

# Trade Unions and Remediation Agreements – Does the Criminal Law Favour Management Over Labour?

D A R C Y L . M A C P H E R S O N \*

## I. INTRODUCTION

Since 2019, much has been made of the pressure allegedly brought to bear on then-Attorney-General Jodi Wilson-Raybould to reconsider her decision not to offer a remediation agreement with respect to wrongdoing allegedly committed by SNC-Lavalin Group Inc.<sup>1</sup> However, this contribution is relatively unconcerned with the political fallout of the decisions made with respect to SNC-Lavalin. Rather, consider that the Prime Minister's repeated assertion that he was trying to protect jobs and the Québec economy by attempting to convince the Attorney-General to

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<sup>1</sup> See e.g. Amanda Coletta, "Canadian political Scandal deepens as ex-justice minister testifies that Trudeau's office pressured her in criminal case", *The Washington Post* (27 February 2019) online: <[www.washingtonpost.com/world/the\\_americas/canadian-political-scandal-deepens-as-ex-justice-minister-testifies-that-trudeaus-office-pressured-her-in-criminal-case/2019/02/27/04587380-3ada-11e9-b10b-f05a22e75865\\_story.html?noredirect=on&utm\\_term=.5b6901267944](http://www.washingtonpost.com/world/the_americas/canadian-political-scandal-deepens-as-ex-justice-minister-testifies-that-trudeaus-office-pressured-her-in-criminal-case/2019/02/27/04587380-3ada-11e9-b10b-f05a22e75865_story.html?noredirect=on&utm_term=.5b6901267944)> [perma.cc/E65D-F994]; Robert Fife & Steven Chase, "Wilson Raybould alleges 'consistent and sustained' effort by Trudeau, officials to 'politically interfere' in SNC-Lavalin case", *The Globe & Mail* (27 February 2019) online: <

offer a remediation agreement to SNC<sup>2</sup> would seem to suggest a desire to protect workers.<sup>3</sup>

This is a jumping-off point to consider whether the remediation provisions of the *Criminal Code*<sup>4</sup> expressly favour management over workers. Trade unions are specifically precluded from receiving remediation agreements from government prosecutors. This was not an oversight that created a lacuna within the legislative scheme. It was a deliberate choice. The basic question that I will attempt to answer here is: “Can this legislative choice be justified?” There are a number of reasons that this policy choice is suspect. This paper will question the clear legislative decision to exclude trade unions from accessing remediation agreements. As trade unions serve a vital role in protecting workers, the decision to preclude them from an agreement that is designed to consider workers interests is nonsensical. A constitutionally protected entity that is by its very design mandated to protect workers is left without the diversion from prosecution that the Prime Minister claims is to protect said workers, while the employer (which often antagonistic to the union) is granted the use of the workers interests as a shield when using a remediation agreement.

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<sup>2</sup> See e.g. David Ljunggren, “Government has a responsibility to defend jobs, Trudeau says amid SNC-Lavalin allegations”, *Global News* (22 February 2019) online: <[globalnews.ca/news/4988388/justin-trudeau-snc-lavalin-jobs/](http://globalnews.ca/news/4988388/justin-trudeau-snc-lavalin-jobs/)> [perma.cc/S6KT-PVQ5]; Josh Wingrove, “Trudeau says fears of job losses drove SNC-Lavalin talks”, *BNN Bloomberg* (15 February 2019), online: <[www.bnnbloomberg.ca/trudeau-says-fears-of-job-losses-drove-talks-about-snc-lavalin-1.1215115](http://www.bnnbloomberg.ca/trudeau-says-fears-of-job-losses-drove-talks-about-snc-lavalin-1.1215115)> [perma.cc/9DM8-K97D].

<sup>3</sup> For the purposes of this paper, I take this assertion at face value. A more cynical observer might legitimately point to the importance of the province of Quebec in establishing federal electoral success. To be clear, some of the articles referred to above (see *supra* note 1) make reference to the political implications of the choices made.

My goal here is not to resolve whether the Prime Minister did consider, or could legitimately consider, the potential electoral impacts of this decision. One could certainly make an argument that those might have been considerations for the Prime Minister (who is, after all, the leader of a political party, as well as the leader of the executive branch of government), that are not legitimate for a decision such as the one with respect to SNC-Lavalin. This is a legitimate question for lawyers, political scientists, and ethicists. My point is a simpler one: to analyze the appropriateness of the specific legislative exclusion of unions from the possibility of remediation agreements.

<sup>4</sup> *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], ss 715.3- 715.42. These provisions were added by the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 (originally Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, 2018, s 404 (assented to 21 June 2018)).

Part II will discuss the general amenability of trade unions to the criminal law, by considering both the historical common law position that existed prior to the current statutory language, and then the subsequent amendment to the *Criminal Code*<sup>5</sup> that created statutorily-based organizational criminal liability.<sup>6</sup> Part III of this paper turns to the legislative framework for remediation agreements under the recently-added Part XXII.1 of the *Criminal Code*, which will include a discussion of the non-availability of these agreements to public bodies, municipalities and trade unions. Part IV deals with trade unions in particular, and whether they should be excluded from the remediation agreement regime. Part V concludes.

## II. ARE TRADE UNIONS SUBJECT TO THE CRIMINAL LAW AT ALL?

The short answer to the question posed in the title of this section is, that trade unions are subject to the criminal law. Under both the common law (in place up to March 2004), and the statutory language that has covered most of the field from March 31, 2004 onward, it is quite clear that trade unions are, in and of themselves, actors beyond the individual trade union members (who, as individuals, are certainly subject to the criminal law). Below, we examine the historical stance taken in common law and the current statutory language in turn:

### A. The Historical Application of the Common Law to Trade Unions

While the current statutory language provides the answer, it is important to consider the route that led to the amendments. There are some common-law principles that indicate the amenability of trade unions to the criminal law. For example, as Justice Cory, dissenting in the result, but not on this point (Chief Justice Lamer concurring) explains somewhat tersely in *United Nurses of Alberta v. Alberta (Attorney General)*:

(a) Are Unions Subject to Criminal Contempt?

There can be no doubt that unions have the legal status to sue and to be sued in civil matters. They can and do present and defend cases before the courts. They

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<sup>5</sup> *Ibid.*

<sup>6</sup> See Bill C-45, *infra* note 13.

make full use of the courts and the remedies they provide. If unions avail themselves of court facilities, they must be subject to the court's rules and restraints placed on the conduct of all litigants. It follows that they are subject to prosecution for the common law offence of criminal contempt. There can be no question that unions fall within the scope of the term "societies" in the *Criminal Code's* definition of person and they must be equally liable for prosecution for a common law crime.<sup>7</sup>

Justice McLachlin (as she then was), writing for the majority in the same case, comes to a similar conclusion. She writes in part:

I see nothing in the authorities to suggest that the general applicability of the law to unions should not extend to the common law offence of contempt. In so far as the common law denied unions legal status, it was to impede the effective enforcement of collective agreements: see *Young v. C.N.R.*, [1931] 1 D.L.R. 645 (P.C.). That notion has long since died. Having been given legal status for collective bargaining purposes, unions now find themselves subject to the responsibilities that go with that right. If they exercise their rights unlawfully, they may be made to answer to the court by all the remedies available to the court, including prosecution for the common law offence of criminal contempt.<sup>8</sup>

These paragraphs make clear that the majority of the Supreme Court of Canada viewed trade unions as being amenable to the criminal law, at least insofar as the law of criminal contempt was concerned. However, Justice McLachlin did not stop there. She addresses whether in fact trade unions should be amenable to the *Criminal Code* in general. Later in the same judgment, she continues:

The union argues that while the *Criminal Code*, R.S.C., 1985, c. C-46, includes "societies" in its definition of "person",<sup>9</sup> the union is not a society because it is not so defined under the *Alberta Societies Act*, R.S.A. 1980, c. S-18. This argument depends on defining "societies" in the *Code* as limited to those entities recognized by provincial legislation. It also assumes that the definition of society in the *Alberta Act* is exhaustive. In fact, it is not. Section 1(c), provides that "In this Act . . . (c) 'society' means a society incorporated under this Act". This clearly implies that there may exist societies which are not incorporated under the Act. Thus it appears that the union may be a "society" under the *Code*. If the union may be

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<sup>7</sup> *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 [*United Nurses*] at 910, 89 DLR (4<sup>th</sup>) 609.

