Deconstructing SNC-Lavalin:

Implications of Deferred Prosecution Agreements and Canada's Obligation to the OECD Convention

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ABBREVIATIONS AND ACRONYMS

AFA	France, l'Agence française anticorruption
AG	Attorney General of Canada
BPEC	Bangladesh Bridge Project Evaluation Committee
BPI	Bribe Payers Index
CBC	Canadian Broadcasting Corporation
CFPOA	Canada, *Corruption of Foreign Public Officials Act*
CJIP	France, La Convention judiciaire d'intérêt public
CPI	Corruption Perception Index
The Charter	The *Canadian Charter of Rights and Freedoms*
Criminal Code	*Criminal Code of Canada*
DPAs	US, UK, Deferred Prosecution Agreements
DPP	Canada, Director of Public Prosecutions
DPPA	Canada, *Director of Public Prosecutions Act*
FCPA	US, *Foreign Corrupt Practices Act*
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
MUHC	McGill University Health Centre
NTR	OECD, Non-Trial Resolutions
OECD	Organisation for Economic Co-operation and Development
PMO	Prime Minister's Office
PPSC	Public Prosecution Service of Canada
PSPC	Public Service and Procurement Canada
PCMLTFA	*Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
RCMP	Royal Canadian Mounted Police
SEC	US, Securities and Exchange Commission
SCC	Supreme Court of Canada
JRO	judicial remediation orders
TI	Transparency International
US DOJ	United States Department of Justice
WB	World Bank
WGB	OECD's Working Group on Bribery

SUMMARY

This paper examines what SNC-Lavalin considers "legacy issues"—criminal charges for alleged offences that were committed from 2001 to 2011—and various legal matters that have emerged as a result of its recent involvement in the Canadian political and legal sphere. The narratives surrounding SNC-Lavalin provide a backdrop to examine domestic and international measures to combat bribery of foreign officials, the issue of judicial independence and national economic interest, recent changes to the legal framework for assessing unreasonable delay, and the use of remediation agreements in corporate criminal matters.

This paper begins by providing an overview of SNC-Lavalin, its history of legal matters and the current legal battles surrounding its conduct in Libya from 2001 to 2011 to provide context to the discussion. Much of the information used in this section is largely drawn from open-source media reports. There are two key elements to this sequence of events: SNC-Lavalin's alleged offence and the account behind political interference by the Prime Minister's Office ("PMO") on former Attorney General Jody Wilson-Raybould.

The concepts of corruption and bribery, as understood in various literary sources, are presented. Legislative tools available to Canadian authorities in combating bribery of foreign officials, as well as relevant sections from the *Corruption of Foreign Public Officials Act ("CFPOA")* and the *Criminal Code of Canada ("Criminal Code")* under which SNC-Lavalin and its officers were charged will be reviewed.

An interesting aspect highlighted in the litany of testimonies from government officials speaking to the Standing Committee on Justice and Human Rights was the role of the Organisation for Economic Co-operation and Development ("OECD") and its legally binding document combating bribery and corruption as well as its impact on Canadian legislation. This paper sheds light on the OECD Anti-Bribery Convention—to which Canada is a signatory—and the extent to which the recent remediation agreement legislation is impacted. Specifically, Article 5 speaks to concepts associated with judicial independence and national economic interest, two concepts brought to the forefront due to the SNC-Lavalin affair.

Fuelling the suspicions surrounding remediation agreements was what appeared to be attempts by the PMO to politically interfere with the Attorney General's judicial independence. It was alleged that the PMO pressured the then-Attorney General to accept the remediation agreement with SNC-Lavalin, which would allow the embattled corporation to avoid a potential criminal conviction. The paper further considers the Shawcross Doctrine ruling by the Supreme Court of Canada and Article 5 of the OECD Anti-Bribery Convention with respect to judicial independence.

SNC-Lavalin attempted to move past its "legacy issues" by advocating to negotiate a settlement with the office of the Director of Public Prosecutions ("DPP"). This settlement—known as a remediation agreement in Canada—is a recent addition to the Canadian legal

system. A remediation agreement (also known as deferred prosecution agreement ("DPA") or non-trial resolutions ("NTR"), among other terms) is essentially a non-trial agreement reached between a prosecutor and an entity that could be criminally prosecuted. Although similar agreements have existed in other countries for several years, the manner in which it was introduced in Canada casts a pall on its credentials.

SNC-Lavalin has publicly presented its case for warranting a remediation agreement: it is in the best interest of the public and will deliver a safer outcome for innocent third parties who had no role to play in the alleged offences. It maintains that a remediation agreement is also in the best interest of Canada and Canadian companies conducting business internationally. Recognizing that, inevitably, there is an element of self-preservation in these claims, this paper considers remediation agreements used in other jurisdictions to better understand this mechanism and its implications in Canada.

In examining one of the potential benefits of remediation agreements, the paper will explore the changing Canadian legal landscape, notably the *R. v. Jordan* ruling. This ruling, delivered in 2016, places a time constraint on the judicial system while protecting the right to be tried within a reasonable time. Consequently, charges against several SNC-Lavalin executives were dismissed. Remediation agreements could provide a method of eliciting co-operation from corporate entities so that prosecutors and law enforcement authorities can more fully identify and successfully prosecute the individuals who are responsible for committing wrongdoings within the legally mandated timeframes.

Throughout the discussion, it is imperative to note that remediation agreements can be susceptible to abuse. To mitigate misuse, other countries—notably the United States—have developed policies to guide the monitoring of entities that partake in deferred prosecution agreements. The evolution of the practices surrounding deferred prosecution agreements in the United States highlights areas of concern that policy makers need to consider and potential solutions that will strengthen the Canadian remediation agreement process.

Canada made a commitment to the international community to combat financial crimes when it agreed to the OECD Anti-Bribery Convention. This essay concludes by considering whether the use of various non-trial resolutions and its Canadian iteration strengthens its commitment towards the OECD Anti-Bribery Convention and if it aligns with the broader international community in its effort to mitigate corporate economic crimes.

Transparency International, an international non-governmental organization ("NGO") with a stated goal of working with "partners in government, business and civil society to put effective measures in place to tackle corruption", defines corruption broadly as "the abuse of power for private gain".[1] The OECD similarly defines corruption as "the abuse of public or private office for personal gain".[2]

A research brief from Public Safety Canada, the federal department mandated to ensure that Canadians are safe from a range of risks including crime and terrorism,[3] further expands on the definition of corruption by categorizing it into "supply-side corruption" and "demand-side corruption".[4] "Supply-side corruption" speaks to the provision of payments or undue advantage, whereas "demand side corruption" appeals to the receipt or solicitation of such payments or advantage. Various international conventions primarily focus on the "supply-side" of the equation.

The *Criminal Code*, in addressing bribery of judicial officers (s. 119) and bribery of officers (s. 120), uses similar phrases in both sections, namely "directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment..."

[1] https://www.transparency.org/what-is-corruption#define
[2] https://www.oecd.org/cleangovbiz/49693613.pdf
[3] https://www.publicsafety.gc.ca/cnt/bt/index-en.aspx
[4] https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rgnzd-crm-brf-48/rgnzd-crm-brf-48-en.pdf

Moreover, in the article "Corruption in Canada: Definitions and Enforcement", the authors maintain that, under common law, bribery has historically been defined as "the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity"[5].

Transparency International defines bribery as "providing or receiving a benefit to induce another into engaging in an action that is illegal, unethical or breach of trust".[6]

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[5] http://publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf, from Katz Karen, "Here Comes the Bribe: Canada's Efforts to Combat Corruption in International Business," (2011) 69 *Advocate Vancouver* 501, at 502.

[6] https://www.transparency.org/glossary/term/bribery

This section provides contextual information and takes the reader through SNC-Lavalin's operating environment and its history of legal matters. It culminates with the events that allegedly transpired in Libya from 2001 to 2011 which resulted in the current legal matters against various corporate entities of SNC-Lavalin.

Operating Environment

SNC-Lavalin, founded in 1911, is a Canadian engineering and construction firm based in Montréal, Québec. In its 2018 Annual Report, SNC-Lavalin describes itself as "a global fully integrated professional services and project management company and a major player in the ownership of infrastructure". It provides capital investment, consulting, design, engineering, construction management and operations, and maintenance services to clients in the oil and gas, mining and metallurgy, infrastructure, clean power and nuclear energy sectors, as well as engineering design and project management. In 2018, SNC-Lavalin employed 52,435 individuals globally and received $10.1 billion in revenue.[7] It was the leading engineering contractor by revenue in 2017 and 2018.[8]

Its geographic coverage includes the Americas (49%), the Middle East and Africa (24%), Europe (20%) and Asia Pacific (7%).[9] SNC-Lavalin's website lists projects that are currently

[7] SNC-Lavalin's Annual Report 2018, available at: https://www.snclavalin.com/en/investors/financial-information/annual-reports/2018 [2018 SNC]
[8] On-site Magazine. (2019). Canada's top 40 contractors by revenue. Retrieved on 30 June 2019 from https://www.on-sitemag.com/features/top-40-contractors-by-revenue/
[9] 2018 SNC, supra note 1 at pg. 18

underway in Africa, Asia Pacific, Canada, Europe, Latin America, Middle East and North America.[10] Furthermore, from the SNC-Lavalin website, it is possible to surmise some of the countries in the Middle East and Africa where the corporation is potentially generating its revenue. Transparency International's 2018 Corruption Perception Index ("CPI")—an index published annually that ranks countries by their perceived level of public sector corruption—assigned the following rankings to countries in which SNC-Lavalin is currently operating: Dubai (United Arab Emirates) ranks 23, with a score of 70; Qatar ranks 33, with a score of 62; Saudi Arabia ranks 58, with a score of 49; Colombia ranks 99, with a score of 36; and Brazil ranks 105, with a score of 35.[11] Average CPI score in the Middle East and North Africa is 39. Nearly a quarter of SNC-Lavalin's geographic footprint is in regions that score low in the CPI.

Transparency International also publishes the Bribe Payers Index ("BPI"), which evaluates the supply side of corruption: the likelihood that firms from the world's industrialized countries would engage in bribery abroad. The last available BPI, from 2011, is useful since the allegations surrounding SNC-Lavalin which is the focus of this paper concluded around that timeframe. When business executives were asked, "how often do firms headquartered in that country engage in bribery in this country?", re-write this portion? Saudi Arabia and United Arab Emirates ranked 22 and 23 respectively, near the riskier end of the BPI.[12] The

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[10] SNC-Lavalin. (2019). Projects; retrieved 30 June 2019 from https://www.snclavalin.com/en/projects#africa/all/all/all

[11] 2018 Exporting Corruption (Transparency International) at pp. 2 and 3, from https://www.transparency.org/whatwedo/publication/exporting_corruption_2018

[12] 2011 Bribe Payers Index (Transparency International) at pg. 5, from https://www.transparency.org/whatwedo/publication/bpi_2011

same study also published the perception of foreign bribery by sector. Mining, oil and gas, and public works contracts and construction rounded up the bottom of the list at 15th, 16th and 19th places respectively.[13]

These reports indicate that SNC-Lavalin was operating in a sector that is perceived to be susceptible to bribery, and operating in regions of the world that are known for corruption. The 2011 BPI also alluded to the ease in which it is possible to conceal and inflate additional expense in public works contracts and the construction sector with its typically large contracts and opaque costs. These observations are largely consistent with the manner in which the corruption scandal surrounding SNC-Lavalin evolved in Libya.

A history of legal issues

Numerous media articles outline a myriad of corruption scandals surrounding SNC-Lavalin over the past 10 years, presenting a picture of a company fraught with a litany of scandals and legal matters. These instances, discussed below, show that the accused in many of these situations was charged with offences under the *Criminal Code* or the *CFPOA.* The outcome of these charges will be discussed later in this paper to demonstrate Canada's ability to address corruption in the post-*R. v. Jordan* legal landscape. Canadian Broadcasting Corporation ("CBC")'s article "A closer look at SNC-Lavalin's sometimes murky past" outlines key moments in the company's legal drama.

[13] ibid at pg. 15

McGill University Health Centre contract

A $1.3 billion contract was awarded to a consortium that included SNC-Lavalin to design, build and maintain (until 2044) the McGill University Health Centre ("MUHC")'s Glen Site. This contract, plagued by allegations of fraud and corruption, was the subject of a criminal investigation.[14] Consequently:

- Chief Executive Officer Pierre Duhaime was arrested in late 2012 on allegations that he structured secret payments to a shell company to obtain the MUHC contract. He pleaded guilty to aiding a government official commit breach of trust; 14 charges against him were withdrawn;[15]
- Executive Vice-President of Construction Riadh Ben Aissa ("AISSA") was arrested in April 2012 in Switzerland for a separate SNC-Lavalin scandal (more on this later) and extradited to Canada to face corruption charges arising from the MUHC contract. AISSA was charged in 2014 with 16 offences, including fraud, for allegedly ordering $22.5 million in kickbacks to help SNC-Lavalin win the MUHC contract. He pleaded guilty to one charge of using forged documents; 15 other charges against him were later withdrawn;[16] and,

[14] https://www.cbc.ca/news/canada/snc-lavalin-corruption-fraud-bribery-libya-muhc-1.5010865 [MUHC]
[15] ibid
[16] ibid

- Vice-President Stephane Roy ("ROY") was arrested in 2014 on allegations of conspiring to pay commissions to hospitals in order to obtain the MUHC contract. He was acquitted of all charges relating to the MUHC contract in July 2018.[17]

Padma Bridge Project in Bangladesh

In response to accusations of bribery relating to awarding contracts to build the Padma Bridge in Bangladesh, The World Bank launched an investigation. The investigation found that there was evidence of two members of the Bangladeshi Bridge Project Evaluation Committee ("BPEC") illegally informing senior SNC-Lavalin officers in Bangladesh that SNC-Lavalin was second in line to another firm in the bidding process; however, no final recommendation had been made. BPEC and Minister Syed Abdul Hossain of the Bangladeshi government would be making the recommendation.[18] It was alleged that SNC-Lavalin executives employed measures to improve the company's standing in the bidding process.[19] As a result of their investigation, The World Bank banned SNC-Lavalin from conducting further business with it and other multilateral development banks for 10 years due to the entity's role in the corruption scandal.[20]

An investigation by CBC News and the Globe and Mail uncovered allegations from former employees claiming there were secret internal accounting codes that indicated bribes

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[17] ibid

[18] Ferguson, G. (2018). Global Corruption: Law, theory & practice. (3rd ed.). Victoria, BC: University of Victoria. Retrieved from https://icclr.org/publications/global-corruption-law-theory-and-practice/ [Ferguson]

[19] ibid

[20] http://news.trust.org//item/?map=world-bank-blacklists-snc-lavalin-over-corruption-in-padma-bridge-project

relating to projects across Africa and Asia.[21] Based on information provided by The World Bank, the Royal Canadian Mounted Police ("RCMP") laid corruption charges against five individuals, specifically for contravening s. 3(1)(*b*) of the *CFPOA*.[22] Charges against two of the employees were dropped and the three remaining accused were acquitted in February 2017 as a result of key wiretap evidence being ruled inadmissible.[23]

Elections Financing

To add to the plethora of scandals, a former SNC-Lavalin vice-president, Norman Morin ("MORIN"), pleaded guilty to charges of violating Canada's election financing laws. Between 2004 and 2011, MORIN perpetrated a scheme where he instructed employees to donate to political parties, riding associations or political candidates in an attempt to circumvent rules that prevented companies from directly donating to federal political parties.[24] The employees were then reimbursed for their donations via false refunds for personal expenses or fictitious bonuses. As stated in the CBC article, "a major recipient of these funds was the Liberal Party of Canada: $83,534 to the Party and $13,552 to various riding associations; The Conservative Party of Canada also received $3,137, while Conservative riding associations received $5,050".[25]

[21] MUHC, supra note 13.
[22] Ferguson, supra note 17.
[23] MUHC, supra note 13.
[24] ibid
[25] ibid

The "Election Financing" scandal is particularly concerning, since the Liberal Party of Canada currently occupies a majority in the Canadian Parliament and the Liberal PMO is accused of politically interfering in the justice system to favour SNC-Lavalin—the very corporation that purportedly skirted election financing laws to fund mainly Liberal election groups. Whether or not there was political interference is beyond the scope of this paper; however, one must consider the public perception and the impact it has on the reputation of the justice system.

Charges Against SNC-Lavalin Inc.: The Libya Corruption Scandal

The Libya scandal will be addressed in detail in this paper, as the prosecution of this particular corruption allegation culminated with the political fallout involving the PMO and the Attorney General of Canada and brought remediation agreements into the limelight.

Investigative journalists from several national media outlets have written on the investigation and charges surrounding SNC-Lavalin's Libya corruption scandal. An article from the Financial Post, "RCMP charges SNC-Lavalin with fraud and corruption linked to Libyan projects", captures the essence of the investigation. In 2011, the RCMP began an investigation called "Project Assistance" into the transactions of SNC-Lavalin in Libya,

based on a tip from Swiss authorities.[26] The investigation originated from SNC-Lavalin's transactions in Libya between 2001 and 2011. Court documents obtained by the press state that the corporation offered bribes to several public officials in Libya.[27]

According to the RCMP, AISSA leveraged close personal relationships with the family of deposed Libyan leader Muammar Gaddafi to obtain contracts for SNC-Lavalin. Since the Gaddafi family was in a position of influence, they were able to confer business advantages to SNC-Lavalin in Libya. To facilitate the scheme, AISSA allegedly created two shell companies to which SNC-Lavalin paid approximately $127 million for helping acquire several major contracts in Libya during the investigation period.[28] Some of these funds were then dispersed as bribes to Libyan officials and Saadi Gaddafi, the son of Muammar Gaddafi. The remaining funds were retained by AISSA or Sami Bebawi ("BEBAWI"), another executive vice-president from SNC-Lavalin.[29]

The RCMP alleged that, between 2001 and 2011, SNC-Lavalin offered Libyan government officials bribes amounting to $47.7 million to secure contracts. The company was also accused of defrauding the Libyan government and others of $129.8 million in "property, money or valuable service".[30] Consequently:

[26] RCMP charges SNC-Lavalin with fraud and corruption linked to Libyan projects. (2015, February 19). Financial Post. Retrieved from https://business.financialpost.com/news/rcmp-charges-snc-lavalin-with-fraud-and-corruption-linked-to-libyan-projects [RCMP charges]
[27] ibid
[28] ibid
[29] ibid
[30] MUHC, supra note 13.

