that developed by John Rawls to determine their own priority rules for justice and fairness within that organization. [38]

APPLICATION TO THE SNC-LAVALIN CASE

In terms of the specific case of SNC-Lavalin, the Hon. Jody Wilson-Raybould, testified that she received a section 13 notice from the Director of Public Prosecutions (DPP) regarding their intention not to invite SNC-Lavalin to negotiate a DPA. A section 13 notice under the Act provides updates on prosecutions that are in the general interest. The information is provided to the Attorney General of Canada to act on or not as he or she deems appropriate. Ms. Wilson-Raybould described her review of the decision by the DPP as follows:

> While I cannot discuss the merits of the section 13 notice in respect of SNC-Lavalin as the matter is sub judice, what I can say is that after due diligence and consideration of the matter, I accepted the conclusions of the DPP's section 13 notice and determined that I would not take any further action in the matter. When considering this section 13 notice, and of course as necessary in my role, I respected the role of the DPP, her discretion, and the constitutional principles of prosecutorial independence and the rule of law. Further, I made this decision having a thorough understanding of the DPA regime given my previous knowledge and involvement with the regime. For example, in September 2017, in conjunction with Public Services and Procurement Canada, my Department conducted a public consultation on "Expanding Canada's Toolkit to address corporate wrongdoing". This was followed by a number of Cabinet discussions on Deferred Prosecution Agreements. Eventually this led — through the Budget Implementation Act 2018 —to an amendment to the Criminal Code to include this new tool — changes that came into force in September 2018. As stated in my previous testimony, I had made this determination — this 'decision' — prior to my meeting with the Prime Minister and the Clerk on September 17, 2018.[39]

It is difficult to evaluate the merits of the case without knowing what the reasons were from the DPP in its decision to not issue an invitation to negotiate a DPA. Without such detail, it is impossible to determine whether the DPP properly considered the purposes and factors as set out in the legislation. For example, what analysis was done in terms of corporate criminal liability to determine the scope of persons who would not be guilty of any wrongdoing? Was the failure of SNC-Lavalin to self-disclose a factor that was considered and if so, was it put in the context of the unavailability of remediation agreements at the time?

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[38] See Archibald and Jull, *Profiting from Risk Management and Compliance*. (Thomson Reuters). INT:10:150 — A Fair Organization and Profit

[39] HONOURABLE JODY WILSON-RAYBOULD MEMBER OF PARLIAMENT for VANCOUVER GRANVILLE, Letter dated March 26, 2019 to Mr. Anthony Housefather, M.P. Chair, Standing Committee on Justice and Human Rights at 4/21.

Ms. Wilson-Raybould observes that her review of the section 13 notice did not require her to communicate a decision to the Prime Minister's office which has no responsibility or authority in relation to the exercise of prosecutorial discretion. This interpretation is consistent with the absence of a broad policy override power given to Cabinet in the legislation. There is evidence however that the Prime Minister's office did have a copy of the section 13 notice.[40]

Ms. Wilson-Raybould had a telephone call with the Clerk, Michael Wernick, on December 19, 2018. This call lasted 17.24 minutes, and was taped by Ms. Wilson-Raybould to ensure accuracy, as she did not have staff present to take notes. The tape and its transcript have been released to the Justice Committee. The conversation includes reference to the threat by SNC-Lavalin to move its office, to the need to protect jobs, and the desire to use the legitimate toolbox to try to head that off. What is not clear from the dialogue in this call is which exact purposes or factors in the legislation were considered.

As this affair appears to be the centre stage of public attention it might be appropriate for the government to waive the privilege concerning the decision by the DPP. SNC-Lavalin would not likely complain, as they sought the reasons for the decision in their unsuccessful judicial review. Given that both the Attorney General and the Prime Minister's office both had access to this decision by the DPP, a waiver would allow a more precise analysis of the reasoning that was applied.

Professor Kent Roach has argued that "Prosecutorial independence should not be an excuse for prosecutors not providing reasons for important decisions."[41] In short, the public disclosure of the section 13 notice might provide insight into the central question as to whether the right or wrong roads were pursued in the past and what the proper road forward should be.

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[40] HONOURABLE JODY WILSON-RAYBOULD MEMBER OF PARLIAMENT for VANCOUVER GRANVILLE, Letter dated March 26, 2019 to Mr. Anthony Housefather, M.P. Chair, Standing Committee on Justice and Human Rights at 17/21.

[41] https://www.law.utoronto.ca/blog/faculty/snc-lavalin-controversy-shawcross-principle-and-prosecutorial-independence