<sup>8</sup> *Ibid* at 928-929.

<sup>9</sup> At the time of *United Nurses*, *ibid.*, the relevant portion of the *Criminal Code* read as follows: "every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively".

prosecuted for a criminal offence under the *Code*, there appears to be little basis for suggesting that it cannot be prosecuted for a criminal offence at common law.<sup>10</sup>

Despite the language of uncertainty (“Thus it appears that the union may be a ‘society’ under the *Code*. ... If the union may be prosecuted for a criminal offence under the *Code*, ...”), the fact is that this analysis by the majority is designed to hold the union liable for criminal concept. Thus, while it may appear to some that the Supreme Court left open the question of criminal liability more generally, the paragraph quoted should be taken to be, in fact, a very strong statement of the majority of the Supreme Court of Canada that under the then-current language of the *Criminal Code*, trade unions were amenable to the criminal law. After all, if Justice McLachlin meant only to suggest the possibility of amenability to the criminal law as codified in the *Criminal Code*, this would not provide much support for the idea that a non-codified offence could nonetheless be pursued against a trade union.

Furthermore, if that does not definitively determine the issue, consider turning Justice McLachlin’s sentiment on its head. The argument would run as follows: as a general rule, most “true” criminal offences<sup>11</sup> are codified.<sup>12</sup> Given this statutory rule requiring codification, it follows that the exception to that general rule (criminal contempt) should not be more widely available to the courts than should its codified counterparts. As the courts have already determined that trade unions are amenable to the non-

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<sup>10</sup> *United Nurses, ibid* at 929.

<sup>11</sup> “True” criminal offences (as the term is used here) are to be contrasted with “public welfare offences.” The former category would include most, if not all, of the offenses contained within the *Criminal Code*, *supra* note 4, where *mens rea* is generally required. The latter category, on the other hand, is generally more concerned with offences of strict liability or of absolute liability. For a more detailed discussion of this distinction, please see the judgment of Justice Dickson, as he then was, for the court, in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 at 1309-1310, 85 DLR (3d) 161.

<sup>12</sup> The notable exception to this general rule is that of criminal contempt. Section 9 of the *Criminal Code* reads as follows: “Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730, (a) of an offence at common law, (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada, but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.”

codified offence of criminal contempt, it should then follow that those offences that have been codified under the *Criminal Code* should at least apply no less broadly in terms of the offenders to which they can be applied (in this case, trade unions) than would their non-codified counterpart. Thus, the historical perspective forwarded by the common law supports the idea that trade unions were always amenable to the criminal law generally.

## B. The Statute

Now turning to the language that was implemented following the common law position discussed above, which currently governs the issue. Under Bill C-45,<sup>13</sup> since March 30, 2004,<sup>14</sup> any remaining ambiguity as to the amenability of trade unions has been clarified. Section 2 of the *Criminal Code*<sup>15</sup> provides as follows in the relevant definitions:

*every one, person* and *owner*, and similar expressions, include Her Majesty and an organization;

...

*organization* means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons;

Thus, the general definition of “organization” specifically includes trade unions within its ambit, within paragraph (a).

Similarly, even if trade unions were not specifically mentioned, for the same reasons referred to by Justice McLachlin, as she then was, in *United Nurses*,<sup>16</sup> a trade union is likely also a “society” within the meaning likely to

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<sup>13</sup> Bill C-45, 2<sup>nd</sup> Sess, 37<sup>th</sup> Parl, *An Act to Amend the Criminal Code (criminal liability of organizations)* (Royal Assent 7 November 2003), now SC 2003, c 21 [Bill C-45].

<sup>14</sup> This is fixed as the date on which most of the operative provisions of Bill C-45 came into force. See Privy Council Minute 2004-90 (16 February 2004). One section of the Bill had come into force on assent.

<sup>15</sup> *Criminal Code*, *supra* note 4, s 2, *sv* “every one” and *sv* “organization” [emphasis added].

<sup>16</sup> *United Nurses*, *supra* note 7, at 928-929.

be ascribed to it under the definition of “organization.” In my view, the definition of *“every one, person and owner, and similar expressions”* was meant to expand the definition, and not to narrow, or contract, it.<sup>17</sup>

Furthermore, as a thought experiment on the application of the relevant terms above, even if we were to ignore paragraph (a) of the definition entirely, it is clear that a trade union fits the definition under paragraph (b). It is an “association of persons with a common purpose and an operational structure that holds itself out to the public as an association of persons,” as those terms are used in paragraph (b) of the definition of “organization.” The union, virtually by definition, requires more than one person to join it. Otherwise, it remains an individual, and nothing more. It has been clearly established that the associational aspect of union membership has been recognized and affirmed by the Supreme Court of Canada itself.<sup>18</sup> One of the most impactful statements with respect to the

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<sup>17</sup> Underlining was added for emphasis by the author of the current article.

In other fora, I made the argument that the overarching purpose of Bill C-45 was to expand corporate criminal liability as it had been understood up to that point under the common law. On this point, see, for example, Darcy L. MacPherson, “Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45” (2004) 30 Man LJ 253; Darcy L. MacPherson, “Criminal Liability of Partnerships: Constitutional and Practical Impediments” (2010) 33 Man. LJ 329.

The reason for the question mark in the first of these titles was that not every element of Bill C-45 actually has the effect of extending liability to places where it did not previously exist. In a small number of examples, it is at least arguable, if not clear, that there were areas where corporate criminal liability became more difficult to establish, making corporate criminal liability narrower, rather than expanding it. However, in my view, it is equally clear, if not more so, that, overall and on balance, Bill C-45 did have the effect of expanding liability beyond the contours that were previously in place in the common-law version of corporate criminal liability.

The second article makes clear that whatever the intention of Parliament, the statute did not necessarily clear away all the impediments to achieving the goals that were set for the statute. Nonetheless, it is quite clear that the intention of the government of the day at the time of the introduction of Bill C-45 was to “clarify and expand” as well as to “modernize” corporate criminal liability. See Canada, Department of Justice, Press Release, “Justice Minister Introduces Measures to Protect Workplace Safety and Modernize Corporate Liability” (Ottawa, June 12, 2003).

<sup>18</sup> See *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 38 DLR (4<sup>th</sup>) 161; *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 [*Dunmore*]; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 (providing constitutional protection for collective bargaining); *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4,

difference between the individual and the collective is in *Dunmore*, where Justice Bastarache, for the majority, writes as follows:

As I see it, the very notion of “association” recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members.<sup>19</sup>

This would appear to be sufficient to satisfy the first of the requirements (that is, an association of persons). The second element of an operational structure would also be present in virtually any conceivable case. After all, to fulfil its legislative mandate of representing workers, administrative tribunals routinely treat unions as a singular actor, as opposed to a collection of workers.<sup>20</sup> The union is recognized by statute for this purpose.<sup>21</sup> Clearly, the third element is satisfied, as the union is the actor that negotiates the collective agreement on behalf of the employees.<sup>22</sup> Thus, it is held out to the employer (and to the general public) as representing the employees collectively in their dealings with the employer. Thus, either paragraph of the definition of “organization” would support the fact that trade unions are “organizations” for the purposes of the *Criminal Code* under the prevailing statutory language.<sup>23</sup>

### III. WHAT IS A REMEDIATION AGREEMENT?

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[2015] 1 SCR 245 (holding that the right to strike is an indispensable part of the constitutionally-protected right to bargain collectively).

<sup>19</sup> *Dunmore*, *ibid* at para. 17.