- Executive Vice President of Construction, AISSA—also charged in relation to MUHC contract—was arrested in April 2012 in Switzerland and charged with corruption, money laundering and fraud due to his involvement in Libya. After serving 29 months in jail, he agreed to a settlement whereby he admitted to bribing Saadi Gaddafi in order to obtain contracts for SNC-Lavalin;[31]

- Vice President ROY—also charged in relation to MUHC contract—was charged in 2014 with fraud and bribery of a foreign public official in connection with SNC-Lavalin's transactions in Libya.[32] In February 2019, a judge stayed proceedings against ROY, stating that the delays created by the prosecution "are an example of the culture of complacency that was deplored by the Supreme Court" in its 2016 *R . v. Jordan* decision;[33]

- Executive Vice President BEBAWI and his Montréal-based tax lawyer, Constantine Kyres, were charged with obstruction of justice in 2014 after they allegedly offered a $10 million bribe to AISSA who was being detained in Switzerland. The bribe was intended to persuade AISSA to offer authorities a version of events that would not implicate BEBAWI in the ongoing Libya corruption scandal. The obstruction of justice charges against both individuals were stayed due to the time it took to bring the case to trial, as per the 2016 *R. v. Jordan* decision. BEBAWI still faces charges in

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[31] ibid

[32] ibid

[33] Valiante, G. (2019, February 19). Criminal case dropped for ex-SNC-Lavalin exec Stephane Roy due to delays. CTV News: Montreal. From, https://montreal.ctvnews.ca/criminal-case-dropped-for-ex-snc-lavalin-exec-stephane-roy-due-to-delays-1.4303635

relation to fraud and bribery of foreign public officials in connection with SNC-Lavalin's transactions in Libya.[34]

With respect to SNC-Lavalin's knowledge of AISSA's activities, the RCMP alleged that SNC-Lavalin and its various entities were "well aware of it and fostered the relationship".[35] Consequently, in addition to charging the former officers, on February 19, 2015, the Public Prosecution Service of Canada ("PPSC") also laid charges against SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. Each entity has been charged with one count of fraud under Section 380 (1)(*a*) of the *Criminal Code*, and one count of corruption under Section 3(1)(*b*) of the *CFPOA*.[36] Although a series of charges were laid against individuals pertaining to SNC-Lavalin's transactions relating to MUHC in Montréal, Padma Bridge Project in Bangladesh and Libya, these were the first Canadian charges against the legal entity SNC-Lavalin.

In a press release dated February 19, 2015, SNC-Lavalin Group Inc. President and CEO Robert G. Card stated: "The charges stem from the same alleged activities of former employees from over three years ago in Libya, which is publicly known, and that the company has co-operated on with authorities since then…even though SNC-Lavalin has already incurred significant financial damage and losses as a result of actions taken prior to

[34] Valiante, G. (2019, February 15). Former SNC executive Sami Bebawi has obstruction charge stayed because of excessive delays. The Globe and Mail. From, https://www.theglobeandmail.com/canada/article-former-snc-executive-sami-bebawi-has-obstruction-charge-stayed-because/

[35] RCMP charges, supra note 25.

[36] https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-19.aspx?lang=eng

March 2012, we have always been and remain willing to reach a reasonable and fair solution that promotes accountability, while permitting us to continue to do business and protect the livelihood of our over 40,000 employees, our clients, our investors and our other stakeholders."[37]

Alluding to the remediation agreement option that would come nearly four years later, the press release further added: "it is important to note that companies in other jurisdictions, such as the United States and United Kingdom, benefit from a different approach that has been effectively used in the public interest to resolve similar matters while balancing accountability and securing the employment, economic and other benefits of businesses".[38]

Impact of legal matters: Canada's new Integrity Regime

A brief overview of SNC-Lavalin's financial performance since the series of scandals began illustrates the loss to shareholders as well the uncertainty surrounding the business environment. According to the Financial Post, SNC-Lavalin generated approximately 60% of its revenue from Canada in 2014; this had decreased to almost 30% in 2017. Analysts estimate that up to 50% of Canadian revenues came from federal government contracts.[39] The future prospect of this revenue stream is in jeopardy under Canada's new "Integrity Regime". The "Integrity Regime"—adopted in Canada, in part, to address corruption—

[37] https://www.snclavalin.com/en/media/press-releases/2015/19-02-2015
[38] ibid
[39] https://business.financialpost.com/news/heres-what-a-10-year-ban-on-federal-contract-bids-would-mean-for-snc-lavalin

carries with it significant consequences for a criminal conviction. In July 2015, the Public Service and Procurement Canada ("PSPC"), the Government of Canada's main contracting arm, introduced its "Integrity Regime" for procurement and real property transactions.[40] PSPC administers the "Integrity Regime" policy on behalf of the Government of Canada. This policy is intended to ensure that the government only engages in business with ethical suppliers in Canada and abroad. Any supplier charged with an offence under, among others, the *Criminal Code* and the *CFPOA*, would not be eligible to conduct business with the federal government for 10 years; offences that lead to ineligibility include bribery, fraud and money laundering. However, the "Integrity Regime" permits the ineligibility period to be reduced by up to five years if a supplier can establish that it has co-operated with law enforcement authorities or addressed the causes of misconduct.[41] On December 8, 2015, SNC-Lavalin entered into an "Administrative Agreement" with PSPC.[42] This "Administrative Agreement" allowed SNC-Lavalin and other companies with pending federal charges to continue to contract with or supply the Government of Canada.[43] A criminal conviction under the new "Integrity Regime" would result in a 10-year ban from engaging in contract with the federal government.

[40] https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/examiner-review-eng.pdf
[41] https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html
[42] https://www.tpsgc-pwgsc.gc.ca/ci-if/ententes-agreements-eng.html
[43] https://www.snclavalin.com/en/media/press-releases/2015/10-12-2015

[44]

During SNC-Lavalin's annual shareholder's meeting on May 2, 2019, CEO Neil Bruce stated that the ongoing legal matters have cost the company $5–$6 billion in potential contracts. The company's first-quarter results extended the downward trend seen in 2018. For the first quarter of 2019, SNC-Lavalin reported a net loss of $17.3 million on revenue of $2.36 billion. For the same quarter a year ago, it reported a profit of $78.1 million on $2.43 billion in revenue.[45]

Impact of a conviction: Department of Justice Memorandum

The Deputy Minister of Justice and Deputy Attorney General of Canada prepared a memorandum outlining the impact of a potential conviction of the pending charges against SNC-Lavalin for the Clerk of the Privy Council, Michael Wernick.[46] The memorandum, dated November 9, 2018, provides insight into considerations weighed by various interested parties. It draws the following conclusions about the possible sentences and related

[44] https://www.google.com/search?q=snc+lavalin+stock+price&ie=utf-8&oe=utf-8&client=firefox-b
[45] https://www.theglobeandmail.com/business/article-snc-lavalin-to-cut-costs-exit-15-countries-after-stock-falls-131-per/
[46] https://www.ourcommons.ca/content/Committee/421/JUST/WebDoc/WD10390731/421_JUST_reldoc_PDF/421_JUST_reldoc_DepartmentOfJustice-e.pdf

outcomes: (1) Fine; (2) Probation Order; and (3) Impact of conviction compared with a successful remediation agreement. With regards to the implications of a criminal conviction, the document draws attention to the period in which SNC-Lavalin would be ineligible to do business with the Government of Canada, likely resulting in lost business opportunities, reputational damage and potential increase in reporting requirements.

The memorandum states:

> *While these remediation agreement conditions could provide for outcomes similar to those that would result from a sentence following a conviction, the biggest difference for a company convicted of a fraud or corruption charge would likely be an ineligibility period (also known as a debarment period) during which the company could not do business with the government. This would follow a criminal conviction, but would not follow the successful completion of a remediation agreement. In other words, a conviction might lead to a period of ineligibility, but a remediation agreement would not. Any period of suspension or debarment is likely to trigger adverse effects, such as foregone business opportunities, reputational damage, and possible reporting requirements to third parties, such as banks and other financial institutions that are the source of operating capital.*[47]

The memorandum further elaborates on the impact on the "Administrative Agreement" currently in place with SNC-Lavalin, noting that the PSPC has only concluded one "Administrative Agreement" with SNC-Lavalin.[48]

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[47] ibid
[48] ibid

Also addressed in the memorandum is the consequence of a conviction under the Government of Canada's "Integrity Regime"—a 10-year ineligibility to contract with the government, unless the government invokes a "public interest exception". A "public interest exception" is described in the memorandum as an "emergency where delay could harm public interest; company/supplier is the only person capable of performing the contract; the contract is essential to maintain sufficient emergency stocks; not entering into the contract with the company/supplier would have a significant adverse impact on the health, national security, safety, public security or economic or financial well-being of Canadians or the functioning of any portion of the federal public administration".[49]

Item # 1 in the Appendices shows a Timeline of Events (prepared using information from The Globe and Mail, published February 12, 2019)

[49] ibid

This section will review the Canadian legal framework pertaining to corruption of foreign officials and Canadian institutions responsible for overseeing the enforcement and prosecution of these offences.

Canadian Legislation, Institutions, and Enforcement pertinent to Combating Bribery

Canada belongs to several international conventions against foreign anti-corruption, including the OECD Anti-Bribery Convention (this will be discussed later). In keeping with these international commitments, Canada's anti-bribery laws go beyond addressing the risk of bribery within its borders. To this end, anti-corruption and bribery in Canada are enforced primarily under two federal statutes: the *CFPOA*, which addresses foreign bribery, and the *Criminal Code*, which addresses domestic bribery and corruption.[50]

Also essential in aiding investigations is the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("*PCMLTFA*"), which authorizes the Financial Transactions and Reports Analysis Centre of Canada's ("FINTRAC") financial intelligence unit to facilitate the detection, prevention and deterrence of money laundering while ensuring the protection of personal information under its control.

[50] https://www.osler.com/en/resources/business-in-canada/browse-topics/additional/anti-corruption-bribery-and-enforcement

Corruption of Foreign Public Officials Act

The *Corruption of Foreign Public Officials Act* (*CFPOA)* was passed by Parliament in 1998 in response to Canada's obligations under the OECD Anti-Bribery Convention (this will be discussed in detail later).[51] This legislation was intended to address the supply side of bribery by curbing Canadian entities from participating in corruption practices in a foreign country.

The *CFPOA* stipulates that it is a criminal offence for Canadian corporations or individuals to bribe or offer a bribe to a foreign official in order to generate trade or to acquire improper advantage. Maintaining or destroying books and records to facilitate or hide the bribing of a foreign public official is also considered an offence. Specifically, subsection 3(1) states:

> *3(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official*
>
> *(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or*

[51] https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-19.aspx?lang=eng

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Sections 3 and 4 offences under the *CFPOA* are eligible for a remediation agreement if certain conditions are met.[52] The conditions of their use will be discussed in detail in the "Deferred Prosecution Agreement/Remediation Agreement" section of this paper. Major amendments to the *CFPOA* in 2013 increased its scope and effectiveness by expanding its jurisdiction based on nationality. These amendments gave authorities the ability to prosecute acts committed by Canadian citizens, permanent residents and entities formed under Canadian law that were contrary to the *CFPOA*. In addition, the amendments included not-for-profit organizations, prohibited facilitation payments and increased sentencing. [53]

SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. were charged with one count each of bribery under Section 3(1)(*b*) of the *CFPOA*.

[52] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-216.html#h-133418 (SCHEDULE TO PART XXII.1 [Section 715.3 and subsections 715.32(2) and 715.43(2) and (3)])

[53] https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption_questions-answers-reponses.aspx?lang=eng

Convictions under the *CFPOA*

Convictions of bribery of foreign officials in Canada have been far from stellar. A more in-depth analysis of how Canada compares to its international peers is examined further in this paper. As of June 30, 2019, there have been six convictions under the *CFPOA*: three convictions involve corporate entities, while three involve individuals.

Summarized below are the three cases involving a corporate offender.

(1) Griffiths Energy International Inc., based in Calgary, pleaded guilty on January 22, 2013, to one count of bribery under the *CFPOA* for securing an oil and gas contract in Chad. The company was handed a total financial penalty of $10.35 million.[54]

(2) Niko Resources Ltd., a publicly traded company based in Calgary, pleaded guilty to one count of bribery contrary to paragraph 3(1)(*b*) of the *CFPOA*, covering the period from February 1, 2005, to June 30, 2005, relating to its dealings in Bangladesh. It was fined $9.5 million and placed under Court supervision for three years to ensure the company's compliance with the *CFPOA*.[55]

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[54] https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-19.aspx?lang=eng
[55] ibid

(3) Hydro-Kleen Group Inc., based out of Red Deer, pleaded guilty on Jan. 10, 2005, to one count of bribery contrary to paragraph 3(1)(*a*) of the *CFPOA*, and was ordered to pay a fine of $25,000. The charges against the director and the officer of the company were stayed.[56]

The Criminal Code of Canada

Domestic bribery and corruption are addressed by the *Criminal Code*, which prohibits various forms of corruption including bribery of various officials, frauds on the government, breach of trust by a public officer and secret commissions, as well as various corrupt accounting and record-keeping practices.[57] Specifically, section 380 deals with fraud, and states that:

> *380(1) Everyone who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,*
>
> *(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars.*

[56] ibid
[57] ibid

Section 380 offences under the *Criminal Code* are also eligible for a remediation agreement if certain conditions are met[58]. SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. were also charged with one count of fraud under Section 380 (1)(*a*) of the *Criminal Code.*

Proceeds of Crime (Money Laundering) and Terrorist Financing Act

The *PCMLTFA* is a legislative and procedural framework for reporting money laundering transactions. The legislation is instrumental in detecting the bribery of foreign public officials through its "know your client" requirements and mandatory reporting of suspicious transactions. As noted in OECD's Phase 2 evaluation of Canada, an effective anti-money-laundering scheme can reduce the incentive to bribe foreign public officials[59]. The *PCMLTFA* establishes FINTRAC as Canada's financial intelligence unit mandated to facilitate the detection of suspicious transaction reporting, the reporting of cross-border movements of large currency and monetary transactions.

The Public Prosecution Service of Canada

The PPSC is Canada's national prosecuting authority. It is tasked with prosecuting cases that fall under federal jurisdiction in a manner that is "fair and free from any improper influence".[60] The mandate of the PPSC is prescribed in the *Director of Public Prosecutions Act*

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[58] ibid
[59] https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf
[60] https://www.ppsc-sppc.gc.ca/eng/bas/index.html

("*DPPA*"). The *DPPA* empowers the Director of Public Prosecutions ("DPP"). It is worthwhile to review the DPP's responsibilities, as they are a critical piece in analyzing the allegations of political interference and the "Shawcross Doctrine".

Relevant parts of the DPP's mandate, as per the PPSC website, are outlined below. The DPP is mandated to:[61]

(1) initiate and conduct federal prosecutions;

(2) intervene in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations;

(3) issue guidelines to federal prosecutors;

(4) exercise the authority of the Attorney General of Canada in respect of private prosecutions; and

(5) exercise any other power or carry out any other duty or function assigned by the Attorney General of Canada that is compatible with the Office of the DPP.

The PPSC Annual Report for the 2017–2018 period indicates that the PPSC worked on 65,898 files (36,873 files opened during the year and 29,025 files carried over from previous years).[62] PPSC spent a total of 1,202,719 hours working on prosecution files for that year. This includes all the hours spent on these cases by prosecutors, paralegals, legal

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[61] ibid

[62] PPSC Annual Report (2018) https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2017_2018/index.html#section_4

support staff and legal agents. Of these, *Criminal Code* offences and regulatory and economic offences amounted to 35.4% and 13.7% respectively.[63]

The Royal Canadian Mounted Police

Bribery of foreign officials is investigated through the RCMP, specifically the Sensitive and International Investigations Unit within the RCMP's National Division. In addition to other responsibilities, the Unit is tasked with investigating corruption, among other large-scale economic crimes. It investigates sensitive, high-profile cases that could threaten Canada's integrity and reputation, including matters involving domestic and international corruption. To this end, it also investigates international corruption including bribery, embezzlement and money laundering.[64]

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[63] ibid

[64] http://www.rcmp-grc.gc.ca/en/sensitive-and-international-investigations

This section presents background on a crucial intergovernmental economic organization that has driven legislative changes in Canada. Also presented is the international standard and requirement that has prompted the passage of the *CFPOA*, and the monitoring of these requirements.