<sup>20</sup> See The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 9<sup>th</sup> ed (Toronto: Irwin Law, 2018) at 538, para 7:100: “Collective bargaining law is concerned with the substantive requirements and procedural standards of *bargaining between the employer and the employees seen as a unit*. Collective bargaining is one of the principal reasons why employees join a union and why unions secure the right to represent employees through certification or voluntary recognition. Once a union secures the status of collective bargaining agent, it supersedes individual bargaining between employer and employee...” [emphasis in original].

<sup>21</sup> *The Labour Relations Act*, CCSM, c L10, para 4(1)(c).

<sup>22</sup> *Ibid*, s 1 *sv* “bargaining agent”.

<sup>23</sup> *Criminal Code*, *supra* note 4.

As I have covered in other articles,<sup>24</sup> a remediation agreement is an agreement between an alleged organizational offender, on the one hand, and the prosecutor, on the other.<sup>25</sup> In this agreement, the organizational offender agrees to take certain steps, and if the organizational offender complies with the agreement, the prosecutor agrees to stay any charges which have already been laid.

In some cases, one group of persons which is sought to be protected by the adoption of a remediation agreement (in lieu of a criminal charge and trial) is employees. In fact, the relevant statutory language reads as follows [underlining for emphasis added by the current author]:

715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:

...

- (f) to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

In my view, part of the reason for this approach is that there may be certain cases where the harm to innocent third parties resulting from the conviction may be so severe and widespread that it could be legitimately taken into account in determining the value of calling the organization a “criminal.” Often this harm may be borne by individuals who are in some way related to the organization who could neither avoid the wrongdoing, nor prevent it. With respect to employees, there is at least one example where a criminal trial (even where the conviction was later vacated by an

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<sup>24</sup> See e.g. Darcy L. MacPherson, “When Is a Criminal Not Really a Criminal? When It Is a Corporation with a Remediation Agreement - Deferred Prosecution Agreements Come To Canada” *Robson Crim Legal Blawg* (16 July 2018) online: <[www.robsoncrim.com/single-post/2018/07/16/WHEN-IS-A-CRIMINAL-NOT-REALY-A-CRIMINAL-WHEN-IT-IS-A-CORPORATION-WITH-A-REMEDIATION-AGREEMENT~deferred-prosecution-agreements-come-to-Canada](http://www.robsoncrim.com/single-post/2018/07/16/WHEN-IS-A-CRIMINAL-NOT-REALY-A-CRIMINAL-WHEN-IT-IS-A-CORPORATION-WITH-A-REMEDIATION-AGREEMENT~deferred-prosecution-agreements-come-to-Canada)> [perma.cc/ZAG7-9BXY]; Darcy L. MacPherson, “Politics, Discretion and the Rule of Law as Applied to the Criminal Law: A Case Study of SNC Lavalin” *Robson Crim Legal Blawg* (12 March 2018) online: <[www.robsoncrim.com/single-post/2019/03/12/POLITICS-DISCRETION-AND-THE-RULE-OF-LAW-AS-APPLIED-TO-THE-CRIMINAL-LAW-A-CASE-STUDY-OF-SNC-LAVALIN](http://www.robsoncrim.com/single-post/2019/03/12/POLITICS-DISCRETION-AND-THE-RULE-OF-LAW-AS-APPLIED-TO-THE-CRIMINAL-LAW-A-CASE-STUDY-OF-SNC-LAVALIN)> perma.cc/SE7C-EG75].

<sup>25</sup> *Criminal Code*, *supra* note 4, s-s 715.3(1) *sv* “remediation agreement.”

appellate court<sup>26</sup>) led to massive job losses arising from the insolvency of the firm due to the charges, despite the fact that the firm was not ultimately convicted of a crime.<sup>27</sup> Thus, even the potential of ultimate acquittal does not necessarily protect workers. Such protection is even more tenuous when the crime is proven in court and the organized is properly punished.

A remediation agreement allows an organization to state (correctly) that it has not been convicted of, or punished for, a criminal offence.<sup>28</sup> The same cannot be said for the trade union that represents workers of a corporate employer. The language in the relevant section of the *Criminal Code*<sup>29</sup> provides as follows:

715.3(1) The following definitions apply in this Part [30].

**organization** has the same meaning as in section 2[31] but does not include a public body, trade union or municipality.<sup>32</sup>

In other words, public bodies, trade unions and municipalities are “organizations” for the general purposes of the *Code*.<sup>33</sup> This means that these are all organizations that are subject to the criminal law, in the sense that the organization can be labeled as a “criminal” in appropriate circumstances. However, unlike other forms of organizations, such as corporations (which can enter into a remediation agreement if invited by the prosecutor<sup>34</sup>), trade unions have no access to this mechanism to avoid being labeled a “criminal” if the alleged conduct is substantiated.

Municipalities and public bodies should be excluded from accessing remediation agreements. Municipalities and public bodies are inherently keepers of the public trust. Any crime committed to their benefit is virtually by definition a violation of that very trust. A violation of the public trust should be dealt with very seriously. Furthermore, public bodies and

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<sup>26</sup> *Arthur Andersen LLP v United States*, 544 US 696 (2005), per Chief Justice Rehnquist, for the Court.

<sup>27</sup> *Ibid.* For an academic perspective on this point, see

<sup>28</sup> *Criminal Code*, *supra* note 4, s. 715.4(2).

<sup>29</sup> *Ibid.*, s. 715.3(1).

<sup>30</sup> The reference to “this Part” is a reference to Part XXII.1 of the *Criminal Code*, *supra* note 4, that is, the Part of the *Code* that deals with remediation agreements.

<sup>31</sup> The definition of “organization” for the purpose of section 2 of the *Criminal Code* is reproduced in the text associated with note 15, *supra*.

<sup>32</sup> The underlining was added by the current author for the purposes of emphasis.

<sup>33</sup> *Criminal Code*, *supra* note 4.

<sup>34</sup> See Bill C-74, *supra* note 4, s 404, now *Criminal Code*, *supra* note 4, s 715.33(1).

municipalities can rely on government coffers to pay any financial penalty assessed due to criminal wrongdoing. A remediation agreement negotiated by one part of a government with respect to alleged wrongdoing by another part of the same government seems at best an exercise in futility, transferring the value from one government account to another. Additionally, a remediation agreement allows the public institutions at issue to avoid the label of “criminality.” Commentators in the U.S. have made it clear that the appropriateness of the behaviour of public officials should be, at least in large part, decided through the electoral mechanism of the country.<sup>35</sup>

However, it also follows that government institutions should be subject to the same basic rules as are individuals. This is the very essence of the rule of law. The label of “criminality” is something that even the most unengaged voter can understand as being a statement about the morality of the actions undertaken.<sup>36</sup> Trying to explain that an agreement with the prosecutor can effectively mean the same thing may not be as easily understood by a large part of the electorate. The criminality of an administration may affect its chance of being re-elected. Allowing the government to essentially make a deal with itself (or to perhaps be perceived as doing so) in an effort to re-label the actions of that administration as being non-criminal could fundamentally alter the relationship between the governors and the governed in the electoral process.<sup>37</sup>

This fundamental relationship between public officials, on the one hand, and the electorate on the other, was described in very lucid fashion

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<sup>35</sup> See Richard Cohen, “Opinion: The best way to get rid of Trump? Beat him at the ballot box.” (The *Washington Post*, March 25, 2019), online: < [www.washingtonpost.com/opinions/the-best-way-to-get-rid-of-trump-beat-him-at-the-ballot-box/2019/03/25/ba98b344-4f2f-11e9-8d28-f5149e5a2fda\\_story.html?noredirect=on&utm\\_term=.e82be17497d1](http://www.washingtonpost.com/opinions/the-best-way-to-get-rid-of-trump-beat-him-at-the-ballot-box/2019/03/25/ba98b344-4f2f-11e9-8d28-f5149e5a2fda_story.html?noredirect=on&utm_term=.e82be17497d1)> [perma.cc/93FH-PEGH].

<sup>36</sup> With respect to the moral element inherent in the criminal law, see, for example, Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993) at 9-10.

<sup>37</sup> Examples of government largesse being used as a method to influence the political process are not uncommon, nor are they unique to people of any particular political stripe. For example: in 2015, then-Prime Minister Stephen Harper’s Conservative government disproportionately allocated federal infrastructure funds to ridings represented by Conservative Members of Parliament in the months leading up to an election. See Chris Hannay, “Federal infrastructure fund spending favoured Conservative ridings” *The Globe and Mail* (29 June 2015) online: < [www.theglobeandmail.com/news/politics/federal-infrastructure-fund-spending-favoured-conservative-ridings/article25172781/](http://www.theglobeandmail.com/news/politics/federal-infrastructure-fund-spending-favoured-conservative-ridings/article25172781/)> [perma.cc/XAX7-VCSZ].

in the concurring opinion of Justice Hugo Black (Justice William O. Douglas concurring) of the United States Supreme Court in *New York Times Co. Ltd. v. U.S.*:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the founders hoped and trusted they would do.<sup>38</sup>

Of course, readers would be correct to point out that this arose in a very different context (publication of sensitive government materials by a newspaper) than the one under consideration here. It also did not arise in Canada, and thus took place under a very different constitutional framework. Notwithstanding all those acknowledged differences, what I take away from this famous piece of judicial writing is that there is an obligation to hold government to account in a democracy. If this is so (and I believe that Justice Black is very much correct in holding that it was at the time of his writing, and continues to be so), it follows that allowing governments to make remediation agreements with other government actors may be injurious to the public interest. By specifically excluding public bodies and municipalities from the availability of a remediation agreement, the legislation makes clear that the ability to label a bad government actor as being “criminal” is a very important step in holding elected officials to account. Although, below, the argument will be made that not allowing trade unions to have access to the possibility of a remediation agreement is probably ill-conceived, the exclusion of public bodies and municipalities is completely justified.

#### IV. WHAT ABOUT TRADE UNIONS?

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<sup>38</sup> *New York Times Co Ltd v US*, 403 US 713 (1971) at 717.

## A. Introduction

Notwithstanding the previous argument in respect to both public bodies and municipalities, there are several reasons as to why trade unions stand on quite a different footing compared to the other two excluded groups.

First, trade unions are statutorily recognized for a very specific purpose, that is, to help protect the rights of workers vis-à-vis their employers. However, the attempts to use the remediation agreement regime show that, in an attempt to avoid criminal sanctions, the employer is the one who gets to argue that it is protecting the employees by seeking a remediation agreement, as was seen when the Prime Minister urged the consideration of a remediation agreement for SNC-Lavalin to avoid the loss of jobs in Quebec.<sup>39</sup> This is true even when the relationship between management and labour may be quite antagonistic (where, for example, there are constant complaints about working conditions, or protracted job action every time that the collective agreement between management labour is up for renegotiation). While an employer may use the negative impacts of a potential conviction on its labour force as a reason for the government to engage in the negotiation of a remediation agreement, the trade union representing the same employees is not accorded this same ability.

Second, trade unions are not only statutorily recognized, their activities on behalf of workers are also constitutionally recognized as protected pursuant to the *Canadian Charter of Rights and Freedoms*.<sup>40</sup> To give less protection to a trade union (which is not allowed to access the mediation agreement regime) and more protection to an employer corporation (which is at least not statutorily prohibited from negotiating a remediation agreement) would seem to turn this constitutional protection on its head.

Third, there is an issue as to whether or not it is legitimate to remove the possibility of a remediation agreement from a trade union due to the source of its funding. Under the Rand formula in Canadian labour law,

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<sup>39</sup> *Supra* note 2.

<sup>40</sup> *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, in particular, para. 2(d). In terms of cases that have recently considered the content of this paragraph in the labour context, see e.g.: *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391; *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Dunmore*, *supra* note 18; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

even non-members of the union can be required by law to contribute to its economic well-being by paying an amount equal to the dues paid by its members. Therefore, just like the innocent employees of a corporation who will be negatively affected by criminal conviction of their employer, non-members of the union may be unduly affected by a criminal conviction of the union to which they were forced to contribute by operation of law. Put another way, given that people are statutorily forced to contribute money to a trade union even if they are not members of it, it does seem particularly harsh that the trade union can never avoid the label of “criminality.”

Fourth, it does seem counter-intuitive that the legislation specifically provides that remediation agreements are to be used where damage can be done to innocent third parties, while at the same time, in a situation where there will clearly be innocent third parties, the use of a remediation agreement is statutorily prohibited. It is doubtful that every member of the rank-and-file in a trade union will be actively involved in wrongdoing, no matter what its goal, so those people are innocent of the wrongdoing, at least to that extent. Relatedly, the damage to the union of being labelled a “criminal” may actually be greater because the achievement of its goals through, for example, strike action, may be undermined because the employer will be able to paint it as untrustworthy given its criminal history.

Below, we consider each of these arguments in turn.

## **B. The Unequal Relationship of the Protection of Workers in the Context of a Remediation Agreement**

As the reference to the SNC-Lavalin affair in the introduction makes illusion, the sitting Prime Minister’s desire in trying to cause the Attorney-General to allow the negotiation of a remediation agreement was, at least allegedly, in large part driven by the protection of jobs. In other words, the reason the employer corporation should, in the view of the Prime Minister at least, be allowed to negotiate a remediation agreement is to protect the economic interest of employees. Yet, the blanket exclusion of trade unions from the ability to negotiate a remediation agreement serves the exact opposite purpose. The trade union exists as a means of protecting the collective interests of workers.<sup>41</sup> Those interests may be economic, but they

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<sup>41</sup> *The Labour Relations Act*, *supra* note 21, s 1, *sv* “union” means any organization of employees formed for purposes which include the regulation of relations between employers and employees.

also may be much broader than merely the quantity of remuneration received. The collective agreement represents “the law of the shop.”<sup>42</sup> Put another way, two of the matters with which any trade union should be genuinely concerned are generally the working conditions and job security for its members.<sup>43</sup> This is not to say that all members of any given trade union should all have the same working conditions or level of job security, but rather, that these issues are often collectively bargained, with the union representing the interests of the workers.

So, when an employer is a wrongdoer, not only is the potential effect of the criminal sanction on the workers a relevant consideration, but it may be the single most important consideration, at least according to the Prime Minister of the government that introduced the concept of a remediation agreement in the first place. Yet, the same government is willing to disallow the protection of a remediation agreement from the direct representative whose job it is to protect the welfare of workers, that is, the trade union of which the workers are members.

To be clear, there is no issue with any assertion that the vast majority of workers may be entirely innocent of the wrongdoing that leads to the potential criminal charges. Nor is there any issue with an assertion that if the criminal sanction for wrongdoing is too heavy, there may be unintended, negative consequences for the workforce of the corporate wrongdoer, both individually and collectively. Rather, the sole point here is that sauce for the goose is sauce for the gander.

Both employer and union are incentivized to protect the workforce of the employer. Each of them does this in a different way. The employer protects the workforce by hiring other competent people, including competent management, to oversee the work done by the rest of the workforce. Many employers want to create an identity of interest with their work forces so that everyone can feel the pride of a job well done. This type of pride furthers an identity of interest that encourages both hard work in the short term, and commitment to the workplace in the longer term.<sup>44</sup> One

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<sup>42</sup> On this point, see William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: The Osgoode Society for Canadian Legal History, 2009) [Kaplan, *Canadian Maverick*] at 432.

<sup>43</sup> *Ibid* at 176.