The Organisation for Economic Co-operation and Development

The OECD initially began as the Organisation for European Economic Co-operation ("OEEC")—an international forum created in 1948 to aid in the reconstruction of Europe post-World War II,[65] which included funding from the United States and Canada through the Marshall Plan.[66] During this time, the once segregated governments increasingly recognized the interconnected nature of their economies. Canada and the United States joined OEEC members in signing the new OECD Convention on December 14, 1960. The OECD was officially launched on September 30, 1961, when the Convention entered into force.[67]

As per Article 1 of the OECD Convention:[68]

> *The aims of the Organisation for Economic Co-operation and Development (hereinafter called the "Organisation") shall be to promote policies designed:*

[65] http://www.oecd.org/about/history/
[66] https://www.oecd.org/marshallanniversary/themarshallplan60thanniversary.htm
[67] http://www.oecd.org/about/history/
[68] https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm

(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The OECD sets international standards and codes in collaboration with member countries; the 36-member countries are expected to demonstrate a "readiness and a commitment to adhere to (i) democratic societies committed to rule of law and protection of human rights; and (ii) open, transparent and free-market economies".[69] Some of the OECD instruments and initiatives, including the OECD's 1997 Anti-Bribery Convention, are legally binding and are expected to be fulfilled by its members.[70]

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Anti-Bribery Convention") is a legally binding international agreement to inhibit corruption. To meet this objective, parties to the OECD Anti-Bribery Convention are required to criminalize bribery of foreign public officials in international business transactions and obligated to investigate, prosecute and sanction the

[69] OECD Membership and the values of the Organization (28 May 2018)
[70] ibid

perpetrators.[71] The OECD Anti-Bribery Convention tackles only the supply side of bribery—or "active bribery", referring to individuals or entities that offer, promise or give bribes. The agreement, signed on December 17, 1997, entered into force on February 15, 1999. It is comprised of 44 parties, which includes all 36 OECD countries and eight non-OECD countries; Canada is a signatory and a Party to the OECD Anti-Bribery Convention.[72] Subsequently, in order to honour its commitments to the OECD Anti-Bribery Convention, Canada enacted the *CFPOA*.

There were two addenda to the OECD Anti-Bribery Conventions. These accompanying instructions provide further recommendations and guidance to the original document: "The 2009 Recommendation" aims to strengthen mechanisms for the prevention, detection and investigation of foreign bribery; and "Guidelines for Multinational Enterprises", which was updated in May 2011, contains guidance regarding corporate social responsibility aimed at multinational enterprises investing abroad.

As a member of the OECD (and a Party to the OECD Anti-Bribery Convention), Canada is legally obligated to adhere to the rules set therein. The members are in effect committed to changing their country's legislation to facilitate the prevention of corruption of foreign public officials in international trade.

[71] Fighting the crime of foreign bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery

[72] ibid

Monitoring of the OECD Anti-Bribery Convention

Countries that are part of the agreement review all other countries that are part of this convention; essentially they review one another. This is accomplished specifically by the OECD Working Group on Bribery ("WGB") through a peer-review mechanism that monitors a member country's adherence to the OECD Anti-Bribery Convention. The goal is to ensure that the signatory countries are following through with their international obligations under the agreement.[73] As of the writing of this paper, the purpose of the review process is to "ensure compliance with the Convention and implementation of the 2009 Recommendations".[74]

Monitoring takes place in several phases:[75]

- Phase 1: evaluates the anti-bribery laws within a member country by reviewing their legal framework, and recommends implementing legislation that is consistent with the OECD Anti-Bribery Convention.

- Phase 2: assesses the implementation and effectiveness of the legislation.

[73] http://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf
[74] http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/countrymonitoringprinciplesfortheoecdanti-briberyconvention.htm
[75] http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm

- Phase 3: focusses on enforcing the OECD Anti-Bribery Convention and outstanding recommendations from Phase 2.

- Phase 4: focusses on outstanding issues and matters unique to each country.

At the time of writing this paper, the WGB began the 4th phase of globally monitoring in 2016. According to the monitoring schedule, Canada is due for its 4th-phase evaluation in June 2021, with Austria and the United Kingdom as the lead examiners.[76]

[76] http://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Calendar-2016-2024.pdf

The May 2013 follow-up report submitted by Canada in response to the finding of the Phase 3 evaluation noted that there were 35 ongoing investigations of foreign bribery.[77] Since that time, as of June 30, 2019, there have only been six convictions under the *CFPOA*: three entities (Hydro-Keeln Group Inc., Niko Resources Ltd. and Griffiths Energy International)[78] and three individuals (Nazir Karigar, Robert Barra and Shailesh Govindia).[79] The three entities entered guilty pleas, while the three individuals were convicted in contested trials. Based on these data, there seems to be a lack of enforcement of the *CFPOA*.

Canada has been criticized for a lack of convictions and for its perceived leniency in enforcing foreign corrupt practices. This sentiment is self-evident when looking at the "2017 Enforcement of the Anti-Bribery Convention Report" by the WGB and echoed in the Transparency International's report "Exporting Corruption Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention".

[77] Canada: Follow up to the Phase 3 Report & Recommendations (May 2013) (at pg 3)
[78] https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-19.aspx?lang=eng
[79] https://www.dwpv.com/en/Insights/Publications/2019/Corruption-of-Foreign-Public-Officials-Act

Findings by the OECD Working Group on Bribery

The 2017 Enforcement of the Anti-Bribery Convention Report by the WGB highlights the state of enforcement since the Convention came into effect in 1999 up until the end of 2017. Importantly, it offers an insight into what happens to public officials in sanctioned foreign bribery schemes and the manner in which the Parties to the Convention are meeting their commitment to combat foreign bribery.

The Report finds that, since the time the Convention came in effect, 560 individuals and 184 entities received criminal sanctions for foreign bribery.[80] A substantial portion of all enforcement actions against corporate entities took place in the United States (125 out of the 184, or 68%) and Germany (11 out of the 184, or 6%), followed by the United Kingdom and the Netherlands (tied at 7 out of 184, or 3.8%).[81] In the United Kingdom, three of the seven sanctions on corporate entities were imposed through a DPA. Canada sanctioned three corporate entities (2.4%); moreover, three individuals were acquitted.[82]

Findings by Transparency International

Transparency International is an international NGO founded in 1993. Its stated mission is to "stop corruption and promote transparency, accountability and integrity at all levels and

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[80] http://www.oecd.org/daf/anti-bribery/OECD-WGB-Enforcement-Data-2018-ENG.pdf
[81] ibid
[82] ibid

across all sectors of society"[83]. Transparency International defines corruption as "the abuse of entrusted power for private gain". It publishes the Corruption Perception Index ("CPI"), which ranks 180 countries and territories by their perceived levels of public sector corruption. In the 2018 CPI Report, it ranks Canada 9th, with a score of 81[84], which is a decrease from 2017 when it ranked 8 with a score of 82[85]. Transparency International also publishes a report, "Exporting Corruption", which provides an independent assessment of the enforcement of the OECD Anti-Bribery Convention. Its 2018 Exporting Corruption report found that Canada has limited enforcement, and that this enforcement has regressed since the last report published in 2015. Moreover, in the 2014–2017 period, it found that Canada commenced four foreign bribery cases and concluded one. Two of the four foreign bribery cases involved SNC-Lavalin[86].

Transparency International Canada Executive Director, Alesia Nahirny, stated, "We've fallen behind and need to play catch up on a number of anti-corruption fronts. Canadians want us to be leaders with respect to the fight against corruption at home and abroad and we can no longer rest only on our good reputation. The inadequacies in our enforcement system can no longer be ignored."[87]

Transparency International noted inadequacies in Canada's legal framework, enforcement system and legal assistance. With respect to the legal framework, it found that the current

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[83] https://www.transparency.org/whoweare/organisation/mission_vision_and_values/0
[84] https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2018
[85] https://www.transparency.org/news/feature/corruption_perceptions_index_2017
[86] 2018 Exporting Corruption
[87] http://www.transparencycanada.ca/news/canada-falls-behind-fighting-foreign-bribery/?

system of penalties for foreign bribery, and the requirement for full-blown criminal investigations in all cases, could undermine effective enforcement against less severe breaches of the *CFPOA*. The report advocated for alternative enforcement options in Canada, reasoning that it would provide greater flexibility and enhance overall enforcement[88]. In fact, the report recommends that the DPA legislation be passed as planned.

Dubai (United Arab Emirates) ranks 23, with a score of 70; Saudi Arabia ranks 58, with a score of 49; Qatar ranks 33, with a score of 62; Brazil ranks 105, with a score of 35; and Colombia ranks 99, with a score of 36. Average score in the Middle East and in North Africa is 39.

Transparency International maintains that transparency is crucial in settlements for ensuring a deterrent effect and assuring the public of their fairness, commanding the United States' practice of posting copies of legal documents such as DPAs online. The US Justice Department has also published helpful guidance for companies seeking leniency; this guidance provides clarity on ethics compliance programs and self-reporting requirements.

[88] 2018 Exporting Corruption (at pg. 36)

The *CFPOA* was Canada's response to the requirements set out in the OECD Anti-Bribery Convention. SNC-Lavalin was charged with contravening sections of the *CFPOA*. Political interference to prevent prosecution of SNC-Lavalin to safeguard national economic interests violate Article 5 of this convention. This section explores Article 5, the issue of national economic interest, and political interference.

To provide some context to Article 5, the former Secretary General of the OECD who presided over the OECD during the creation of the bribery convention was interviewed. An awareness of the social, economic and political environment during that time, as well as comments from past WGB evaluations is important in understanding what might constitute "national economic interest".

The PMO is accused of politically interfering with the independence of the Attorney General, contrary to Article 5. An awareness of constitutional conventions such as the Shawcross Doctrine and Canadian jurisprudence sheds light on the interaction between these two responsibilities.

Article 5 of the OECD Anti-Bribery Convention

A point of debate in the SNC-Lavalin–Attorney General scandal was whether the PMO was favouring SNC-Lavalin when it considered job losses and share prices, and whether these

factors constituted "national economic interest". Was the PMO influenced by "national economic interest" when it allegedly attempted to pressure Minister Jody Wilson-Raybould?

Article 5 of the OECD Anti-Bribery 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.*

Article 5 of the OECD Anti-Bribery Convention acknowledges that the investigation and prosecution of corruption cases might be swayed by factors other than the facts of the case. It identifies three considerations that should NOT be a mitigating factor: (1) a country's national economic interest; (2) potential effect of relations with another state; and (3) identity of the natural or legal person.

Article 5 of the OECD Anti-Bribery Convention and National Economic Interest

The issue of "national economic interest" was raised during the testimony of the Clerk of the Privy Council Michael Wernick to the Standing Committee on Justice and Human Rights on March 6, 2019. The testimony states the following:

Mr. Charlie Angus:

> *Finally, Mr. Butts claimed that there was new evidence, which would be reason to intervene in a public prosecution but, Mr. Wernick, you said that this new evidence consisted of SNC's share price.*

When the Prime Minister's Office wrote that legislation, it specifically exempted the economic argument. Ms. Wilson-Raybould was very clear that this could not be, and yet you believe that if it's something that you think can happen, "Well, we'll just make it happen."

If "economic argument" was written by the Prime Minister's Office as not allowable, how do you get to claim that's new? That's not new evidence.

Mr. Michael Wernick:

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.

Combating corruption can result in unintended, dire consequences to innocent parties. The cost of enforcement goes beyond simply accounting for the resources expended by law enforcement and prosecutors. It can carry with it detrimental consequences to the livelihood of innocent third parties inflicted by corporate entities that retaliate by threatening to relocate to different countries. Much hinges on the definition of what constitutes "national economic interest".

According to various media sources, SNC-Lavalin warned prosecutors about job losses and the potential relocation of its offices in Ontario and Québec to other jurisdictions if it did not get a remedial agreement. CEO Neil Bruce publicly denied these statements.[89] This paper will not attempt to debate whether these statements were uttered; however, it does pose an interesting question worth exploring: What is "national economic interest" as defined by the OECD Anti-Bribery Convention? Do job losses and loss of business

[89] https://globalnews.ca/news/5107865/snc-lavalin-jobs-relocation/

constitute "national economic interest"? Does a potential 9,000 job loss fall under "national economic interest"? Article 5 of the OECD Anti-Bribery Convention clearly states that prosecutors and investigators should not be influenced by "national economic interest".

To help understand this issue, the PPSC was contacted to clarify what was considered "national economic interest". Unfortunately, they were unable to provide any guidance, responding rather that it constituted "legal advice or legal interpretation", a reasonable reply considering this issue is at the forefront of public debate.

The OECD was also contacted for clarification on what was considered "national economic interest". Again, as with the PPSC, the OECD was not in a position to respond to the question. However, the WGB's monitoring reports provide some insight into the importance of this topic.

Phase 2 of the WGB's monitoring report (issued in 2004) recommended that Canada confirm that, when investigating and prosecuting *CFPOA* cases, "national economic interests" would not be taken into consideration. It recommended that prosecutors be given guidance on how to appropriately deal with declining to prosecute a case based on public interest.

On page 33 of the Phase 2 report, OECD raises its concern about Article 5:

> *"Certain public interest considerations could potentially involve conflicts of interest, and one such factor is included in the list in the FPS Deskbook–"whether prosecuting*

*would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest". **Hypothetical cases that could create a conflict of interest include those where prosecuting a high-ranking political figure who has allegedly bribed a foreign public official could cause embarrassment to Canada, or a bribery transaction involving a contract with a foreign government could harm international relations if prosecuted.*** [90]" (Emphasis added)

This matter was of concern to the OECD because the "public interest" could be used as justification for not proceeding with a prosecution. This was also of concern in Phase 3 review. On page 35 of the Phase 3 report, the WGB reiterated its concern:

> *"First, the public interest factors listed in the FPS Deskbook that could be considered in making prosecution decisions included at least one that is prohibited by Article 5 of the Convention – i.e. "whether prosecuting would require or cause the disclosure of information that would be injurious to international relations".*

It appears that the amendments to the policy regarding the "decision to initiate a prosecution or refuse to prosecute" required by the WGB was ultimately adopted. The PPSC Deskbook (which supplanted the FPS Deskbook) now instructs prosecutors to be mindful of Article 5 of the OECD Anti-Bribery Convention when deciding whether or not to prosecute. Interestingly, job losses were not mentioned in the examples given by the OECD Working Group. There appears to be more than job losses behind the spirit of Article 5; Article 5 deals with national issues and conduct between nations.

Donald Johnston, Secretary General of the OECD from 1996 to 2006 and former federal Liberal cabinet minister, was interviewed as part of this report to help shed light on the issue of "national economic interest". The interview added to his position on the matter,

[90] https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf

which was also presented in a Financial Post opinion piece titled "Was SNC-Lavalin denied a deal all because of three simple but misunderstood words?" Mr. Johnston was able to speak about the sentiments surrounding the period in which the OECD Anti-Bribery Convention came to fruition. He stated that, when the OECD Anti-Bribery Convention was drafted, there was concern—especially by United States—that international contracts were being lost due to an inconsistent set of rules. The US *Foreign Corrupt Practices Act ("FCPA")* prevented US corporations from engaging in bribery; however, this put the US corporations at a disadvantage against other nations who did not have similar legislation. The term "national economic interest" should therefore be viewed in the context of an era where trade discussions dominated international organizations. In his words, as cited in the Financial Post, Mr. Johnston states:

> *"so that the phrase was intended to prevent exporters in OECD countries from avoiding prosecution under the convention by arguing that exports were in the national economic interest – and that bribery was therefore required to protect their export markets. That is what the word "national" was put in there to mean. I do not recall jobs ever being discussed as relating to the national economic interest as defined in the convention, nor were DPAs ever considered in the convention".*[91]

To understand the rationale behind the term "national economic interest", it is helpful to understand the development of international bribery law.

In order to bring foreign corporations (competitors) in line with US domestic standards against corruption to which US corporations were being subjected since the enactment of the *FCPA* in 1977, the US government focused its efforts on combating the supply side of

[91] https://business.financialpost.com/opinion/was-snc-lavalin-denied-a-deal-all-because-of-three-simple-but-misunderstood-words

the equation primarily through the use of the OECD.[92] The intention was to even the playing field in the international space so that the US corporations would not be at a disadvantage against foreign corporations when competing for contracts.

Timothy Martin in "The development of International Bribery Law" states that the United States engaged in a "massive global campaign in every conceivable multilateral organization in the world".[93] He asserts that there was an element of self-interest in this goal. Although all countries prohibited bribery of their own officials, the United States was the only country in the world that expressly prohibited the payment of bribes to foreign officials prior to OECD Anti-Bribery Convention entering into force on February 15, 1999, as a result of the enactment of the *FCPA*.

Milos Barutciski and Sabrina A. Bandali, in their paper "Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption and Canada's Anti-Corruption Efforts to Date", contend that the impetus to address corruption in a coordinated international effort was the consequence of two simultaneous frustrations experienced during the early 1990s. Firstly, NGOs such as Transparency International were disturbed by the misappropriation of funds by corrupt officials. Secondly, the US business community was aggrieved that it was at a competitive disadvantage in international

[92] A. Timothy Martin, "The Development of International Bribery Law" (1999) 14 Natural Resources & Environment 95, online: <http://timmartin.ca/wp-content/uploads/2016/02/Devpt-of-Int-Bribery-Law-Martin1999.pdf>.
[93] http://timmartin.ca/wp-content/uploads/2016/02/Devpt-of-Int-Bribery-Law-Martin1999.pdf

business, since its foreign competitors were not subjected to the same conditions as the *FCPA*.[94]

Augusto Lopez Claros, a director at The World Bank, speaking from experience, describes the taboo nature of discussing corruption in the 1980s as "virtually zero attention given to corruption and its implications in the everyday work of the organization, even in countries with long traditions of widespread corruption at the highest levels of government".[95] However, this began to change in the 1990s. In his World Bank policy research working paper "Removing Impediments to Sustainable Economic Development", Lopez Claros captures the sentiment of the times: the 1990s saw the emergence of various international and regional anti-bribery conventions, including the Inter-American Convention against Corruption in 1996, the OECD Convention in 1997, the Council of Europe Criminal Law Convention on Corruption in 1999, the African Union Convention on Preventing and Combating Corruption and the Unidad Especializada Anticorrupción (UNAC), both in 2003.