<sup>44</sup> See Daphne G Taras & Morley Gunderson, “Chapter 1: Canadian Labour and Employment Relations” in Morley Gunderson & Daphne Gottlieb Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson/Addison Wesley, 2009) at 8-12.

can see this in the transition from “workers” to “human resources.” One reason for this change is to recognize the value of the workers to the enterprise that the corporation operates.<sup>45</sup>

The trade union, on the other hand, is in place to protect the interests of the worker when that identity of interest between employer, on the one hand, and the employee, on the other, breaks down. Where the employer becomes the antagonist to the employee’s interests, the trade union (and the collective agreement that it negotiates) is generally meant to ensure the employee is treated fairly when dealing with the antagonistic employer.

In the context of remediation agreements, however, the employer has the possibility of receiving one; the union does not. The categorical removal of the possibility of a remediation agreement from a trade union is a step that places employers on a better footing than the representative of the overall interests of employees, that is, the trade union to which those employees belong.

### C. The Constitutional Protection of Trade Unions and Their Activities

As a general rule, the right of employers to carry on business is not constitutionally protected. Corporations and other non-individual businesses do not even have the same rights as individuals.<sup>46</sup> Meanwhile,

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<sup>45</sup> *Ibid.*

<sup>46</sup> On this point, see e.g. *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4<sup>th</sup>) 577 per Chief Justice Dickson, Justice Lamer (as he then was), and Justice Wilson, as the majority, but speaking for the Court on this issue (holding that s. 7 is unavailable to corporations in the absence of specific penal proceedings). Justices Beetz and McIntyre dissenting on other grounds (in particular, finding that there was a violation of the freedom of expression not justified under s. 1 of the *Charter*), but agreeing with the majority with respect to the non-applicability of s. 7.

The Supreme Court of Canada has also determined that s. 12 of the *Charter* (prohibiting “cruel and unusual punishment”) does not apply to corporations. See *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32. In fact, this is one of the few areas where the majority (Justices Brown and Rowe, writing jointly, with Chief Justice Wagner, and Justices Moldaver and Coté, concurring) and the minority (Justice Abella, writing, and Justices Karakatsanis and Martin, concurring) are in agreement, Justice Kasirer wrote a limited judgment, agreeing with both the reasons of Justices Rowe and Brown, on the one hand, and those of Justice Abella, on the other, with respect to this issue. With respect to other issues, there were significant disagreements between the majority and the dissent, notably with respect to the proper role of constitutional documents from other countries in domestic constitutional interpretation.

many of the activities of a recognized trade union are constitutionally protected under the *Charter*.<sup>47</sup>

To be clear, it is not intended to suggest, by the argument made below, that all activities undertaken by a trade union are of necessity constitutionally protected. Clearly, where a trade union engages in criminal conduct no suggestion has been made that any court has ever indicated that the trade union cannot be prosecuted for the criminal conduct. Rather, the argument is that by excluding a trade union from ever being a proper subject of a remediation agreement, one may in fact be undermining the constitutional protection provided to certain types of activities under recent jurisprudence. For example, in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, the majority held as follows:

Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against “substantial interference” with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether “excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association” (para. 23). Or to put it another way, does the state action target or affect the associational activity, “thereby discouraging the collective pursuit of common goals”? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the *Charter*. It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.<sup>48</sup>

This paragraph could easily be adapted to make an argument that the deliberate exclusion of trade unions from the possibility of remediation agreements could constitute a “substantial interference” with the ability of the trade union to carry out its functions. While a full *Charter* analysis will not be conducted here, several points could be made in favour of such an approach. First, all goals of a trade union are typically for an association of

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<sup>47</sup> *Charter*, *supra* note 40.

<sup>48</sup> *Health Services and Support – Facilities Subsector Bargaining Assn*, *supra* note 18, at para 90, per Chief Justice McLachlin, and Justice LeBel, writing in joint reasons for the majority.

persons, that is, the collective membership of the trade union. Secondly, it is important to remember that an “organization” as defined in the *Criminal Code*<sup>49</sup> can only be convicted where the criminal activities undertaken were undertaken with the intent of benefitting the organization.<sup>50</sup> One could certainly see benefit flowing to a trade union if it is able to achieve the associational goals of its membership. In other words, while not completely overlapping, one could certainly see a connection between the associational goals of a trade union, on the one hand, and overall benefit to the organization even if some of the activity might technically violate the *Criminal Code*.

A simple example may assist here. Section 322 of the *Criminal Code* provides in part as follows:

- 322(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
  - (b) to pledge it or deposit it as security;
  - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
  - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

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<sup>49</sup> *Criminal Code*, *supra* note 4.

<sup>50</sup> On this point, see the wording of section 22.2 of the *Criminal Code*, *ibid*. The relevant wording provides in part as follows: “22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers ... (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.”

- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.<sup>51</sup>

One can certainly imagine a situation where a management-level employee of the trade union<sup>52</sup> steals information (or causes another person to steal information) in the run-up to a potential strike about the plans of management in the event of a strike. It is, therefore, at least arguable that subsection 322(1) might apply. Law enforcement officials decide to charge the trade union and the thieving employee with contravention of subsection 322(1).<sup>53</sup>

Theft could never be countenanced. Yet, strike preparations could certainly be considered part of the “associational activity” of a trade union,

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<sup>51</sup> *Criminal Code*, *supra* note 4, s. 322.

<sup>52</sup> “Senior officer” as the term is used in s. 22.2 (the relevant wording of this section is reproduced at note 50, *supra*) of the *Criminal Code*, *supra* note 4, is defined as follows: “**senior officer**” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”.

<sup>53</sup> Section 322 is not chosen at random. Under s. 1 of the Schedule to Part XXII.1, only certain *Criminal Code* offences are eligible for remediation agreement. Section 1 provides as follows: 1 An offence under any of the following provisions of this Act: (a) section 119 or 120 (bribery of officers); (b) section 121 (frauds on the government); (c) section 123 (municipal corruption); (d) section 124 (selling or purchasing office); (e) section 125 (influencing or negotiating appointments or dealing in offices); (f) subsection 139(3) (obstructing justice); (g) section 322 (theft); (h) section 330 (theft by person required to account); (i) section 332 (misappropriation of money held under direction); (j) section 340 (destroying documents of title); (k) section 341 (fraudulent concealment); (l) section 354 (property obtained by crime); (m) section 362 (false pretence or false statement); (n) section 363 (obtaining execution of valuable security by fraud); (o) section 366 (forgery); (p) section 368 (use, trafficking or possession of forged document); (q) section 375 (obtaining by instrument based on forged document); (r) section 378 (offences in relation to registers); (s) section 380 (fraud); (t) section 382 (fraudulent manipulation of stock exchange transactions); (u) section 382.1 (prohibited insider trading); (v) section 383 (gaming in stocks or merchandise); (w) section 389 (fraudulent disposal of goods on which money advanced); (x) section 390 (fraudulent receipts under Bank Act); (x.1) section 391 (trade secret); (y) section 392 (disposal of property to defraud creditors); (z) section 397 (books and documents); (z.1) section 400 (false prospectus); (z.2) section 418 (selling defective stores to Her Majesty); and (z.3) section 426 (secret commissions); (z.4) section 462.31 (laundering proceeds of crime). Accessory, attempt, and counselling liability for the same offences is also included. Certain other crimes outside the *Code* (notably under the *Corruption of Foreign Public Officials Act*, SC 1998, c 34) also potentially have remediation agreements available in appropriate circumstances.

and a criminal charge could be seen as government “thereby discouraging the collective pursuit of common goals.” In other words, the government’s blanket denial of a remediation agreement based on the form of organization (a trade union) and/or its goals (the protection of the interests of workers) seems contrary to permitting “the collective pursuit of common goals”.

To return for a moment to the statutory framework of remediation agreements, a remediation agreement is a contract.<sup>54</sup> Nothing in this paper is meant to suggest that a trade union should have any greater likelihood of achieving a remediation agreement, but under the right circumstances, the negotiation of such an agreement should at least not be statutorily prohibited. Yet, the definition of “organization” for these purposes has exactly that effect.

Meanwhile, this might also be a perfect case for the use of a remediation agreement. If the crime of theft caused loss to a public body employer or other private interests, a remediation agreement might be one way to ensure that the union makes reparations to those interests, without requiring private legal action in order to seek redress. Put another way, allowing for a remediation agreement in appropriate circumstances may allow the government to mediate the rights of the trade union, on the one hand, and those public and private entities who may be negatively affected by the exercise of those rights, on the other. The use of the remediation agreement mechanism may be one way that the government can show that it has taken minimally impairing steps<sup>55</sup> to respect the rights of the trade union while, for example, providing financial reparations for those whose interests might have been damaged beyond a *de minimus* level.<sup>56</sup>

## D. The Impact of the Rand Formula

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<sup>54</sup> According to J.D. McCamus, a contract is “any enforceable promise” arising out of a “bargain”. See John D McCamus, *The Essentials of Canadian Law – The Law of Contracts*, 3<sup>rd</sup> ed (Toronto: Irwin Law, 2020) at 1.

<sup>55</sup> Of course, “minimal impairment” of a constitutionally-protected right is part the test propounded in the judgment of Chief Justice Dickson in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4<sup>th</sup>) 200, for the majority, and its multitudinous progeny.

<sup>56</sup> For example, providing financial recompense to affected parties, for both direct and indirect costs, plus an amount to recognize the wrongfulness of the act, could easily be part of the remediation agreement.

I have argued elsewhere the impacts on individuals or organizations other than those charged with an offence is generally not considered the “punishment” of that other.<sup>57</sup> Think of it this way: when Bernard Madoff went to jail for massive criminal fraud, his wife and sons lost their lifestyles, and were the subject of significant social ostracization,<sup>58</sup> to the point that one of his sons committed suicide.<sup>59</sup> Yet, by virtually all accounts, they knew nothing of the wrongdoing that was occurring,<sup>60</sup> despite the fact that the sons worked for the organization. From the point of view of the criminal law, they are not being “punished,” even though their lives are made significantly more difficult and less comfortable by the conviction of Mr. Madoff. The reason they are not being punished is they have not had the stigma of the criminal conviction attached to them. Even though they are certainly suffering negative consequences resulting from their association with the criminal (these consequences are sometimes referred to as “hard treatment”<sup>61</sup>), the moral statement of culpability (sometimes referred to as “censure”<sup>62</sup>) is notably absent as against those around the direct wrongdoer.

Of course, the same can be said of union leadership and rank-and-file members of the trade union who have nothing to do with the wrongdoing that leads to criminal charges against the trade union itself. Nothing below should be taken to indicate that the negative effects of criminal sanction that may be unintentionally foisted upon non-wrongdoers should be considered as a reason not to pursue the wrongdoer in criminal proceedings. The argument offered here assumes that there is at least a substantial and plausible argument that the criminal sanction is one

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<sup>57</sup> On this point, see Darcy L MacPherson, “‘A Centenary of a Mistake?’: An Outsider’s Critical Analysis of, and Reply To, The Approach of Professor Hasnas” (2018) 18 *Asper Rev Intl Business Trade L* 104 [“MacPherson, ‘A Centenary of a Mistake?’”] at 132.

<sup>58</sup> Kaitlyn Menza, “How Bernie Madoff Took His Family Down”, *Town & Country* (19 May 2017) online: <[www.townandcountrymag.com/society/money-and-power/a9656715/bernie-madoff-ponzi-scheme-scandal-story-and-aftermath/](http://www.townandcountrymag.com/society/money-and-power/a9656715/bernie-madoff-ponzi-scheme-scandal-story-and-aftermath/)> [perma.cc/4THJ-L8HB].

<sup>59</sup> Diana B Henriques & Al Baker, “A Madoff Son Hangs Himself on Father’s Arrest Anniversary”, *New York Times* (11 December 2010) online: <[www.nytimes.com/2010/12/12/business/12madoff.html](http://www.nytimes.com/2010/12/12/business/12madoff.html)> [perma.cc/5K9Z-7TF4].

<sup>60</sup> Erik Larson, “The Madoff Players: Where Are They Now?” *Bloomberg* (11 December 2018) online: <[www.bloomberg.com/news/articles/2018-12-11/the-bernie-madoff-ponzi-scheme-who-s-where-now](http://www.bloomberg.com/news/articles/2018-12-11/the-bernie-madoff-ponzi-scheme-who-s-where-now)> [perma.cc/7XAN-XC2P].

<sup>61</sup> MacPherson, “‘A Centenary of a Mistake?’”, *supra* note 57 at 130.

<sup>62</sup> *Ibid* at 132.

potentially appropriate tool to be used to discourage inappropriate conduct by a trade union. In other words, it is accepted that the trade union may commit criminal wrongdoing, and that the criminal sanction may be an appropriate remedy.

Notwithstanding this concession, the question which remains is whether, given the framework which governs a trade union, is the trade union's blanket exclusion from the potential use of a remediation agreement appropriate?

In this regard, there is a specific element of the make-up of a Canadian trade union (and particularly, its funding model) that needs to be considered here. The Rand formula means that all the holders of positions within a unionized work environment who are members of the bargaining unit are required to pay the equivalent of union dues to the trade union, whether they are members of the trade union or not.<sup>63</sup>

The majority of the Supreme Court of Canada has recognized that the payment of dues to a trade union pursuant to the Rand formula can invoke the freedom not to associate<sup>64</sup> which has been recognized to be part of the freedom to associate guaranteed by para. 2(d) of the *Charter*.<sup>65</sup> Nonetheless, the majority in *Lavigne* held that the forced payment of an amount equivalent to trade union dues by non-members of the trade union was a justified infringement on the freedom to associate.<sup>66</sup> Given the negative financial impact on non-members of the trade union who have paid the equivalent of union dues to the trade unions despite not being members of it, it would seem that this is yet another group of truly innocent third parties who could reasonably be protected through the use of a remediation agreement. Put another way, in a more typical situation of corporate wrongdoing, scholars have argued that criminal penalties are inappropriate, mainly because the people who will pay those penalties are not the corporation itself, but rather, shareholders who will have the value of their shares reduced when the corporation pays the fine levied against it.<sup>67</sup> As I have argued elsewhere,<sup>68</sup> a significant weakness that inherently

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<sup>63</sup> On this point, see *Lavigne v OPSEU*, [1991] 2 SCR 211, 81 DLR (4th) 545.

<sup>64</sup> *Ibid* at 340, per Justice LaForest, writing for the majority.

<sup>65</sup> *Charter*, *supra* note 40.

<sup>66</sup> *Lavigne*, *supra* note 63 at 323.

<sup>67</sup> See John Hasnas, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) *Am Crim L Rev* 1329 at 1339.

<sup>68</sup> MacPherson, "A Centenary of a Mistake?", *supra* note 57 at 131.

produces a great deal of trouble with this proposition is that the shareholders of a corporation are speculating the value of the shares will increase. If they are correct in this, few if any of them would ask why they were allowed to benefit. If this is so, why then, should those same people be allowed to question the reason for the decline in the value of their shares? Why, from the point of view of the shareholder, should a criminal fine be treated any differently than any other expense that a corporation is to pay?<sup>69</sup> Regardless of the strength of the argument when applied to corporations, what is important about these arguments is that, in virtually every case, when considering a corporation, the relationship is a voluntary one. Workers are generally able to choose their employer. Shareholders are allowed to choose the companies in which they invest. Financial and other trade creditors are allowed to refuse to do business with any borrower, as they see fit. This is not necessarily true of the person who gives money to a trade union. The Rand formula can and does force people who do not wish to be financially supportive of the trade union to nonetheless provide financial security to that very same trade union.