These findings, including the Phase 2 and 3 assessments by the WGB, hint at the possibility that the phrase "national economic interest" was more than about preventing countries from safeguarding domestic jobs. This is not to say that the motivation of the PMO was not to safeguard jobs in a politically valuable riding in Québec. Rather, it might imply that the concept of "national economic interest" is about more than simply saving a relatively small

[94] https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1137&context=olsrps
[95] http://documents.worldbank.org/curated/en/102991468332344284/Removing-impediments-to-sustainable-economic-development-the-case-of-corruption

number of jobs. What is evident is that there are no clear guidelines surrounding the interpretation of “national economic interest”. Ultimately, for SNC-Lavalin, the question hinges on whether the PMO’s possible attempt to safeguard Canadian jobs, and protect blameless employees and innocent third-parties is tantamount to serving national interest and thus breaching Article 5. A powerful outcome of remediation agreements, as we will see further along in this paper, is to spare the detrimental effect of prosecution on guiltless employees—a just goal, but is this “national economic interest”? The guidance in the literature—and from authorities—about what constitutes “national economic interest” is far from definitive; what does emerge in the research is that the crafters of the OECD Anti-Bribery Convention were motivated, at least in part, by the inequality caused by an uneven set of rules and its impact on trade in an increasingly globalized world. The evolution of the OECD Anti-Bribery Convention calls for a broader interpretation of the term.

Article 5 of the OECD Anti-Bribery Convention and Political Interference

On February 7, 2019, citing unnamed sources, The Globe and Mail published an article titled “PMO pressed Wilson-Raybould to abandon prosecution of SNC-Lavalin”; Trudeau denied his office ‘directed’ the then-Attorney General Jody Wilson-Raybould, which set in motion a series of events that has since plagued the PMO, SNC-Lavalin and top civil servants. The article claimed that SNC-Lavalin lobbied government officials to obtain a remediation agreement (DPA) in place of a criminal prosecution. The federal DPP refused

to negotiate a remediation agreement, and Jody Wilson-Raybould sided with the DPP and refused to instruct the DPP to do otherwise.[96]

The consequence of a conviction under the *CFPOA* would bar the company from obtaining government contracts, in keeping with the "Integrity Regime", as elucidated by the memorandum to Mr. Wernick on November 9, 2018. To avoid this pitfall, it was alleged that "Prime Minister Justin Trudeau's office attempted to press Jody Wilson-Raybould when she was Justice Minister to intervene in the corruption and fraud prosecution of Montréal's engineering and construction giant SNC-Lavalin Group Inc."[97]. These allegations brought the issue of judicial independence to the forefront. In a written statement on March 11, 2019, the WGB raised its concerns about the allegations of interference in the prosecution of SNC-Lavalin, and reiterated the requirement of prosecutorial independence in foreign bribery cases pursuant to Article 5 of the OECD Anti-Bribery Convention.

The Attorney General's Judicial Independence and the Shawcross Doctrine

This section will not pass judgment on the veracity of statements issued by either side, but rather alert the reader to some of the concerns surrounding this matter. In the Canadian political and legal system, an individual occupying the role of the Minister of Justice serves two roles: the Minister of Justice and the Attorney General of Canada. The Minister of Justice is responsible for developing policy and drafting legislation, whereas the Attorney General of

[96] ibid
[97] https://www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/

Canada is responsible for providing legal advice to Canada's executive branch and representing the government in legal proceedings. The SNC-Lavalin affair highlights the dilemmas inherent in these dual roles.

Section 4 of the *Department of Justice Act* relates to the role of the Minister of Justice and states the following:

> *The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall*
>
> *(a) see that the administration of public affairs is in accordance with law;*
>
> *(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;*
>
> *(c) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and*
>
> *(d) carry out such other duties as are assigned by the Governor in Council to the Minister.*

The Minister of Justice is responsible for matters concerning the administration of justice that falls within federal jurisdiction and fulfils this responsibility by developing policies, programs and laws to strengthen the national framework.[98]

Section 5 of the *Department of Justice Act* relates to the role of the Attorney General and states that:

> *The Attorney General of Canada*
>
> *(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when*

[98] https://www.justice.gc.ca/eng/trans/transition/tab2.html

the Constitution Act, 1867, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;

(b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments;

(c) is charged with the settlement and approval of all instruments issued under the Great Seal;

(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and

(e) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.

The Honourable Marc Rosenberg, in "The Attorney General and the Prosecution Function on the Twenty-First Century", discusses the fact that the Attorney General is independent from the government. He states that it is a constitutional convention that, although the Attorney General is a Cabinet minister, they act independently from the Cabinet when engaging in a prosecutorial capacity.[99] He goes on to state that "the parameters of independence in the prosecution function are also firmly established, and have achieved the status of a constitutional convention".

In England, the Attorney General of England, Sir Hartley Shawcross, elaborated on this convention. What is now referred to as the "Shawcross Doctrine" dictates that there must be a separation between political concerns and the decision to prosecute. The "Shawcross Doctrine" is quoted on the PPSC website:

[99] http://www.ontariocourts.ca/coa/en/ps/publications/attorney_general_prosecution_function.htm#_ftn1

> *"I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.*
>
> *In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.*
>
> *Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations."* [100]

This statement contains numerous implications to SNC-Lavalin, the remediation agreement and the alleged inappropriate pressure by the PMO on the Attorney General.

Firstly, the Shawcross Doctrine expects the Attorney General to take into account all relevant facts, including the impact of the prosecution on "public morale and order". Honourable Marc Rosenberg equates this to mean "public interest" in his article referenced above. Did Minister Jody Wilson-Raybould have all the necessary information on the SNC-Lavalin case, remediation agreements (and their use) and public interest in the outcome? This would have been the first instance in which remediation agreements would have been used in Canada, so there was no Canadian precedent to review. However, it is reasonable to assume that the

[100] http://www.ontariocourts.ca/coa/en/ps/publications/attorney_general_prosecution_function.htm This article was published in Volume 43(2) of Queen's Law Journal, p. 813-862 (Queen's University, Kingston, 2009). Published here, with the kind permission of the Queen's Law Journal and author. Copyright restrictions still apply for republication elsewhere.

Attorney General would have known that the passage of Bill C-74, which includes remediation agreements, received Royal Assent on June 21, 2018, with the *Criminal Code* amendments taking effect on Sept. 21, 2018[101]. Despite all the punditry and opinions on this issue, we do not have sufficient information on Minister Jody Wilson-Raybould's depth of knowledge in this subject matter to pass judgment on whether or not she took into account "all relevant facts". However, as we shall see below, this was her decision to make.

Secondly, the Attorney General is ***not required*** to consult with the Cabinet, but is free to do so in order to be better informed. The key element in this statement is that the onus to seek out assistance from the Cabinet rests on the Attorney General. The Attorney General—*if she so chooses*—can seek advice from the Cabinet; this is her decision alone.

Thirdly, any assistance from the Cabinet is restricted to advising the Attorney General on issues to consider rather than directing their actions. The responsibility for the decision is that of the Attorney General alone; the government is not to put pressure on him or her. In this matter, there are differing versions of events being offered from both sides. Minister Jody Wilson-Raybould said she was subjected to an inappropriate amount of pressure, tantamount to forcibly directing her actions. The PMO, on the other hand, indicated that it was acting to keep the Attorney General appropriately informed.

[101] https://www.theglobeandmail.com/canada/article-timeline-a-chronicle-of-snc-lavalin-trudeau-the-pmo-and-jody-wilson/

The issue of prosecutorial independence is also addressed in a Canadian case, *Law Society of Alberta v. Krieger*, in which the Supreme Court of Canada (SCC) clearly noted the magnitude of influence the Attorney General can have over the trajectory of a prosecution. The decision to commence and end a case was their raison d'être, and along with it, the expectation of being free from the political pressures from the government of the day.

The SCC stated in *Law Society of Alberta v. Krieger* that:

> *the quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution.*

The "Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" states the following with regards to prosecutorial discretion under Article 5:

> *Article 5. Enforcement:*
>
> *27. Article 5 recognizes the fundamental nature of national regimes of prosecutorial discretion. It recognizes as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.*

As stated earlier, it is unknown whether undue influence was applied or whether discussions took place in good faith. But what is clear is that the Article 5 of the OECD Anti-Bribery Convention, constitutional conventions such as the Shawcross Doctrine, and the Supreme Court of Canada, are unequivocal in their expectation of prosecutorial independence from political interference.

REMEDIATION AGREEMENT/DEFERRED PROSECUTION AGREEMENT

The terms deferred prosecution agreement (DPA), non-trial resolution (NTR) and remediation agreements are being used interchangeably in this paper. Unless otherwise specified, the phrase "DPA" should be understood to refer to either a "NTR" or "remediation agreement" involving a business organization.

Firstly, this section will provide a background on common elements found in DPAs; secondly, a detailed review of the Canadian version of a DPA; thirdly, the origins and the evolutions of DPA in the US; and, fourthly, a brief overview of the recent French equivalent to provide perspective.

Introduction to Deferred Prosecution Agreements

Deferred prosecution agreements ("DPAs"), know as remediation agreements in Canada, are voluntary agreements negotiated between the prosecutor and a corporation that is under criminal investigation. The criminal prosecution of that corporation is "deferred" (not eliminated) for a period of time while the corporation fulfils certain conditions. If the corporation fails to comply with these terms, the charges can be reinstated and the prosecution of the corporation continues.[102] Most DPA regimes require that corporations comply with similar conditions such as: co-operating with the prosecutors in the investigation of the offending individuals; accepting responsibility by acknowledging the

[102] https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/aps-dpa-eng.pdf (at pg. 4)

acts of its employees; undertaking internal reforms including compliance measures and oversight from independent monitors; and paying a fine and returning all profits from the offence. If the corporation fails to fulfil these terms, the charges can be reinstated and the prosecution of the corporation continues. In this event, the government, aided by any evidence acquired during its collaboration, would continue with the prosecution of the corporation, almost assuring a conviction.[103] In return for implementing meaningful internal changes to address the failures that led to the offence and for co-operating with the investigators to fully uncover the offence—and the perpetrators—the corporation avoids the severe fallout of a criminal conviction.[104]

Some arguments in favour of a DPA include:

(1) Minimizing reputational damage to the corporation;

(2) Obtaining assistance of the corporation in gathering information that could lead to the prosecution of the perpetrators of the offence;

(3) Shielding innocent stakeholders such as employees, customers, suppliers from becoming collateral damage should the corporation collapse;

(4) Enabling the collection of larger fines which is more effective deterrent for a corporate wrongdoer and greater amount of restitution for victims;

(5) Changing the corporate culture and mandating controls to prevent future occurrence of similar offences within the company; and,

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[103] Mazzacuva, F. (2014). Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice. The Journal of Criminal Law, 78(3), 249–262. https://doi.org/10.1350/jcla.2014.78.3.921

[104] Regulating the new regulators: current trends in deferred prosecution agreements (spivak, raman)

(6) Enabling the monitoring of the corporation's conduct to confirm adherence to the agreement; and, minimizing the significant expenditure of time and resources.

In his paper "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements", Federico Mazzacuva discusses the overwhelming financial costs to pursue a corporate criminal case and limited number of cases that can be completed. With regards to fraud-related cases, Mazzacuva states that the National Fraud Authority in the United Kingdom estimates that, in 2012, fraud committed by all types of offenders cost £73 billion per year. The lengthy investigation and prosecution of these cases cost the Serious Fraud Office almost £1.6 million and required approximately eight years to resolve; this includes monitoring and reporting requirements.

There are commonalities in the DPA regime among Canada's trading partners. Most DPA proceedings, with some exceptions, involve the following steps:[105]

(1) A determination by the prosecuting authority to invite (or not) an entity to a DPA and enter into a DPA following an investigation;
(2) The initiation of the DPA proceeding before the a judicial body;
(3) The judicial approval of the contents of the DPA;
(4) Identification of actions required by the entity to undertake to rectify non-compliance. The breach of these terms would nullify the deferral of the matter and prosecution would commence;

[105] Mazzacuva, F. (2014). Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice. The Journal of Criminal Law, 78(3), 249–262. https://doi.org/10.1350/jcla.2014.78.3.921

(5) Assignment of monitors to oversee compliance of the above; and,

(6) A withdrawal of prosecution if the terms of the DPA had been fully satisfied by the entity.

A 'Made-in-Canada' Deferred Prosecution Agreement (Remediation Agreement)

From September 25 to November 17, 2017, the Government of Canada held a public consultation to solicit views on whether it has the right tools in place to address corporate wrongdoing. Included in this consultation was Canada's version of a DPA regime.[106] According to the Department of Justice (DOJ), during the consultation, "over 70 submissions were received and more than 370 Canadians, industry associations, businesses, non-governmental organizations and others participated". On February 22, 2018, the Government released the results of the consultation.[107] On February 27, 2018, the Government tabled the 2018 budget bill, Bill C-74, which included *Criminal Code* amendments to include Canada's version of a DPA called "remediation agreements"; it received Royal Assent on June 21, 2018. [108]

The 2018 federal budget stated that remediation agreements were to be implemented through judicial remediation orders ("JRO"s), and serve as an additional tool to hold

[106] https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/aps-dpa-eng.pdf (at pg. 4)
[107] https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html
[108] https://www.parl.ca/DocumentViewer/en/42-1/bill/C-74/royal-assent

corporate offenders to account[109]. As stated by lawyers Larissa Fulop and Jason Wadden in "Canada Adopts New 'remediation agreement' Regime to Address Corporate Crime", these measures were not offered in Canada, except in some Competition/Antitrust cases.[110] The 2018 federal budget further asserts that these actions are in line with those taken by some of our key trading partners such as the United States, the United Kingdom, Australia and France.[111] The following sections will review, compare and contrast each of these respective country's version of a DPA. The analysis will draw upon the OECD questionnaire results from a detailed survey on resolving foreign bribery cases with NTRs.

According to the Government of Canada's DOJ website, the main purposes of a remediation agreement are as follows: [112]

(1) To denounce an organization's wrongdoing and the harms that such wrongdoing has caused to victims or to the community;
(2) To hold the organization accountable for the wrongdoing;
(3) To require the organization to put measures in place to correct the problem and prevent similar problems in the future;
(4) To reduce harm that a criminal conviction of an organization could have for employees, shareholders and other third parties who did not take part in the offence; and

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[109] https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf (at pg. 202)
[110] https://www.goodmans.ca/Doc/Canada_Adopts_New__Remediation_Agreement__Regime_to_Address_Corporate_Crime
[111] https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf (at pg. 202)
[112] https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html

(5) To help repair harm done to victims or to the community, including through reparations and restitution.

The remediation agreement regime was enacted through the creation of a new Part (Part XXII.1) of the *Criminal Code*. Subsection 715.32(1) outlines the condition for remediation agreement, and subsection 715.32(2) lists factors to consider. Conditions for remediation agreements set out under s. 715.32 of the *Criminal Code*:

*(2) For the purposes of paragraph (1)(*c*), the prosecutor must consider the following factors:*

(c) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;

(f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;

Important to this discussion is subsection 715.32(3) which identifies factors not to consider:

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.*

This subsection is consistent with Article 5 of the OECD Anti-Bribery Convention which states that investigators and prosecutors should not consider national economic interests when confronted with bribery of foreign public officials.

DPAs in the United States of America

Several literary sources point to the origin of the DPA as a tool to assist juvenile offenders in their rehabilitation. Andrea Amulic in "Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution", Paola C. Henry in "Individual Accountability for Corporate Crimes after the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform", Peter R. Reilly in "Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions", Peter Spivak and Sujit Raman in "Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements" all speak to this origin in their respective work. According to these authors, DPAs were used in early 1900s to help reform low-level, non-violent individuals, especially juveniles and first-time offenders. Rather than further subjecting vulnerable members of society to the stigma of a criminal conviction and setting them on a harder path to reform, prosecutors devised a process to file charges in court but with an agreement to suspend the prosecution during a probationary period. Once the conditions of the probation were successfully completed, the prosecutor would dismiss the charges. The probation allowed the offenders the time to demonstrate that they had rehabilitated and be spared the onerous criminal conviction. A marked departure from its earlier use, this approach was eventually configured for use in corporate criminal matters.

Arthur Andersen and the collateral damage to third parties

Court E. Golumbic and Albert D. Lichy, in their paper "The 'Too Big to Jail' Effect and the Impact on the Justice Department's Corporate Charging Policy", outline the arguments in support of the DPA regime in corporate matters. They assert that DPAs allow companies to be shielded from reputational and collateral damage that might flow from a criminal indictment or trial, including curtailing the probability that innocent third parties would be subjected to job losses from company closures, as was the case in the collapse of the accounting firm Arthur Andersen.[113] In 2002, the accounting firm Arthur Andersen—a firm founded in 1913, now with 85,000 employees worldwide—was charged with one count of obstruction of justice. The prosecutors alleged that the firm destroyed "tons of paper" and deleted a large number of records pertaining to its audits of Enron.[114] As a consequence of this conviction, thousands of innocent Americans lost their jobs. [115] James R. Copland in "The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements" states that: "on the heels of the Andersen case, Deputy US Attorney General Larry Thompson issued in 2003 a memorandum outlining the factors that the US DOJ should consider in deciding whether to prosecute corporations" and that "it also, for the first time, expressly offered pretrial diversion or deferred prosecution as an option for co-operating corporations".[116] Golumbic and Lichy note that, since Andersen, no corporations have collapsed after entering into DPAs with the government. The authors assert that the collapse of Andersen illustrated to prosecutors the consequence of a corporate criminal conviction on innocent

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[113] http://www.hastingslawjournal.org/wp-content/uploads/Golumbic-Lichy-65.5.pdf
[114] https://www.forbes.com/2002/03/15/0315topnews.html#606979e51868
[115] ibid
[116]

third parties such as employees and shareholders. An abundance of caution resulting from the lessons of this experience, in part, led to the prolific use of DPAs in relation to corporate crimes.