To be clear again about the scope of this argument, there is no suggestion that non-members of the trade union should not be expected to have their money contributed toward any fine or other financial consequence of the wrongdoing. As soon as the money is properly received by the trade union, it is also fully available to be dispensed by the trade union in accordance with its activities.<sup>70</sup> Rather, the argument is that

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<sup>69</sup> There are other arguments that, in my view at least, counter the "innocent shareholder" thesis to oppose corporate criminal liability. These arguments are beyond the scope of the current paper. For some of these arguments, see e.g. MacPherson, "A Centenary of a Mistake?", *ibid* at 130-133.

<sup>70</sup> Both the majority and the concurring opinions in *Lavigne* make clear that there have historically been restrictions placed on the ability of trade unions to spend money on certain activities. On this point, Justice Wilson writes as follows (at 297): "Mr. Lavigne notes that legislatures have in the past placed restrictions on the way compelled dues could be spent: see *Labour Relations Act Amendment Act, 1961*, S.B.C. 1961, c. 31, s. 5, and *The Industrial Relations Act*, S.P.E.I. 1962, c. 18, s. 48. Both these provisions restricted only the right to make contributions for electoral purposes and not for the "non-collective bargaining" purposes cited by the appellant. These provisions have since been repealed: see *Labour Code of British Columbia*, S.B.C. 1973, c. 122, s. 151, and *Prince Edward Island Labour Act*, S.P.E.I. 1971, c. 35, s. 76(1)(a). To my mind, the fact that some jurisdictions at one time imposed restrictions on the Rand formula does not advance the inquiry. We simply do not know whether the old system worked or why it was abandoned."

unlike most creditors of a corporation,<sup>71</sup> the employees, who pay union dues or the equivalent of union dues, are not doing so in any sense that is truly and meaningfully “voluntary.” Rather, employees are required by law to make those payments because this serves a policy rationale. This rationale runs something like this: unions protect the interests of workers, and the employer is likely to give a similar deal to all employees in the same or similar positions, whether they are members of the union or not.<sup>72</sup> As a result, the worker is assumed to benefit from the unionized environment, regardless of whether they are members of the union or not.<sup>73</sup> However, if the worker receives the same benefit from the employer regardless of union membership, there is a temptation to not join the union so as to receive the benefits (better working conditions) without the underlying costs (that is, union dues).<sup>74</sup> The union needs financial security (a relatively consistent level of money coming into its coffers, mostly in the form of dues, or the equivalent)<sup>75</sup> in order to perform its role as the protector of employees.<sup>76</sup> The tension between these last two sentences (the economic reality is that if the result of paying and not is the same, most people will choose to receive benefits but not to pay, despite the need

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<sup>71</sup> The notable exception to this general rule of course are “classic” tort victims. On this point, see the judgment of Justice LaForest (in partial dissent, by not on this point), in *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 S.C.R. 299 at 342-343, 97 D.L.R. (4<sup>th</sup>) 261. “Classic” tort victims are those tort victims who have no connection with the corporation prior to the tort. As Justice LaForest explains: “Nonetheless, for one reason or another, the employer may not be available as a source of compensation. In my view, in what may be termed a ‘classic’ or non-contractual vicarious liability case, in which there are no ‘contractual overtones’ concerning the plaintiff, the concern over compensation for loss caused by the fault of another requires that as between the plaintiff and the negligent employee, the employee must be held liable for property damage and personal injury caused to the plaintiff. An example of such a case is a plaintiff who is injured by an employee while the employee, acting in the course of employment, is driving on the road. In this context, the plaintiff obviously never chose to deal with a limited liability company.”

<sup>72</sup> Kaplan, *Canadian Maverick*, *supra* note 42 at 168.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

for consistent funding to maintain the benefits achieved) is known as the “free rider problem.”<sup>77</sup>

The goal is to point out that the Rand formula creates more people who are truly innocent. The shareholders of a company are generally “innocent” in the sense that, as a group, they do not share the *mens rea* of the actual individual perpetrators of the underlying crime. However, as shareholders, they have put their faith voluntarily into the directors of the corporation, as well as the people who report to them.<sup>78</sup> In most business corporations, this is generally done in an effort to reap financial reward from the success of the business of the corporation.<sup>79</sup> Put another way, there is an immediate identity of financial interest between the shareholders, on the one hand, and the activities of the corporation, on the other. This is not to say that the shareholders would necessarily support the undertaking of illegal activity in order to try to create the economic outcome of increased share value. Rather, this is simply an acknowledgement that in the traditional corporate setting, the shareholder chooses to speculate (along with management) that the activities undertaken in the name of the corporation will be profitable and attempts to share that profitability if it occurs.

For those people paying the equivalent of dues pursuant to the Rand formula, that identity of interest may, frankly, be lacking. The person forced to pay dues in this way may in fact be philosophically opposed to the collective and associational nature of the union’s activities. Nonetheless, so as to avoid the free rider problem, Canadian law mandates that at least for financial purposes, they are required to contribute to the trade union that represents a bargaining unit that

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<sup>77</sup> Interview of Horace Pettigrove (27 October 1989) cited in Kaplan, *Canadian Maverick*, *ibid* at 463.

<sup>78</sup> See e.g. s 107 of the *Canada Business Corporations Act*, RSC 1985, c C-44 [CBCA], which mandates that the shareholders with the right to vote are permitted to vote in the election of directors. Section 102(1) of the CBCA gives the directors the duty to manage, or oversee the management of, the business and affairs of the corporation. Section 121 of the same statute gives the power to the directors to appoint the officers of the corporation. The by-laws of most CBCA corporations will define the rights, obligations, and powers of the Corporation of the offices created by the by-laws. The by-laws must be passed by the board of directors, and subsequently approved by the shareholders acting in general meeting. See CBCA, s 103.

<sup>79</sup> See J Anthony VanDuzer, *The Essentials of Canadian Law – The Law of Partnerships and Corporations*, 3<sup>rd</sup> ed (Toronto: Irwin Law, 2009) at 124-125.

includes their position. While moral innocence does not easily permit of gradations in this respect, it is quite clear that those non-members of a trade union who are nonetheless compelled to contribute financially to it are even more morally innocent than those shareholders who contribute to a corporation and expect to share in the rewards thereof. The reason for this is simple: shareholding is generally a voluntary activity.<sup>80</sup> According to Canadian law, contribution to a union may not be. If part of the goal of a remediation agreement is avowedly “to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing,”<sup>81</sup> it would seem to me that this would apply to a union even more than it would apply to the shareholders of a corporation. Similarly, the employees of a corporation generally choose their employer. The law does not allow them to choose to not contribute financially to the union that represents other employees, even if they do not choose to be a member of the union themselves. At the very least, those employees who contribute to the union are in no worse position than the employees and shareholders who are generally considered to be “innocent” of the wrongdoing. Yet, the employees of a corporate offender are a reason to give a remediation agreement, while neither the rank-and-file employees who are members of the union, nor the non-members who were required by law to contribute to it as part of their employment are legally allowed to qualify for the same treatment. This seems to run counter to one of the very purposes that remediation agreements are designed to serve.

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<sup>80</sup> Of course, there are scenarios where voluntariness can be more questionable than the standard purchase of a share or particular corporation by a particular individual. For example, the acquisition of a share upon the death of its original holder and the receipt of that year by either operation of law under a will, or intestacy would be one example. One could also make the case that the acquisition of shares of a company through a mutual fund with a person who buys the mutual fund and was unaware of the underlying holdings of the mutual fund, or where the mutual fund changed its holdings after the person acquired an interest in the mutual fund may be different as well. Neither of these scenarios may be as “voluntary” as the scenario contemplated here, where a person specifically decides to acquire shares of a particular corporation in an attempt to benefit financially from the operations of that particular corporation.

<sup>81</sup> See *Criminal Code*, *supra* note 4, para 715.31(f).