<u>Remediation Agreements and the Evolution of Monitors in the United States</u>

The remediation agreement can require a corporation to adopt internal control changes that seek to rectify the deficiencies leading to an offence. An impartial and independent monitor can be assigned to verify compliance to these measures. In addition to assuaging the public's concern over whether the entity is abiding by the terms of the remediation agreement, the presence of a monitor can also minimize the probability of recidivism. The monitorship process is crucial for the rehabilitation of a corporation's culture and for ensuring necessary changes are implemented to prevent further wrongdoing. However, this responsibility also makes the role of the monitor susceptible to undue influence by the very corporate offenders they are meant to oversee. The potential hazards associated with the monitorship of corporation was addressed in the US as its DPA process matured. This section will explore the evolution of the DPA in the United States by reviewing key US DOJ memoranda relating to the monitoring of corporations subjected to a DPA.

Under s. 715.34(3)(*a*) and (*b*) of the *Criminal Code*, a remediation agreement can impose enhanced compliance measures and require that an independent monitor verify the entity's compliance. The monitor provision brings government oversight into a corporation's operations and seeks to mitigate future offences of similar nature. In order for a remediation

agreement to gain public confidence, reduce recidivism and positively influence the corporate culture, the rules governing the selection and conduct of an autonomous monitor are essential.

Optional contents of agreement set out under s. 715.34(3) of the *Criminal Code* states:

> *A remediation agreement may include, among other things,*
>
> *(a) an indication of the obligation for the organization to establish, implement or enhance compliance measures to address any deficiencies in the organization's policies, standards or procedures—including those related to internal control procedures and employee training—that may have allowed the act or omission;*
>
> *(c) an indication of the fact that an independent monitor has been appointed, as selected with the prosecutor's approval, to verify and report to the prosecutor on the organization's compliance with the obligation referred to in paragraph* (a)*, or any other obligation in the agreement identified by the prosecutor, as well as an indication of the organization's obligations with respect to that monitor, including the obligations to co-operate with the monitor and pay the monitor's costs.*

Although monitors have not been used in Canada due to the relative infancy of remediation agreements, it is nevertheless a recognizable condition of DPAs. Since 2008, the US DOJ has issued four memoranda relating to the appointment of corporate monitors. These memoranda reflect the evolution of monitorship in the United States, as authorities react to address various shortcomings in each of the previous iterations of the relevant memorandum. Since DPAs have been used for a considerably longer period in the United States, it is informative to examine the monitoring process adopted by the US DOJ to address these concerns.

The first memorandum, issued in 2008, was referred to as the "Morford Memorandum". It outlined nine principles for drafting provisions concerning the use of monitors, as per the

DPA. The memorandum addressed areas of selection, scope of duties and duration of the monitorship. From its outset, the memorandum made it clear that prosecutors should be cognizant of the potential benefits that a monitor may have on the corporation and the public, and as well as the cost of a monitor and its impact on the operations of a corporation. Key practices to ensure a sound monitoring process necessitates that the monitor (1) be chosen on merit; (2) be an independent third party; (3) have an appropriately defined scope to effect change; (4) maintain a channel of communication to provide updates to the prosecuting authority; and (5) be flexible with the timeframe of the monitorship based on progress.

A second memorandum—the "Breuer Memorandum"—was issued in 2009; it supplemented the guidance provided by the "Morford Memorandum". The "Breuer Memorandum" contributed to the evolution of the monitorship by requiring the creation of a Standing Committee on the selection of monitors. All participants were reminded to be mindful of their responsibility to comply with the conflict-of-interest guidelines. A detailed set of procedures and policies for the selection and appointment of monitors was outlined in this iteration of the memorandum.

A third memorandum—the "Grindler Memorandum"—was issued in 2010; it supplemented the "Morford Memorandum", with an additional principle pertaining to the resolution of disputes between the monitor and the corporation.

A fourth memorandum issued in 2018—"The Benczkowski Memorandum"—further supplemented "Morford Memorandum". This iteration sought to provide guidance on whether a monitor is needed in an individual case. It provided a framework to consider the potential benefits and costs to prevent unnecessary burden to the corporation. This memorandum instructs the prosecutors to assess whether the presence of a monitor in the corporation has been averted due to: the appointment of new corporate leadership; implementation of a new compliance environment; or undertaking of remedial measures prior to settlement, including ending relationships with problematic agents or employees.

These memoranda reflect the growing pains of a monitorship program and DPAs. "The Benczkowski Memorandum" stresses that the costs and benefits of requiring a monitor must be carefully considered. In emphasizing that the DOJ is considerate of the economic burdens imposed by monitors, one can gleam a potential drawback to the DPA process: costs associated with a monitor could be too onerous for the participating corporation. The principles and practices governing the use of monitors have evolved over time in the United States as authorities have responded to various needs and vulnerabilities of the monitorship requirement.

<u>Item # 2 in the Appendices provides the author's summary of Memoranda from the US DOJ pertaining to monitors</u>

Convention judiciaire d'intérêt public in France (CJIP)

Although France joined the OECD Anti-Corruption Convention in 2000[117], it was a laggard in combating anti-corruption.[118] In 2012, the WGB issued its periodic assessment on the implementation of the Convention. The Phase 3 assessment focused on the implementation and enforcement of the Convention and country-specific issues arising from changes in France's legislative and institutional framework, as well as progress made since France's Phase 2 evaluation in 2004.[119] At the time of the Phase 3 assessment, the WGB had serious concerns about France's effectiveness in combating bribery, stating that "despite the very significant role of French companies in the international economy, only 33 foreign bribery proceedings have been initiated and five convictions—of which only one, not yet final, concerns a legal person—have been handed down since France became a Party to the Convention in 2000".[120] France was ranked 23rd, with a score of 69 out of 100, according to Transparency International's 2016 Corruption Perception Index.[121]

As a response, France's new anticorruption law, named "*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*," ("The law on transparency, the fight against corruption and the modernization of economic life"), also known as

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

[118] http://www.oecd.org/corruption/oecdseriouslyconcernedatlackofforeignbriberyconvictionsinfrancebutrecognisesrecenteffortstoensureindependenceofprosecutors.htm

[119] http://www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf (pg 5)

[120] http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm

[121] https://issuu.com/transparencyinternational/docs/2016_cpireport_en?e=2496456/43483458

"Sapin II Law," was passed by the French government in December 2016.[122] Most provisions of the Sapin II Law entered into effect in June 2017.

The Sapin II Law is based on the FCPA and UK Bribery Act anti-corruption regimes.[123] The Sapin II Law is notable in a number of respects. Specifically, it (1) expands the extraterritorial reach of France's anti-corruption laws in international areas; (2) obligates certain business organizations to implement compliance programs; (3) establishes a new anti-corruption agency, the *Agence française anticorruption* ("AFA"); (4) improves protections for whistleblowers; and (5) creates a criminal settlement procedure, referred to as the *Convention judiciaire d'intérêt public* ("CJIP") (judicial convention in the public interest).[124] The CJIP is similar to the DPAs found in Canada, the United States and the United Kingdom in that it permits a negotiated outcome that avoids a criminal conviction. For entities that participate in the CJIP, there is no admission of guilt and no criminal conviction. Similar to Canada's Integrity Regime, a criminal conviction would lead to automatic debarment from public procurement contracts.[125]

Main components of this remedy are:

(1) A prosecutor or judge may offer a CJIP to entities suspected of having committed an act of corruption.

[122] https://www.covafrica.com/2018/06/what-companies-need-to-know-about-frances-loi-sapin-ii-anti-corruption-law/
[123] https://www.morganlewis.com/pubs/sapin-ii-law-the-new-french-anticorruption-system
[124] https://www.covafrica.com/2018/06/what-companies-need-to-know-about-frances-loi-sapin-ii-anti-corruption-law/
[125] https://www.anticorruptionblog.com/france/new-french-anti-corruption-law-sapin-ii/

(2) Agreeing to CJIP does not carry a conviction. It is not registered in the criminal record, which avoids automatic debarment from public procurement contracts.

(3) If a CJIP is reached, the imposed fine will be proportionate to the gains made from the breach, yet it cannot exceed 30% of the entity's average annual turnover within the last three years at the time the offence was committed.

(4) Implementation of a compliance program for a maximum period of three years. The implementation of the program is monitored by the AFA at the expense of the company…within a ceiling price.

(5) A settlement also imposes the indemnification of any known victim, with payment required within one year.

(6) The legal representatives of the legal person accused of corruption are not covered, and remain liable.

The Sapin II Law can hold companies liable for failure to implement an efficient anti-corruption program, even when no corrupt activity has taken place. This differs from the United States, where DPAs are offered when there are suspicions of actual breaches, or evidence of the existence of an actual breach. This also differs from the UK *Bribery Act*, where companies may demonstrate a full defence of "adequate procedures" in case of a breach.[126]

[126] https://www.ganintegrity.com/portal/anti-corruption-legislation/sapin-ii-law/

Recapped below are charges that were laid against several executives in connection with the SNC-Lavalin scandal discussed earlier in the paper. One of the vice-presidents, Stephane Roy ("ROY"), was charged in 2014 with fraud and bribery of a foreign public official in connection with SNC-Lavalin's transactions in Libya.[127] In February 2019, a judge stayed proceedings against ROY, stating that the delays created by the prosecution "are an example of the culture of complacency that was deplored by the Supreme Court" in its 2016 *R. v. Jordan* decision.[128]

Another Executive Vice-President, Sami Bebawi ("BEBAWI"), and his Montréal-based tax lawyer, Constantine Kyres, were charged with obstruction of justice in 2014, after they allegedly offered a $10-million bribe to another detained executive to alter his version of events such that BEBAWI would not be implicated in the ongoing Libya corruption scandal. The obstruction of justice charges against both individuals were stayed, due to the time it took to bring the case to trial, as per the 2016 *R. v. Jordan* decision. BEBAWI still faces charges related to fraud and bribery of foreign public officials in connection with SNC-Lavalin's transactions in Libya.[129]

[127] ibid
[128] https://montreal.ctvnews.ca/criminal-case-dropped-for-ex-snc-lavalin-exec-stephane-roy-due-to-delays-1.4303635
[129] https://www.theglobeandmail.com/canada/article-former-snc-executive-sami-bebawi-has-obstruction-charge-stayed-because/

Section 11(*b*) of the *Charter of Rights and Freedoms* ("the *Charter*") states: "Any person charged with an offence has the right to be tried within a reasonable time." The systemic delays plaguing the Canadian criminal legal system were highlighted in the SCC's decision in *R. v. Askov*, further refined in *R. v. Morin*, and more recently in *R. v. Jordan*. Moreover, the decision from *R. v. CIP Inc.* affirms that corporations, as well as individuals, are protected by s. 11(*b*) of the *Charter*. These decisions ultimately necessitate changes to the present organization and existing procedures of the criminal justice system to reduce trial delays. The positive impact to a timely resolution of cases due to efficiencies created by the adoption of remediation agreements strengthens the rights granted under s. 11(*b*) of the *Charter*.

Item # 3 in Appendices provides the author's summary of legal cases showing evolution of s. 11(*b*) concerns resulting in *R. v. Jordan*

R. v. Askov

The appellants in *R. v. Askov* were charged with conspiracy to commit extortion in November 1983, and the case eventually moved to trial in September 1986. The defence raised the issue of the length of time it took for the trial to take place since charges were initially laid. In addressing this matter, the SCC established a series of considerations on the right to be tried within a reasonable time: (1) the length of the delay; (2) the explanation of the delay; (3) waiver; and (4) prejudice to the accused. The *R. v. Askov* case took place on

October 18, 1990; subsequently, between October 22, 1990, and September 6, 1991, more than 47,000 charges were stayed or withdrawn in Ontario.[130]

R. v. Morin

The issue of delays in the court system was revisited in *R. v. Morin* on March 26, 1992. By softening the stance set out in the earlier *R. v. Askov* decision, the SCC recognized the limitation of resources in a country with a rapidly growing population. It sought to avoid s. 11(*b*) from becoming a "trial of the budgetary policy of the government as it relates to the administration of justice".[131] The SCC suggested a period of institutional delay of 8–10 months as a general guide to provincial courts.

R. v. CIP Inc.

In *R. v. CIP Inc.* it was ruled that both corporations and individuals were subject to the protection afforded by s. 11(*b*).[132] There are two key judgments in *R. v. CIP Inc.* that are particularly relevant to corporations: (1) corporations are also subject to s. 11(*b*) protection; and (2) a corporation accused must be able to establish that its fair trial interest has been irremediably prejudiced. One consequence of *R. v. CIP Inc.* is that it made it extremely challenging for corporations to assert that s. 11(*b*) rights had been violated, since they were obliged to meet the requirement of showing "prejudice to the accused"—one of the factors to

[130] R. v. Askov, [1990] 2 SCR 1199, 1990 CanLII 45 (SCC) [Askov]
[131] R. v. Morin, [1992] 1 SCR 771, 1992 CanLII 89 (SCC) [*Morin*]
[132] R. v. CIP Inc., [1992] 1 SCR 843, 1992 CanLII 95 (SCC)

be considered as a result of *R. v. Askov*, and reaffirmed in *R. v. Morin*.[133] The *R. v. Jordan* ruling discussed below removes the presence of prejudice as a requirement when applying s. 11(*b*); this development essentially places the corporate defendant on the same footing as an individual when it faces s. 11(*b*) challenges.[134]

R. v. Jordan

The 2016 *R. v. Jordan* ruling was a departure from the *R. v. Morin* framework. The SCC stated that the guidelines provided in *R. v. Morin* had resulted in "doctrinal and practical problems, contributing to a culture of delay and complacency towards it", and presented a new framework to consider whether the defendant's s. 11(*b*) rights were violated.[135] This new framework establishes a firm ceiling: 18 months for cases going to trial in provincial court and 30 months for cases going to trial in superior court (or cases going to trial in provincial court after a preliminary inquiry). Delays beyond these ceilings are considered unreasonable and will result in a stay of proceeding unless the Crown can establish that the delay was the result of reasonably unforeseen, unavoidable exceptional circumstances beyond the Crown's control, or was the result of case complexity.

In an article from the law firm of McCarthy Tetrault, lawyers Peter Brady, Trevor Curtis and Michael Rosenberg discussed the impact of *R. v. Jordan* on challenges of s. 11(*b*) in cases where

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[133] https://www.mccarthy.ca/en/insights/blogs/canadian-era-perspectives/r-v-jordan-supreme-court-canada-dramatically-alters-framework-applicable-right-criminal-trial-within-reasonable-time
[134] ibid
[135] *R v. Jordan*, 2016 SCC 27, [2016] 1 SCR. 631.

a defendant is a corporate entity. They assert that, since *R. v. Jordan* disregards the impact of prejudice, a corporate defendant would be in a similar situation as an individual when attempting to seek the advantages of the presumptive ceiling. This evolution in the legal landscape introduces urgency to corporate cases prosecuted by the Crown. If the case stretches beyond the ceiling, the defendant might be eligible for a stay of proceedings[136].

This issue is not just limited to economic crime cases. A database compiled by Global News found that nearly 800 criminal cases for offences ranging from murder to drug trafficking across Canada (and different jurisdictions) have been stayed because a judge found that the defendant's constitutional right to a timely trial had been violated. Of these cases, 234 cases fell within the purview of the PPSC.[137] These examples highlight the changing legal landscape in Canada. It is no longer acceptable for trials to linger on, keeping the alleged offender and the victim in a state of uncertainty. Courts have taken a firm stand on this.

A review of cases shows the evolution of Canadian law with respect to the right to be tried within a reasonable time. Corruption and bribery cases tend to be lengthy[138], often complicated[139] and frequently entail considerable disclosure. Resource constraints faced by public prosecutors (PPSC) and the court system (e.g. lack of judges, court staff, and general resources allocated to the courts) could result in lengthy delays in corporations and individuals

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[136] https://www.mccarthy.ca/en/insights/blogs/canadian-era-perspectives/r-v-jordan-supreme-court-canada-dramatically-alters-framework-applicable-right-criminal-trial-within-reasonable-time
[137] https://globalnews.ca/news/5351012/criminal-cases-thrown-out-r-v-jordan-decision/
[138] http://publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf
[139] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/CorruptionIssues

charged with complex economic crimes. As elaborated by Michelle Cook in her article "Overthrowing Precedent: *R. v. Jordan*'s Impact on the Crown and the Right to a Trial Within a Reasonable Time", it is improbable that the overburdened legal system will be able to adapt to the expedited timeframe. As a consequence, corporations and white-collar offenders stand to benefit from the expanded s. 11(*b*) protection.[140] Remediation agreements might provide an attractive alternative where cases can move forward in a less adversarial environment. Moreover, remediation agreements would enhance collaboration with companies in obtaining evidence against individual offenders, resulting in a speedier conclusion to the legal process.

[140] http://www.thecourt.ca/overthrowing-precedent-r-v-jordans-impact-crown-right-trial-within-reasonable-time/

Information needed for a successful prosecution comes with a price tag. The strict time limit imposed by *R. v. Jordan* has amplified and expedited these costs. These "costs" can refer to, among others, the technical knowledge required by the prosecutors; staff needed to conduct investigations; and co-operation of foreign officials. A shortage of legal professionals who possess the requisite technical knowledge to extract or interpret information in complicated financial cases contributes to delays. Moreover, obtaining crucial information held in foreign jurisdictions adds to the length of an investigation. The cost of acquiring the information must be weighed against the benefits.

It is this author's view that remediation agreements can facilitate information sharing between prosecutors and corporations, which can result in cases concluding sooner than otherwise expected while mitigating the effect of inadequate information. There are several avenues available under remediation agreements that are useful in remedying asymmetric information between the prosecutors and subject of an investigation. Asymmetric information—a concept prevalent in economics—is a scenario where one market participant has less information than the other. In our context, the corporation is the participant who is in possession of necessary information and is consequently at an advantage; the prosecutors, meanwhile, have less information and are therefore at a disadvantage. Information held by the corporation must be viewed, in this author's opinion, as a scarce good. The mandatory requirements of the remediation agreement can address this concern.

Mandatory contents of agreement set out under s. 715.34(1) of the *Criminal Code* state:

> *A remediation agreement must include*;
>
> *(c) an indication of the obligation for the organization to provide any other information that will assist in identifying any person involved in the act or omission, or any wrongdoing related to that act or omission, that the organization becomes aware of, or can obtain through reasonable efforts, after the agreement has been entered into;*
>
> *(d) an indication of the obligation for the organization to co-operate in any investigation, prosecution or other proceeding in Canada—or elsewhere if the prosecutor considers it appropriate—resulting from the act or omission, including by providing information or testimony.*

A condition in the remediation agreement requires that the organization co-operate in the ongoing investigation into the offence. This attempts to mitigate the information asymmetry that confounds many investigations pertaining to corruption, bribery and financial crimes. Because the organization is compelled to co-operate, remediation agreements provide an alternative in this new legal environment to obtain information swiftly. An organization has an incentive to share information with prosecutors in order to mitigate further damages to its reputation caused by a lengthy, drawn-out litigation. It will also avoid incurring additional legal costs and disrupting business operations. Obtaining scarce information held by the corporation in order to prosecute the individual wrongdoer could accelerate the prosecution of these individuals, addressing the concern of strict time limits imposed by *R. v. Jordan*. To this end, remediation agreements can facilitate greater information sharing in an expeditious manner. The result is a systemic change that goes towards protecting the rights guaranteed under s. 11(*b*) of the Charter and the *R. v. Jordan* ruling by addressing the issue of information asymmetry.

The OECD Study

The OECD held the "OECD Global Anti-Corruption & Integrity Forum" on March 20–21, 2019. It was billed as the "leading annual multi-stakeholder public event on anti-corruption worldwide".[141] It has more than 2,000 participants from 120 countries, uniting governments, businesses and "civil society leaders", and experts to address issues related to integrity and anti-corruption. This particular event heralded the launch of the "OECD Study on Non-Trial Resolutions on Foreign Bribery Cases: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention" ("OECD Study") as well as the accompanying "Resolving Foreign Bribery Cases with NTRs: OECD Data Collection Questionnaire Results" ("OECD Study Data").

The study broadly defined non-trial resolutions ("NTR"s) as a range of practices used to resolve criminal matters without a full court proceeding, based on an agreement between an individual or a company and a prosecuting authority. DPAs, Canada's remediation agreements, and other similar mechanisms are covered in this definition. The OECD Study included 27 of the 44 Parties to the OECD Anti-Bribery Convention;[142] Canada was also included, since it introduced the remediation agreement despite being past the cut-off date of the study (mid-2018).

[141] https://www.oecd.org/corruption/integrity-forum/Highlights-2019-WEB.pdf
[142] Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Slovenia, South Africa, Spain, Switzerland, the United Kingdom and the United States.

Based on information drawn from data contained in the OECD Study, a comparative analysis was conducted between Canada, France, the United Kingdom and the United States. All questionnaires from the OECD Study that included Canada were captured along with the three countries discussed in this paper. France has a civil law tradition similar to Québec, and is a recent entry that was included to give some contrast. The United States was included because its long history with DPAs provides valuable lessons to consider. The United Kingdom is included, since Canada's remediation agreement shares some similarity, and both countries share common legal traditions. **Refer to Exhibit "A" for a compilation of these results comparing these four countries.**

These tables are crucial for understanding commonalities among approaches. All four countries defer criminal proceedings (Table 1). Note that the United States offers DPAs through both the DOJ and the Security and Exchange Commission ("SEC"). These DPAs concern administrative proceedings—this is not covered in the Canadian remediation agreement.

One notable difference between France and the other countries is that the French CJIP requires a guilty plea. This is not the case with other countries; a successful resolution does not result in a criminal record (Table 6). A major difference between the United Kingdom and the other countries is the body authorized to determine sanctions: in the United Kingdom, it is the court, whereas, in the other nations, it is the prosecution (Table 8). In all

four countries, public interest is taken into consideration when deciding whether to use non-trial resolutions (Table 9).

Other similarities and differences are highlighted in the conditions that can be included in a resolution. An obligation to co-operate is not required in France; an admission of guilt is not required in the United States; France does not prohibit corporations from making public statements contrary to agreed facts and it does not prohibit contesting facts in subsequent procedures. This is in stark contrast with the United Kingdom and Canada, where there is an obligation to co-operate in any ongoing or future investigations, and where companies are prohibited from making public statements contrary to agreed facts and contesting facts in future procedures (Table 15). **Refer to Exhibit "A" for a compilation of these results comparing these four countries.**

Summarized below are the main takeaways from the OECD Study:

(1) NTRs have been the principal method of enforcing foreign bribery and other related offences. The study finds that 78 % of foreign bribery cases concluded since the OECD Anti-Bribery Convention were resolved with an NTR. The OECD Anti-Bribery Convention entered into effect on February 15, 1999. Between then and the cut-off date for the OECD Study (mid-2018), 890 foreign bribery resolutions

were successfully concluded; 695 (78%) of these resolutions were concluded through NTRs.[143]

(2) Countries that have completed at least one foreign bribery case using NTRs often used this approach to resolve foreign bribery cases. The authors of the OECD Study concluded that NTR systems could indirectly contribute to an overall increased enforcement of the foreign bribery offence.[144]

(3) NTRs enable greater multi-jurisdictional co-operation. An advantage noted in the OECD Study was that cases involving multiple jurisdictions can be concluded between several authorities simultaneously.[145]

(4) The close coordination between multiple jurisdictions brings certainty, as the matter is resolved across several jurisdictions at the same time; this is advantageous to prosecutors and the legal entities involved, since the total penalty for the offence is known at once (as opposed to penalties being meted out jurisdiction by jurisdiction over a longer time span).[146]

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[143] OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm
[144] ibid
[145] ibid
[146] ibid

(5) When legal entities were engaged in NTRs, significant amount of funds were confiscated. Of the resolutions where the amount confiscated is known, EUR 6.8 billion was imposed on legal entities; 90% of this amount (at least EUR 6.1 billion) was confiscated through NTRs.[147]

OECD Global Anti-Corruption & Integrity Forum Panel Discussion

On March 20–21, 2019, the OECD held its "OECD Global Anti-Corruption & Integrity Forum", where a panel discussion on NTRs was presented[148]. Participants in this discussion included: Victor Godoy Veiga, Head of the Directorate of Leniency Agreements, Office of the Comptroller General, Brazil; Éliane Houlette, Prosecutor, National Financial Prosecutor's Office, France; David Last, Assistant Chief, *Foreign Corrupt Practices Act* ("*FCPA*") Unit, US Department of Justice; and Hannah Von Dadelszen, Head of Fraud, Serious Fraud Office, United Kingdom. These individuals shared their experience on the use of NTRs.[149] The panel was unanimous in their support for NTRs. Some of their views are summarized below:

(1) Trials are lengthy, expensive and unpredictable. NTRs negate these drawbacks, making it an effective tool for a prosecutor.

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[147] ibid
[148] The term Non-trial resolutions include deferred prosecution agreement, remediation agreement, and similar mechanisms used internationally.
[149] https://www.oecd.org/corruption/integrity-forum/webcast/ (20 March 2019 - Watch – Live Room 1 @ 8:13:00)

(2) Prosecution of corporations is further complicated by the fact that there are employees who are innocent third parties to the situation. Prosecutors in the panel welcomed the range of options that NTRs brought to the legal process.

(3) NTRs resulted in larger amounts of funds being confiscated.

(4) Since no corporation is compelled to seek NTRs, an increase in its usage indicates that corporations are fearful of the trial alternative, such as sanctions. A corporation's preference for an NTR could indicate that there is a strong enforcement system in place. If the threat of effective enforcement is not present, corporations will not seek out NTRs—they would rather choose to contest the charges. In order for NTRs to be an effective deterrent, there needs to be strong investigation and prosecution systems in place that serve as a strong "stick" against an NTR's "carrot".

(5) NTRs are conducive to cross-border, multi-jurisdictional collaboration—more so than other options involving criminal prosecution. This is especially useful for law enforcement agencies. Evidence can be shared informally and discussions can be held with ease. Defendants often attempt to take advantage of the lack of co-operation across jurisdictions, playing one country off the other; open dialogue among countries can undermine these strategies.

(6) One of the challenges faced by multi-jurisdictional NTRs is the coordinating and timing of the NTR process. One needs to ensure that all countries are ready to proceed on or about the same time.

(7) In an adversarial trial, there are variables, such as the judge and court systems, that are beyond prosecutors' control. NTRs give prosecutors more control over the process.

(8) Issues covering multiple jurisdictions can be resolved simultaneously, minimizing double jeopardy and avoiding a lengthy process. These benefits encourage corporations to be more cooperative.

(9) There must be clear statutory guidance to ensure law enforcement does not take advantage of the situation and be unreasonable in its conduct towards the corporation.

(10) Policies must be in place to ensure monitors are independent and do not become beholden to the entities they are entrusted to monitor. Measures such as restricting employment with the monitor for a period of time after an engagement and conflict of interest reviews can be effective in this regard. Moreover, the reputation of the monitor is also at stake, and this encourages ethical behaviour.

(11) NTRs encourage greater compliance, additional self-reporting and self-regulation. Companies are using integrity compliance as a preventative tool rather than a reaction to non-compliance.

CONCLUSION

This paper began by visiting SNC-Lavalin's historic actions in its early stages, which paints a bleak picture of a once-revered Canadian company plagued by a slew of allegations of corruption for many years. The drama between the PMO, the Attorney General and SNC-Lavalin highlighted several issues discussed throughout this paper, namely: (1) the need for judicial independence and the delicate balance maintained by the Attorney General; (2) the OECD's role in advancing the fight against corruption through the OECD Anti-Bribery Convention that is reflected in the *CFPOA*; and (3) an introduction to remediation agreements in Canada.

At first glance, the OECD's primary vehicle for combating foreign corruption—the OECD Anti-Bribery Convention—appeared to have been contravened when the PMO allegedly pressured the former Attorney General into offering SNC-Lavalin a remediation agreement in an effort to save jobs. But the story is more nuanced. Although the facts surrounding these allegations are mired in uncertainty, the Shawcross Doctrine highlighted some points to consider regarding the dual role of the Attorney General. There is an expectation that the Attorney General is to take into account all relevant facts, including the impact of the prosecution on "public morale and order". However, the Attorney General is ***not required*** to consult with the Cabinet, but is free to do so in order to be better informed. Finally, any assistance from the Cabinet is restricted to advising the Attorney General on issues to consider rather than directing their actions. The Supreme Court of Canada, in *Law Society of Alberta v.*

Krieger, also spoke against political interference and asserted that judicial independence is paramount in ensuring the integrity of our legal system.

Differing views on the meaning of the term "national economic interest" featured prominently in public discussions. An interview with former Secretary General of the OECD Don Johnston and a review of existing literature on the subject seem to suggest that trade considerations and misuse of foreign aid were of concern in the 1990s when the OECD Anti-Bribery Convention came to fruition. It is possible that the term "national economic interest" goes far beyond preventing domestic impact such as job losses suffered by innocent third parties.

Was the Canadian public interest being served in a legal system without remediation agreements? As evidenced in this report, when remediation agreements were not in place, Canada had an abysmal record on convicting violations under the *CFPOA*. Studies by Transparency International and the OECD point to weak and inconsistent enforcement in Canada. It is clear that the status quo is unacceptable and public interest can be better served in many ways other than through criminal prosecution. Remediation agreements—Canadian iteration of the deferred prosecution agreements or non-trial resolutions—can be a valuable tool for prosecutors. This is especially useful, since the threshold for a criminal prosecution is very high. The burden of proof rests on the Crown, and the standard of evidence required to justify a criminal conviction in an adversarial legal system is beyond a reasonable doubt. This standard, in addition to elements such as *mens rea* and *actus reus,*

could be onerous on prosecutors who are pressed for time in the post-*R. v. Jordan* era which seeks to protect the rights enshrined in section 11(b) of the *Charter of Rights and Freedoms*. The strict time limits to protect one's right to a trial within a reasonable time necessitate a nimbler and more efficient legal system. Since prosecuting economic crime offences are often time consuming and resource intensive, prosecutors might abandon these cases in favour of more relatively straightforward cases. Complicated cases like SNC-Lavalin would be passed over for the "low-hanging fruits". Public interest is not served in such an eventuality.

Remediation agreements impose consequences for corporations that turn a blind eye to corrupt business practices and tolerate lackadaisical compliance programs. Various nonpartisan organizations, such as the OECD and Transparency International, have opined favourably on the use of non-trial resolutions. A comprehensive study by the OECD is unequivocal in its usefulness: it promotes faster resolutions; levies higher fines; spares innocent third parties; allows for close monitoring and an opportunity to change corporate culture; encourages self-reporting; and facilitates multijurisdictional collaboration. However, one should be mindful of the potential pitfalls of such a system: authorities must ensure that an ethical, independent third party conducts the monitoring. Monitoring provides an opportunity to change corporate culture and usher in compliance measures to mitigate further wrongdoings. One factor that will determine the success of remediation agreements is the strength of law enforcement and prosecutors in preventing corporations from using remediation agreements as a ploy to avoid harsh consequences. The stronger the enforcement and threat of a criminal conviction, the more likely a corporation is to engage in remediation

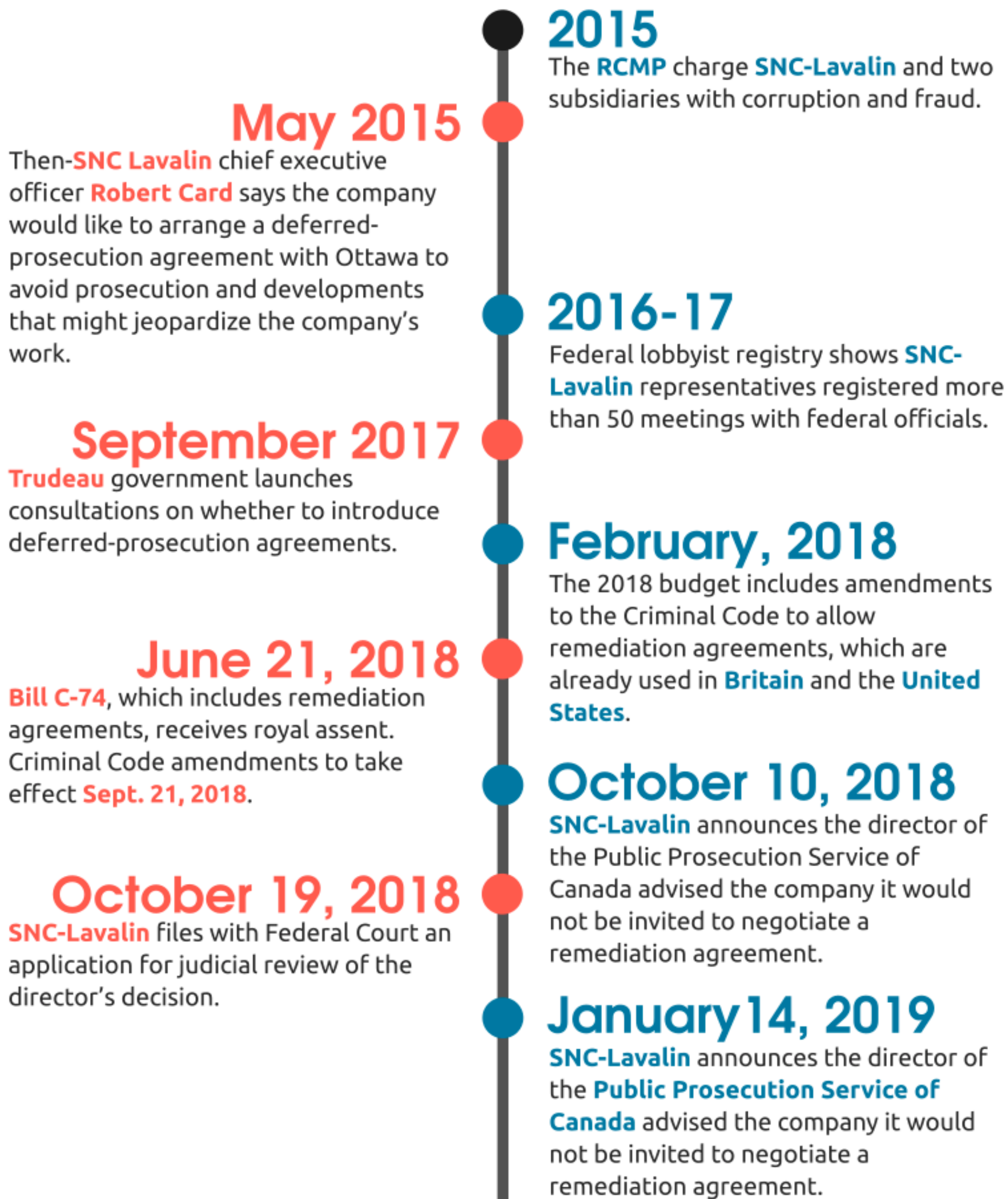
agreements or self-reporting to avoid facing off with a prosecutor in an adversarial trial. Law enforcement and prosecutors must be adequately funded and staffed for remediation agreements to be effective.

A strong integrity regime that requires companies to be debarred from public contracts due to criminal conviction is an effective "stick" against the remediation agreement's "carrot". Legislative changes to Canada's Integrity Regime must be carefully monitored to ensure that the penalties are not so diluted that they lose their deterrent effect.