### E. The Publicity Effect of Labelling a Union as a Criminal, and Giving to a Corporation – Its Opponents in Negotiation – a Remediation Agreement

It is readily observable that, in a situation of labour strife, there is clearly a public element to the private dispute. In a strike situation, one of the goals of the strike is to remove labour from the employer in an effort to return the employer to negotiations with the union to resolve the dispute, by giving the employer an economic incentive to negotiate in a more concessionary fashion. Further, the law clearly allows the union and its membership to picket.<sup>82</sup> Picketing makes the dispute a public one. For the union, the hope is, at least in part, that when the public becomes aware of the employer's unwillingness to accede to the reasonable demands of the union, the public will be less likely to purchase the goods and services offered by the employer, thereby increasing economic and political pressure on the employer.<sup>83</sup>

Assuming that there is in fact a public component to a strike, how does the lack of availability of a remediation agreement affect this public aspect of a strike? The potential for such an affect is real and important. Let us imagine that there is a situation where the corporate employer has been pursued in the past for criminal contempt of court for ignoring a court order.<sup>84</sup> However, the corporate employer was given a remediation agreement with respect to that transgression. Then, later the trade union is pursued for criminal contempt of court for ignoring a court order, arising out of its associational activities. Subsequent to both of these events, there is a strike situation between the employer and the trade union representing its unionized employees. When there is picketing to inform the public as to the plight of the workers, the corporate employer then points out "the

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<sup>82</sup> See e.g. "Winnipeg's Canada Post employees back on the picket line" (15 November 2018), CBC, online: <[www.cbc.ca/news/canada/manitoba/canada-post-rotating-strikes-winnipeg-1.4906465](http://www.cbc.ca/news/canada/manitoba/canada-post-rotating-strikes-winnipeg-1.4906465)> [perma.cc/BYD6-E28W]; Talia Ricci & Katie Dangerfield, "Faculty on strike at the University of Manitoba" (1 November 2016), *Global News*, online: <[globalnews.ca/news/3037596/faculty-will-strike-at-university-of-manitoba-tuesday-morning/](http://globalnews.ca/news/3037596/faculty-will-strike-at-university-of-manitoba-tuesday-morning/)> [perma.cc/98HW-K4FA].

<sup>83</sup> See "Demonstrators picket Tim Hortons after cuts to employee benefits" (10 January 2018), CBC, online: <[www.cbc.ca/news/business/tim-hortons-protest-rally-picket-ontario-employee-benefits-1.4480559](http://www.cbc.ca/news/business/tim-hortons-protest-rally-picket-ontario-employee-benefits-1.4480559)> [perma.cc/ZC8J-UEQG].

<sup>84</sup> I choose this particular offence simply because it is clear that a trade union may be liable for this particular offence (under both the common law and the statute), and it is easy to imagine a situation where similar conduct by a corporate employer could result in similar potential liability.

criminal past” of the trade union in its dealings with the corporate employer, pointing specifically to the conviction of the trade union for failure to obey a court order. The public statements always end with the same question to the public: “Do you want to put your faith in a criminal organization?” Of course, the trade union will want to point out that the corporate employer has engaged in similar behaviour. However, the question of criminality cannot legitimately be raised. The trade union has been adjudged to be a criminal; the corporate employer has avoided a similar fate, given the diversionary tools available to it that are specifically made unavailable to a trade union, namely, the remediation agreement.

Given the public nature of the pressure that is attempted to be exerted by strike action by a trade union, asking the general public to fully understand the differences and similarities between the actions of the trade union in its past, when compared to the actions of the corporate employer in its past, is, quite unrealistic. The general public understands what criminality is. Many members of the public have a visceral reaction to the label of “criminal.” The entire purpose of the remediation agreement provisions of the *Criminal Code*<sup>85</sup> is to avoid labelling an organization as a criminal where such a label would be permissible under the law as it now stands, but where it would nonetheless be inappropriately harsh to do so. Through the inability of trade unions to access the remediation agreement regime, there is certainly the suggestion that it is never inappropriately harsh to label the actions of a trade union as being “criminal” where it fits the strict letter of the law to do so.

Moreover, a strike is an area where organized labour is generally considered to be an antagonist to an employer, group of employers (if the employers are related) or to an industry as a whole.<sup>86</sup> Given the antagonism that exists in a strike situation, it seems as though the government’s decision

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<sup>85</sup> *Criminal Code*, *supra* note 4.

<sup>86</sup> While it would be rare for a strike to be organized against an entire industry, there can be little doubt that the effect of a strike and its resolution by one employer will affect how the remainder of the industry will deal with its labour strife. Technically, the Rand formula was only meant to resolve a singular strike at Ford. On this point, see Kaplan, *Canadian Maverick*, *supra* note 42 at 217. However, it is equally clear that the Rand formula has become fundamentally part of Canadian law which is applied across industries. It is equally clear that the resolution of the dispute with Ford was going to inform how other employers in the automotive industry would deal with their labour strife going forward. On this point, see Kaplan, *Canadian Maverick* at 217.

to deny access to the remediation agreement regime to one side of that antagonism (the trade union) while granting it to the other (the corporate employer) could be seen as the government favouring the employer in the resolution of the strike situation, to the concomitant disadvantage of the trade union.

In other words, labour relations legislation<sup>87</sup> is designed to ensure the resolution of strikes,<sup>88</sup> and to put limits on the actions of the parties thereto in an effort to succeed through strike action (or their response to that action),<sup>89</sup> it would seem very unusual for a level government to explicitly favour one side in this dispute, particularly where there may be significant antagonism between management and labour, and management may effectively be allowed to use the protection of labour as a reason why it should be allowed to access the remediation agreement regime. This seems all the more unusual given that this is to use the criminal law as a means to provide that advantage.

## V. CONCLUSION

In the end, this paper accepts the idea that remediation agreements are an appropriate part of our criminal law. They are properly used where the stigma of the criminal sanction would simply be too heavy and create too much collateral damage for those who did not intend to carry out the criminal wrongdoing undertaken on behalf of an organization. However, this paper seriously questions the clear legislative decision to exclude trade unions from the ambit of the remediation agreement regime. Trade unions serve a socially valuable role in protecting the rights and working conditions of employees. Some of the activities of trade unions are constitutionally protected, so as to ensure they are able to carry out this socially important role. It therefore seems quite incongruous to suggest that there would never be a circumstance in which it would be appropriate that a trade union be

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<sup>87</sup> *The Labour Relations Act*, *supra* note 21.

<sup>88</sup> See e.g. *ibid.*, at ss 83.1-83.3. Even in those provinces where there are similar statutory provisions, there is undoubtedly an interest for both the general public and the government of the day to ensure that strikes and other labour disruptions remain within manageable limits, given the social and economic costs and losses for both sides. This may explain why, more than 75 years ago, a Justice of the Supreme Court of Canada was asked to find a solution to a strike with difficult economic and social consequences. See Kaplan, *Canadian Maverick*, *supra* note 42, c 5.

<sup>89</sup> *The Labour Relations Act*, *supra* note 21, Part V.

given the opportunity to enter into a remediation agreement. Yet, this is clearly the legislative choice that Parliament has made. This paper has attempted to demonstrate that even accepting Parliament's purposes for creating the remediation agreement regime in the first place, this legislative exclusion does not appear to serve the purposes of the regime itself and appears to run directly counter to it.

Of course, it may be possible for a trade union to mount a constitutional challenge to this legislative exclusion. However, laying out the grounds of such a challenge will have to wait for another day. For now, this paper has simply attempted to lay out an incongruity within a legislative scheme. That incongruity leads to certain results that can be considered untenable, including what appears to be a direct interference into the resolution of labour disputes. How this incongruity will be resolved by Parliament in the future is anyone's guess. If Parliament decides to leave the current legislative exclusion of trade unions in place in the remediation agreement regime, at the very least, I hope that Parliamentarians are asked to explain the approach that justifies such an exclusion. Perhaps there is one that has not been canvassed here. It is only by pointing out the incongruity that we can ask for a justification. The motive of this paper was to point out the incongruity so that the groundwork can be laid to seek a justification. Until that justification is provided (assuming that there is one), there are only unanswered questions. One can only hope that, in the near future, answers to these questions will be forthcoming.