Despite its recent entry into the Canadian legal landscape, the remediation agreement has courted a tremendous amount of controversy since its inception. Perhaps it was the manner in which it was introduced into the legislative framework in Canada, or because of partisan regional politics. Whatever the reason, the use of remediation agreements has been swept up in the political drama unfolding between the PMO and the former Attorney General. That said, discounting the benefits of remediation agreements because of the scandals surrounding SNC-Lavalin is akin to throwing the baby out with the bathwater.

"Compromise is the best and cheapest lawyer" — Robert Louis Stevenson.

Item # 1: Timeline of Events (prepared using information from The Globe and Mail, published February 12, 2019)



February 7, 2019

The Globe and Mail reports that Prime Minister Justin Trudeau's office attempted to press Ms. Wilson-Raybould.

Mr. Trudeau denies that senior officials in the PMO "directed" Ms. Wilson-Raybould.

February 8, 2019

Senior government officials confirm to The Globe that discussions were held with Ms. Wilson-Raybould.

February 10, 2019

New Attorney-General David Lametti says it is still possible he could issue a directive to the prosecution service to settle corruption charges against SNC-Lavalin outside of court.

February 11, 2019

Ethics Commissioner Mario Dion launches an investigation.

Mr. Trudeau says at a Vancouver news conference that he discussed the prosecution of SNC-Lavalin in the fall of 2018 with Ms. Wilson-Raybould.

Mr. Trudeau says Ms. Wilson-Raybould's continued membership in his cabinet is an indicator to Canadians that she is not unhappy with the government.

February 12, 2019

Ms. Wilson-Raybould resigns as veterans affairs minister and says she's hired former Supreme Court justice Thomas Cromwell to advise her on the limits of solicitor-client privilege in this case.

February 13, 2019

The House of Commons justice committee debates its own probe of the issue.

February 15, 2019

Mr. Trudeau says in Ottawa that Ms. Wilson-Raybould asked him in September whether he would direct her one way or another on the SNC-Lavalin question; he says he told her he would not.

February 18, 2019

Gerald Butts, Mr. Trudeau's closest adviser and long-time friend, resigns as his principal secretary.

Item # 2: A summary of Memoranda from the US DOJ pertaining to monitors

A brief summary of the nine principles outlined in the "Morford Memorandum" follows:

Selection:

Principle 1 — The monitor should be chosen based on merit. To that end, the selection process must be designed to: (1) select a qualified entity appropriate to the circumstances; (2) avoid potential and actual conflicts of interest; and (3) instill public confidence.

Scope of Duties:

Principle 2 — A monitor is an independent third party, not an employee or agent of the corporation or the Government.

Monitoring Compliance with the Agreement:

Principle 3 — A monitor's role is to evaluate whether the corporation is compliant with the terms of the DPA that are in place to mitigate recurrence of the misconduct; the monitor's responsibility is not to the corporation's shareholders.

Principle 4 — Although a monitor may need to understand the full extent of the corporation's misconduct, the monitor's scope should be "no broader than necessary" in order to minimize the risk of reoffending.

Communications and Recommendations by the Monitor:

Principle 5 — It is in the interest of all three parties involved (the monitor, the government and the corporation) that communication takes place. Based on the circumstances, it is appropriate for the monitor to make periodic written reports to both the Government and the corporation.

Principle 6 — If a corporation opts not to act on the recommendations provided by the monitor, one or both parties should notify the Government. The Government can take this behaviour into consideration when assessing whether or not the corporation has met its requirement as per the DPA.

Principle 7 — During the course of their duties, a monitor might become aware of new or formerly undisclosed misconduct. To address this issue, the DPA should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. The monitor will have the latitude to decide whether to inform the Government, the corporation, or both.

Principle 8 — The length of time of the DPA should be adjusted according to the concerns that have been identified and the nature of the corrective measures required by the monitor to satisfy their mandate.

Principle 9 — If the corporation has not successfully integrated the corrective measures outlined in the DPA, the Government—at its discretion—can extend provisions to the monitor. On the contrary, if the corporation can depict a change in circumstances that eliminates the need for a monitor, the DPA should accommodate an early termination.

The "Grindler Memorandum" established a tenth principle, as follows:

Principle 10 — The Government's role in resolving disputes that may arise between the monitor and the corporation should be outlined in the DPA. This principle reminds the Government that it is not a party to the contract between the corporation and the monitor. Secondly, the Government's involvement in resolving disputes is limited to questions regarding whether or not the company has complied with the terms of the DPA. Thirdly, law enforcement and public interest will determine the extent to which the Government becomes involved in resolving the disputes between the monitor and the corporation. Further, a dispute concerning whether to implement a compliance program recommended by the monitor would warrant the Government's involvement (as opposed to a dispute that has no bearing on corporate compliance or law enforcement).

Item # 3: A summary of legal cases showing evolution of s. 11(*b*) concerns resulting in *R. v. Jordan*

R. v. Askov

The appellants in *R. v. Askov* were charged with conspiracy to commit extortion in November 1983, and the case eventually moved to trial in September 1986. The defence raised the issue of the length of time it took for the trial to take place since the laying of charges. In addressing this matter, the SCC established a series of considerations on the right to be tried within a reasonable time: (1) the length of the delay; (2) the explanation of the delay; (3) waiver; and (4) prejudice to the accused. The justices concurred that the cause of the delay between the preliminary hearing and the trial was institutional, and directed a stay of proceedings. In their decision, the justices concluded that, while s. 11(*b*) strove to protect the individual's rights and ensured fundamental justice for the accused, a speedy resolution carried with it important practical benefits: memories fade; witnesses may become unavailable due to life events victims had an interest in a quick resolution; and the interest of the broader society was served. Upon reviewing statistical data of the court system in Brampton, Justice Cory J suggested that 6–8 months from committal to trial was reasonable. The *R. v. Askov* case took place on October 18, 1990; subsequently, between October 22, 1990, and September 6, 1991, over 47,000 charges were stayed or withdrawn in Ontario.

R. v. Morin

The issue of delays in the court system was revisited in *R. v. Morin* on March 26, 1992. The accused was charged with impaired driving in January 1988 and her trial was completed in

March 1989, resulting in a 14.5-month lapse between the time the charges were laid and the trial. The length of time was severe enough to warrant a review into the reasonableness of the delay, considering the accused did not waive her rights under s. 11 (*b*). Even though the defendant and the Crown were prepared for trial, the judicial system could not facilitate the trial. In *R. v. Morin*, the Court examined the role of the Crown, the defence and the institution (court) in the delay in a more accommodating manner. By relaxing the posture set out in the earlier *R. v. Askov* decision, the SCC recognized the limitation of resources in a country with a rapidly growing population. It sought to avoid s. 11(*b*) from becoming a "trial of the budgetary policy of the government as it relates to the administration of justice". However, it acknowledged there is a limit to the delay that can be tolerated on account of resource limitations. The SCC suggested a period of institutional delay of 8–10 months as a general guide to provincial courts. The SCC qualified that the court must consider the facts surrounding the institutional delay, including changes in local circumstances.

R. v. CIP Inc.

In *R. v. CIP Inc.* it was ruled that both corporations and individuals were subject to the protection afforded by s. 11(*b*). In May 1986, an employee of CIP Inc. was fatally injured in an industrial accident on the business premises. Following an inquest, CIP Inc. and three employees were charged with an offence. However, 19 months had lapsed between the laying of the charge and the final trial date—a delay caused solely from the lack of court facilities. SCC drew upon the framework developed under *R. v. Askov* and found that: (i) the length of delay was excessive at 19 months to bring the appellant to trial; (ii) there was no waiver given; (iii) the delay was solely due to institutional delays; and (iv) there was no prejudice to the

accused. CIP Inc. failed to persuade the court that its ability to make full answer and defence had been compromised. According to the SCC, the degree of prejudice suffered by the accused as a result of the delay was essential for a successful s. 11(*b*) application. There are two key judgments in *R. v. CIP Inc.* that are particularly relevant to corporations: (1) corporations are also subject to s. 11(*b*) protection; and (2) a corporation accused must be able to establish that its fair trial interest has been irremediably prejudiced. One consequence of *R. v. CIP Inc.* is that it made it extremely challenging for corporations to assert that s. 11(*b*) rights had been violated, since they were obliged to meet the requirement of showing "prejudice to the accused"—one of the factors to be considered as a result of *R. v. Askov*, and reaffirmed in *R. v. Morin*. The *R. v. Jordan* ruling discussed below removes the presence of prejudice as a requirement when applying s. 11(*b*); this development essentially places the corporate defendant on the same footing as an individual when it faces s. 11(*b*) challenges.

R. v. Jordan

The 2016 *R. v. Jordan* ruling was a departure from the *R. v. Morin* framework. The SCC stated that the guidelines provided in *R. v. Morin* had resulted in "doctrinal and practical problems, contributing to a culture of delay and complacency towards it", and presented a new framework to consider whether the defendant's s. 11(*b*) rights were violated. This new framework establishes a firm ceiling: 18 months for cases going to trial in provincial court and 30 months for cases going to trial in superior court (or cases going to trial in provincial court after a preliminary inquiry). Delays beyond these ceilings are considered unreasonable and will result in a stay of proceeding unless the Crown can establish that the delay was the result of reasonably unforeseen, unavoidable exceptional circumstances beyond the Crown's control, or

was the result of case complexity. The SCC left it to the "good sense and experience" of the judge in the trial to determine whether circumstances were exceptional. In its ruling, the SCC clearly stated that the seriousness or gravity of the offence, chronic institutional delay and absence of prejudice cannot be considered when contemplating a stay of proceeding for breaching the ceiling set forth in *R. v. Jordan*.

In an article from the law firm of McCarthy Tetrault, lawyers Peter Brady, Trevor Curtis and Michael Rosenberg discussed the impact of *R. v. Jordan* on s. 11(*b*) challenge in cases where a defendant is a corporate entity. They assert that, since *R. v. Jordan* disregards the impact of prejudice, a corporate defendant would be in a similar situation as an individual when attempting to seek the advantages of the presumptive ceiling. This evolution in the legal landscape introduces urgency to corporate cases prosecuted by the Crown. If the case stretches beyond the ceiling, the defendant may be eligible for a stay of proceedings[150].

Corruption and bribery cases tend to be lengthy[151], complicated[152] and entail considerable disclosure. Resource constraints faced by public prosecutors (PPSC) and the court system (e.g. lack of judges, court staff and general resources allocated to the courts) could result in corporations and individuals being charged with complex economic crimes experiencing lengthy delays. As witnessed in Michelle Cook's article "Overthrowing Precedent: *R. v. Jordan*'s

[150] https://www.mccarthy.ca/en/insights/blogs/canadian-era-perspectives/r-v-jordan-supreme-court-canada-dramatically-alters-framework-applicable-right-criminal-trial-within-reasonable-time

[151] http://publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf

[152] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/CorruptionIssues

Impact on the Crown and the Right to a Trial Within a Reasonable Time", it is implausible that the exhausted legal system would be able to adapt to the expedited timeframe. The inherent case complexity, combined with the time limits imposed by *R. v. Jordan*, places an inordinate pressure on the Crown. As a consequence, corporations and white-collar offenders stand to benefit from the expanded s. 11(*b*) protection.[153] Since prosecuting economic crime offences are time consuming and resource-intensive, prosecutors might abandon these cases in favour of more relatively straightforward cases. This paper has presented key cases that illustrate the evolution of s. 11(*b*) challenges and has highlighted the potential repercussions.

[153] http://www.thecourt.ca/overthrowing-precedent-r-v-jordans-impact-crown-right-trial-within-reasonable-time/

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EXHIBIT "A"

Table 1 (OECD Study Table 1. Resolutions and their legal basis [Legal Persons])

Country	Resolution name	Legal basis
Canada	Remediation Agreement	*Criminal Code*, Part XXII.1
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Law n°2004-204 of 9 March 2004; Law n°2011-1862 13 of December 2011; Law n°2013-1117 of 6 December 2013, CCP, art. 495-7 to 495-16
United Kingdom	Deferred Prosecution Agreement	*Crime and Courts Act 2013*, Schedule 17; Deferred Prosecution Agreement Code of Practice (DPA CoP Crime and Courts Act 2013V1 11.2.14)
United States	DPA [DOJ]	USAM Principles of Federal Prosecution of Business Organisations
United States	DPA [SEC]	Division of Enforcement SEC Enforcement Manual, section 6.2.2

Table 2 (OECD Study Table 3. Type of Resolution Proceedings [Legal Persons])

Country	Resolution name (LP)	Criminal proceedings	Civil proceedings	Administrative proceedings	Other non-criminal proceedings
Canada	Remediation Agreement	Yes	No	No	No
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	No	No	No
United Kingdom	Deferred Prosecution Agreement	Yes	No	No	No
United States	DPA [DOJ]	Yes	No	No	No
United States	DPA [SEC]	No	No	Yes	No

Table 3 (OECD Study Table 8. Introduction of Resolution System since last WGB evaluation)

Country	Introduction of a resolution regime for a NP (Yes/No)	Introduction of a resolution regime for a LP (Yes/No)	Additional information
Canada	No	Yes	LP: Budget Implementation Act, 2018, No. 1 (S.C. 2018, c. 12), s. 40 introducing an amendment to the Criminal Code, established one r procedure: Remediation Agreement.
France	No	Yes	LP: Law 2016-1691 (entry into force on 01/06/2017) established one resolution procedure: Public Interest Judicial Agreement (Convention judiciaire d'intérêt public).
United Kingdom	No	No	
United States	No	No	

Table 4 (OECD Study Table 10. In process of changing or introducing a resolution regime for the first time)

Country	In process of changing or introducing resolution regime for NP? (Yes/No)	In process of changing or introducing resolution regime for LP? (Yes/No)	Additional information
Canada	Yes	Yes	"The Canadian government is proposing, in Bill C-86, to amend section 715.42 of the Criminal Code to address the publication/non-publication of a remediation agreement, court orders, decisions and the judicial reasons by ensuring that any initial decision not to publish, and any order on the application to review, and the reasons, if any, be published; expressly providing that a non-publication decision could include a condition related to the duration of non-publication, and permitting anyone to bring an application to ask the court to reconsider a non-publication decision." (Answer to Study Questionnaire)
France	No	No	LP: France introduced a resolution procedure for LP for the first time in 2016 (see table Q1)
United Kingdom	No	No	
United States	No	No	

Table 5 (OECD Study Table 12. Can the resolution result in a conviction? [Legal Persons])

Country	Resolution name	Can the resolution result in a conviction? (Yes/No)
Canada	Remediation Agreement	No
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes
United Kingdom	Deferred Prosecution Agreement	No
United States	DPA [DOJ]	No
United States	DPA [SEC]	No

Table 6 (OECD Study Table 14. Does the resolution result in a criminal or other record? [Legal Persons])

Country	**Resolution name (LP)**	**Does the resolution result in a criminal or other record? (Yes/No/Depends)**	**Additional information**
Canada	Remediation Agreement	No	
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	
United Kingdom	Deferred Prosecution Agreement	No	
United States	DPA [DOJ]	No	"A company's successful completion of a DPA is often not treated as a criminal conviction by debarment authorities."
United States	DPA [SEC]	No	

Table 7 (OECD Study Table 16. Main forms of resolutions [Legal Persons])

Form 1: Termination of an investigation without prosecution or other enforcement action, subject to the fulfilment of specific conditions (e.g., Declination with Disgorgement; Non Prosecution Agreement)

Form 2: Suspension, deferral or withdrawal of a prosecution or other enforcement action, subject to the fulfilment of specific conditions (e.g., Deferred Prosecution Agreement; Conditional Dismissal)

Form 3: Resolution resulting in a decision imposing sanctions without criminal conviction (e.g., Administrative and Civil Resolutions)

Form 4: Resolution with conviction or tantamount to a conviction, but not amounting to an admission or finding of guilt (e.g., Patteggiamento; Swiss Summary Punishment Order)

Form 5: Resolution that amounts to a conviction and entails an admission of guilt (e.g., Plea Agreement or equivalent) Mixed: Resolutions that can take multiple forms or lead to different outcomes (e.g., Leniency Agreement) Country Resolution name Form 1 Form 2 Form 3 Form 4 Form 5
Mixed: Resolutions that can take multiple forms or lead to different outcomes (e.g., Leniency Agreement)

Country	Resolution name	Form 1	Form 2	Form 3	Form 4	Form 5	Mixed
Canada	Remediation Agreement		Yes				
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)					Yes	
United Kingdom	Deferred Prosecution Agreement		Yes				
United States	DPA [DOJ]		Yes				
United States	DPA [SEC]		Yes				

Table 8 (OECD Study Table 18. When can a resolution be reached? Authority entitled to enter into a resolution/impose terms and extent of judicial oversight [Legal Persons])

Country	Resolution name	When can resolution be reached? (Before or After indictment / Either / Other)	Authority entitled to enter into a resolution			What role does court have in decision to resort to resolution?: (Substantive / Procedural / None / Depends)	Entity having authority to determine sanctions / terms imposed on the accused			
			The prosecution	An administrative agency	Other		The Prosecution	Administrative agency acting as law enforcement body	The court	A government agency acting as administrative court
Canada	Remediation Agreement	Either	Yes	No	No	Substantive	Yes	No	No	No
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Either	Yes	No	No	None	Yes	No	No	No
United Kingdom	Deferred Prosecution Agreement	After	Yes	No	No	Substantive	No	No	Yes	No
United States	DPA [DOJ]	After	Yes	No	No	Procedural	Yes	No	No	No
United States	DPA [SEC]	Other	No	Yes	No	None	No	Yes	No	Yes

Table 9 (OECD Study Table 22. Factors considered when deciding whether to use resolution procedure – other factors [Legal Persons])

Country	Resolution name	Public interest	Resources of prosecution/time to conclude case	Strength of the evidence
Canada	Remediation Agreement	Yes	No	Unknown
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité - CRPC)	Yes	No	Unknown
United Kingdom	Deferred Prosecution Agreement	Yes	No	Yes
United States	DPA [DOJ]	Yes	Yes	Yes
United States	DPA [SEC]	Yes	Yes	Yes

Table 10 (OECD Study Table 27. If no resolution reached, can evidence provided be used to investigate or prove the offence? [Legal Persons])

Country	Resolution name	Can evidence be used? (yes/no)	If yes, for investigation/ trial / both	Additional information
Canada	Remediation Agreement	No	N/A	
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	N/A	
United Kingdom	Deferred Prosecution Agreement	Yes	Trial	**Limited use:** Where the company and the prosecution have entered into negotiations for a DPA that is not approved by the Crown Court, material showing that the company entered into negotiations or any material created "solely for the purpose" of preparing the DPA or the statement of facts can only be used against the legal person: (a) on a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information, or (b) on a prosecution for some other offence where in giving evidence [the defendant] makes a statement inconsistent with the material. However, the material can only be used for a prosecution of the other offence under (b) above, if the company has raised the issue or adduced evidence concerning it. (Crimes and Courts Act 2013, Schedule 17 art. 13[3] – [6])
United States	DPA [DOJ]	Yes	Both	**Trial:** Although generally "[c]onduct or a statement made during compromise negotiations about the claim" is not admissible as evidence to prove or disprove a claim or to impeach a witness by a prior inconsistent statement, there is an exception allowing such evidence to be introduced for those purposes "when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority". (Federal Rule of Evidence 408[*a*][2]).
United States	DPA [SEC]	Yes	Investigation	**Trial:** As above, and: According to US FCPA Guide (page 76): "[I]f the Commission authorizes the enforcement action [after a DPA is breached], SEC staff may use any factual admissions made by the co-operating individual or company in support of a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.

Table 11 (OECD Study Table 29. Can a resolution be appealed or challenged? [Legal Persons])

Country	Resolution name	Can resolution be appealed/Challenged? (Yes/No)	If answer is "yes", who is entitled to appeal/challenge?				Additional information
			Suspect/accused	Public prosecutor	Victim	Other	
Canada	Remediation Agreement	No	N/A	N/A	N/A	N/A	
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	Yes	Yes	Yes		
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	No	Yes		The United Kingdom reports that there is no direct route to appeal a DPA, but the decision can be challenged in the Administrative Court by judicial review
United States	DPA [DOJ]	No	N/A	N/A	N/A	N/A	
United States	DPA [SEC]	No	N/A	N/A	N/A	N/A	

Table 12 (OECD Study Table 31. Incentives for an accused to enter into a resolution [Legal Persons])

Country	Resolution name	Total exemption	Obtain reduced sentence	Obtain conditional suspension of sentence	Avoid consequences of conviction	Have certainty in the outcome	Avoid reputational damage	Reduced costs	Avoid lengthy trial
Canada	Remediation Agreement				Yes				
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)				Yes	Yes			Yes
United Kingdom	Deferred Prosecution Agreement	Yes	No		No	Yes	Yes	Yes	Yes
United States	DPA [DOJ]		Yes		Yes		Yes		Yes
United States	DPA [SEC]		Yes		Yes		Yes		Yes

Table 13 (OECD Study Table 33. Disincentives for an accused to enter into a resolution [Legal Persons])

Country	Resolution name	Piling on of enforcement actions or other proceedings	Enforcement actions against managers and/or employees of accused company	Requirement to plead guilty (or admit guilt)	Requirement to accept legal consequences	Higher sanctions	No full trial guaranties	Uncertainty in the outcome	Imposition of robust and onerous conditions
Canada	Remediation Agreement						Yes		
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)								
United Kingdom	Deferred Prosecution Agreement	Yes	Yes		Yes		Yes		Yes
United States	DPA [DOJ]						Yes		
United States	DPA [SEC]						Yes		

Table 14 (OECD Study Table 35. Maximum and minimum sanctions under resolutions, plus reduction in sanctions [Legal Persons])

Country	Resolution name (LP)	Rules regarding max./min. sanction?(Yes/No)	Express legal basis for reduction of sanction? (Yes/No)	Minimum amount	Maximum amount	Minimum possible reduction (%)	Maximum possible reduction (%)	Baseline
Canada	Remediation Agreement	Unknown	Yes	N/A	N/A	None	None	None
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	No	Unknown	Unknown	Unknown	100%	Otherwise applicable sanction
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	None	None	33%	50%	Otherwise applicable sanction
United States	DPA [DOJ]	Yes	No	Unknown	Depends on benefit	Unknown	50%	Low end of sentencing guideline
United States	DPA [SEC]	Yes	No	Unknown	Depends on benefit	Unknown	Unknown	Unknown

Table 15 (OECD Study Table 38. Terms that can be included in a resolution [Legal Persons – Table 1 of 3])

Country	Resolution name	Obligation to co-operate in any ongoing or future investigation	Statement of facts	Admission of guilt	Prohibition on public statements contrary to agreed facts	Prohibition on contesting facts in subsequent procedure
Canada	Remediation Agreement	Yes	Yes	Yes	Yes	Yes
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	Yes	Yes	No	No
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	Yes	Yes	Yes
United States	DPA [DOJ]	Yes	Yes	No	Yes	Yes
United States	DPA [SEC]	Yes	Yes	No	Yes	Yes

Table 16 (OECD Study Table 39. Terms that can be included in a resolution [Legal Persons– table 2 of 3])

Country	Resolution name	Financial Penalties	Confiscation/disgorgement of proceeds	Direct compensation to victim(s)	Compensation to victim by charity / NGO in prosecuting country	Compensation to victim by charity / NGO in country of bribed official	Compensation to victim by financing government program in country of bribed official	Obligation to co-operate in any ongoing or future investigation
Canada	Remediation Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	No	Yes	No	No	No	No
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes
United States	DPA [DOJ]	Yes	Yes	Yes	No	No	No	Yes
Unites States	DPA [SEC]	Yes	Yes	No	No	No	No	Yes

Table 17 (Table 40. Terms that can be included in a resolution [Legal Persons - table 3 of 3])

Country	Resolution name (LP)	Suspension or debarment from Public Contracts	Probation	Creating / enhancing compliance program or internal controls	Independent compliance monitor
Canada	Remediation Agreement	No	Unknown	Yes	Yes
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	No	No	No
United Kingdom	Deferred Prosecution Agreement	Discretionary	No	Yes	Yes
United States	DPA [DOJ]	Unknown	No	Yes	Yes
United States	DPA [SEC]	Unknown	No	Yes	Yes

Table 18 (OECD Study Table 43. Differences with trial resolutions [Legal Persons])

Country	Resolution name (LP)	Existence of differences between resolution/ full trial as to the terms/sanctions that can be imposed
Canada	Remediation Agreement	“Little or no difference, most compliance measures resemble post-conviction sentences or probation terms. The main difference is that external debarment regimes usually require a conviction.” (Answer to Study Questionnaire)
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	
United Kingdom	Deferred Prosecution Agreement	"Only a company et al may enter a DPA and therefore there is no full trial with conviction equivalent. Prosecutions against individuals may proceed, despite a DPA."
United States	DPA [DOJ]	"None."
United States	DPA [SEC]	"None."

Table 19 (OECD Study Table 45. Factors affecting determination of sanctions or terms of resolution [Legal Persons])

Country	Resolution name (LP)	Self-report	Admit guilt	Admit facts	Co-operate	Information on others	Waiver of privilege	Pre-existing compliance system	Remediate after discovery	Source of Factors used: Legal basis / Formal Policy / Practice
Canada	Remediation Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Legal basis
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Legal basis
United Kingdom	Deferred Prosecution Agreement	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Mix of Legal basis and formal policy
United States	DPA [DOJ]	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Mix of Legal basis and formal policy
United States	DPA [SEC]	Yes	No	Yes	Yes	Yes	No	Yes	Yes	Mix of Legal basis and formal policy

Table 20 (OECD Study Table 47. Fine and confiscation [Legal Persons])

Country	Resolution name (LP)	Resolution can impose: Only fine, only confiscation, both fine and confiscation, Either fine or confiscation as alternative	Resolution can impose confiscation without fine? (Always / Sometimes / No)	Resolution can impose fine without confiscation (Always / Sometimes / No)	Is confiscation amount clearly specified? (Yes / No / Sometimes)	Additional Information
Canada	Remediation Agreement	Both	No	Sometimes	Yes	“A remediation agreement requires a fine in all cases.” (Answer to Study Questionnaire)
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Fine	No	Always	N/A	
United Kingdom	Deferred Prosecution Agreement	Both	No	Sometimes	Yes	
United States	DPA [DOJ]	Both	Sometimes	Sometimes	Yes	"Discretionary, but typically if a person did not have means to pay a fine, or if there were no ill-gotten gains to be disgorged." (Answer to Study Questionnaire)
United States	DPA [SEC]	Both	Sometimes	Sometimes	Yes	"Discretionary, but typically if a person did not have means to pay a fine, or if there were no ill-gotten gains to be disgorged." (Answer to Study Questionnaire)

Table 21 (OECD Study Table 49. Do resolutions include a secrecy/muzzle clause? [Legal Persons])

Country	Resolution name (LP)	Yes always/ Yes sometimes/ No	Additional information
Canada	Remediation Agreement	Unknown	
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	
United Kingdom	Deferred Prosecution Agreement	Sometimes	"It depends on whether there are other proceedings ongoing. This might mean there are reporting restrictions in place in order to avoid prejudicing other cases."
United States	DPA [DOJ]	Sometimes	"Sometimes an individual plea agreement or corporate resolutions may be filed "under seal" which would restrict the parties from disclosure if it would impact the ongoing investigation or the life or security of a witness."
United States	DPA [SEC]	Sometimes	"Sometimes an individual plea agreement or corporate resolutions may be filed "under seal" which would restrict the parties from disclosure if it would impact the ongoing investigation or the life or security of a witness."

Table 22 (OECD Study Table 52. Must the resolution be approved by a Court or other authority? [Legal Persons])

Country	Resolution name	Must resolution be approved by a court or any other authority? (Yes/No)	Additional information
Canada	Remediation Agreement	Yes	
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	
United Kingdom	Deferred Prosecution Agreement	Yes	
United States	DPA [DOJ]	Yes	"At least one Deputy Chief and the Chief of the Fraud Section must review and approve all [resolution] decisions. The approval of a Deputy Assistant Attorney General and the Assistant Attorney General of the Criminal Division is sometimes also required. If a company does not agree with the [resolution] decision, it may informally appeal the decision to the Assistant Attorney General." Phase 3, para. 115.
United States	DPA [SEC]	Yes	

Table 23 (OECD Study Table 54. Extent of judicial oversight over resolution's terms and conditions [Legal Persons])

Country	Resolution name	Court involved at all?	If yes, does court examine?				Resolution only filed in court
			Terms and conditions before case validation	Facts of case	Required substantive conditions	Required procedural conditions	
Canada	Remediation Agreement	Yes	Yes	No	Yes	Yes	No
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	Yes	Yes	Yes	Yes	No
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	Yes	Yes	Yes	No
United States	DPA [DOJ]	Yes	N/A	N/A	N/A	N/A	Yes
United States	DPA [SEC]	No	N/A	N/A	N/A	N/A	N/A

Table 24 (OECD Study Table 56. If a resolution is reviewed, what grounds could lead a court to invalidate or refuse to validate it [Legal Persons])

Country	Resolution name	Are there any mandatory grounds that could lead to invalidation/ refusal?	Are there any discretionary grounds that could lead to invalidation/refusal?	Has a resolution been invalidated before in a foreign bribery case? (Yes/No)	Additional information
Canada	Remediation Agreement	Yes	Unknown	No	**Mandatory**: "The court must, by order, approve the agreement if it is satisfied that:(a) the organization is charged with an offence to which the agreement applies; (b) the agreement is in the public interest; and (c) the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence. The court must also take into consideration the impact on victims." (Answer to Study Questionnaire)
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	Unknown	Unknown	**Mandatory:** No real consent of the accused, incorrect legal qualification of facts, unjustified penalties in the light of the circumstances of the offence and the personality of the offender (CCP art. 495-11) **Resolution invalidated**
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	No	**Mandatory**: "Terms fail to meet the interests of justice or if they are unfair or unreasonable." **Discretionary**: If company fails to comply with the terms of the DPA, the prosecutor may apply to the Crown Court to seek a remedy or to have the DPA terminated. See Crime & Courts Act 2013 Schedule 17 para. 9.
United States	DPA [DOJ]	N/A	N/A	N/A	Filed with a court as a procedural step only.
United States	DPA [SEC]	N/A	N/A	N/A	No judicial oversight

Table 25 (OECD Study Table 58. Consequences of court's refusal to validate a resolution [Legal Persons])

Country	Resolution name	The case has to go for a full trial	The parties have to review the terms of resolution	Court will review second, revised agreement	The court can review terms and conditions of resolution	Parties get second, final chance to present deal	Additional information
Canada	Remediation Agreement	Yes	Yes	Yes	Yes	Yes	"The parties may take the opportunity to review the agreement and resubmit it for court approval. Alternatively, the prosecutor may stay or amend the charge, or proceed to trial in the normal fashion." (Answer to Study Questionnaire)
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	Yes	No	No	No	No	"[E]xcept in case of a new element" CCP art. 495-12
United Kingdom	Deferred Prosecution Agreement	No	Yes	Yes	Yes	No	**Full Trial:** The UK reports that the prosecutor must decide whether or not to proceed with a full trial, if the DPA is refused.
United States	DPA [DOJ]	N/A	N/A	N/A	N/A	N/A	No judicial oversight.
United States	DPA [SEC]	N/A	N/A	N/A	N/A	N/A	No judicial oversight.

Table 26 (OECD Study Table 60. Authority determining compliance with terms of resolution [Legal Persons])

Country	Resolution name (LP)	Prosecution Authority	Agency acting as law enforcement body	Court	Agency acting as administrative court	Mixed	Additional information
Canada	Remediation Agreement	No	No	Yes	No	No	
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	N/A	N/A	N/A	N/A	N/A	
United Kingdom	Deferred Prosecution Agreement	**No**	**No**	**Yes**	**No**	**No**	
United States	DPA [DOJ]	**Yes**	**No**	**Yes**	**No**	**Yes**	
United States	DPA [SEC]	**No**	**Yes**	**Yes**	**Yes**	**No**	

Table 27 (OECD Study Table 62. If the terms of a resolution are not properly respected, can it be repealed? [Legal Persons])

Country	**Resolution name**	**Can resolution be repealed? (Yes/No)**	**If answer is "yes" - repeal of resolution leads to indictment/prosecution of accused: (Automatically/ At discretion of prosecution or other law enforcement authority/ Does not lead to indictment or prosecution)**	**Additional information**
Canada	Remediation Agreement	Yes	Discretionary	"**Remediation Orders:** 715.39 (1) On application by the prosecutor, the court must, by order, terminate the agreement if it is satisfied that the organization has breached a term of the agreement. Recommencement of proceedings (2) As soon as the order is made, proceedings stayed in accordance with subsection 715.37(7) may be recommenced, without a new information or a new indictment, as the case may be, by the prosecutor giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered." (Answer to Study Questionnaire)
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	N/A	Only ex ante control.
United Kingdom	Deferred Prosecution Agreement	Yes	Discretionary	"Gravity of the breach. Before reopening proceedings, the prosecutor must be satisfied that the Full Code Test under the Code for Crown Prosecutors is met in relation to each charge. The court will have been informed at the final hearing if the original charge was pursuant to the second limb of the evidential stage at in which case the prosecutor will now need to be satisfied that the more stringent evidential stage of the Full Code Test is met. Furthermore the public interest position will need reassessing in light of the breach."
United States	DPA [DOJ]	Yes	Discretionary	"Same factors that would always factor into whether to prosecute, including the ability to prove the case beyond a reasonable doubt."
United States	DPA [SEC]	Yes	Discretionary	

Table 28 (OECD Study Table 64. Public availability of resolutions [Legal Persons])

Country	Resolution name (LP)	Resolution made available?	How is it available?	If online, the address	Press release?	Additional information
Canada	Remediation Agreement	Yes	Unknown		No	Remediation agreements are published, unless it is necessary for the administration of justice not to publish a settlement. (Answer to Study Questionnaire)
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	N/A	N/A	No	
United Kingdom	Deferred Prosecution Agreement	Yes	Online	https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/	Yes	
United States	DPA [DOJ]	Yes	Online	https://www.justice.gov/criminal-fraud/related-enforcement-actions	Yes	
United States	DPA [SEC]	Yes	Online	https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml	Yes	

Table 29 (OECD Study Table 66. What terms / information of the resolution are published? [Legal Persons])

Country	Resolution name (LP)	Offender's name	Facts	Bribe amount	Bribe-taker details	NPs involved	Relevant offence(s)	Fines	Confiscated sums	Remedial measures undertaken
Canada	Remediation Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
United Kingdom	Deferred Prosecution Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
United States	DPA [DOJ]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
United States	DPA [SEC]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Table 30 (OECD Study Table 68. Impact of resolution on other parties [Legal Persons])

Country	Resolution name	Can refusal of one defendant to accept resolution impact resolution process for other defendants?	Does a resolution (or resolution proceedings) against LP trigger proceedings against NP who allegedly committed underlying offence? – Automatically/ Under certain conditions/ No	Can admission of accused person be used against other NP/LP (LP)?
Canada	Remediation Agreement	No	Under certain conditions	Yes
France	Guilty Plea (Comparution sur reconnaissance préalable de culpabilité – CRPC)	No	Unknown	No
United Kingdom	Deferred Prosecution Agreement	No	Under certain conditions	Yes, subject to evidential requirements and fairness
United States	DPA [DOJ]	No	Under certain conditions	Yes
United States	DPA [SEC]	No	Under certain conditions	Yes