

An Organization that is Criminal, but not Really: A Review of the Canadian Remediation Agreement Regime in the Context of the SNC- Lavalin Affair

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

ABSTRACT

In 2018, the Canadian federal government included in its budgetary measures,¹ amendments to the *Criminal Code*.² The effect of these amendments was to allow what is referred to as “remediation agreements.” Under the remediation agreement regime, there is effectively a scheme of diversion available for corporate and other organizational offenders, whereby if certain requirements are met, the government may choose to enter into negotiations with the putative organizational offender. If an agreement is reached, and the putative organizational offender complies with the terms of the agreement, any charges against the offender will be stayed, or no charges will be filed with respect to this particular criminal

¹ See First Session, Forty-second Parliament, 64-65-66-67 Elizabeth II, 2015-2016-2017-2018, Bill C-74, *Budget Implementation Act, 2018, No. 1* [Bill C-74], s. 404.

² R.S.C. 1985, c. C 46 [*Criminal Code*].

conduct. The regime is similar to practices undertaken in a number of jurisdictions, including the United States³ and the United Kingdom.⁴

However, the first time this regime was tested provided some unique drama in the history of both Canadian law and politics. When the Canadian engineering giant SNC-Lavalin was charged with wrongdoing involving fraud and corrupt practices with respect to the company's activities in Libya during the administration of recognized dictator Muammar Gaddafi, they sought to use the media to force the government to negotiate a remediation agreement with the company. Oddly enough, this seemingly had little, if anything, to do with the direct consequences of the potential conviction. Rather, Canada's Integrity Regime⁵ was the real problem. The Integrity Regime suspends or makes companies ineligible for major government contracts and other support where the company is convicted of certain types of offences,⁶ including certain violations of the *Corruption of Foreign Public Officials Act*,⁷ including one with which SNC-Lavalin had been charged.

The effort to use the remediation agreement regime was also promoted by the Canadian Prime Minister himself. Despite the fact that the Attorney General was the official whose approval was required to allow a remediation agreement to be negotiated,⁸ the Prime Minister made clear that he was very

³ See U.S. Department of Justice, "Justice Manual 9-28.000 - Principles of Federal Prosecution of Business Organizations" (July 2020), online: *Department of Justice* <<https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>> [https://perma.cc/GY6K-MSZ8]; Elizabeth Acorn, "Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization" (2018) 51 UBC L Rev 613 at paras 20-26 [Acorn]; John Geddes, "The government's case for 'remediation agreements' made no mention of SNC-Lavalin", *Macleans*'s (13 February 2019) online: <[The government's case for 'remediation agreements' made no mention of SNC-Lavalin \(macleans.ca\)](#)> [https://perma.cc/W4BL-2M6F] [Geddes].

⁴ See *Crime and Courts Act 2013*, 2013 (UK), c 22, s 45; Acorn, *ibid* at paras 38-45; Geddes, *ibid*; Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report* by Mario Dion, (Report) (Ottawa: Office of the Conflict of Interest and Ethics Commissioner, August 2019) online: <[Trudeau II Report.pdf \(parl.gc.ca\)](#)> [*Trudeau II Report*].

⁵ For a discussion of the Integrity Regime, see <https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>

⁶ *Ibid*.

⁷ S.C. 1998, c. 34.

⁸ *Criminal Code*, *supra* note 2, para. 715.32(1)(d).

interested in protecting jobs in SNC's home province of Quebec.⁹ The person who was in the role of Attorney General (The Hon. Jodi Wilson-Raybould) refused to approve the commencement of negotiations with SNC-Lavalin. Not long after, Wilson-Raybould was shuffled out of this portfolio, and later left Cabinet altogether.

Part I of the paper will explain the basic statutory rules of the remediation agreement regime. Part II explains the SNC-Lavalin situation, including the Integrity Regime and the political and judicial decisions around this drama. Part III considers whether there should be changes to the remediation agreement regime to specifically remove some of the potential ambiguity and the overtly political actors that are currently involved in the regime. Part IV concludes.

I. THE REMEDIATION AGREEMENT REGIME

The remediation agreement regime is a very new phenomenon in Canada. Though the provisions that we will be discussing are provisions of the *Criminal Code*, the changes were not made through a bill directed at amending the *Criminal Code*. Rather, they were one small part of a federal budget bill, the *Budget Implementation Act, 2018, No. 1*.¹⁰ Given that this was a "money bill",¹¹ the vote with respect to its passage becomes a confidence vote for the government.¹² Put another way, by putting these provisions inside a bill that had financial implications for the government, one makes it more difficult for parliamentarians to vote against it. There is no way to vote against only particular provisions of the bill. The remediation

⁹ See Maham Abedi, "SNC-Lavalin affair, explained: A look at remediation deals at the centre of the controversy", Global News, available online: <https://globalnews.ca/news/5022558/deferred-prosecution-agreements-snc-lavalin/>

¹⁰ S.C. 2018, c. 12 [BIA 2018].

¹¹ See The Canadian Press, "Election off the table as Liberals survive final confidence vote over budget", Global News (26 April 2021), online: <(1) Election off the table as Liberals survive final confidence vote over budget - National | Globalnews.ca> [<https://perma.cc/6VS7-H2N2?view-mode=server-side&type=image>] [Canadian Press, "Final confidence vote over budget"]. Katie Dangerfield, "Taking down the government, how a confidence vote works in Canada", Global News (30 June 2017), online: <(1) Taking down the government, how a confidence vote works in Canada - National | Globalnews.ca> [<https://perma.cc/98UU-KEB2?view-mode=client-side&type=image>] [Dangerfield].

¹² See Canadian Press, "Final confidence vote over budget", *ibid*; Dangerfield, *ibid*.

agreement regime has little, if anything, to do with government budget procedures. Yet, it seems as though the government of the day wanted to ensure that even if Members of Parliament were opposed to the remediation agreement regime, but nonetheless did not want to potentially bring down the government in a confidence vote, they would have to vote for the bill that contained the remediation agreement provisions.¹³ This is the first way that political considerations were leveraged in the passage of these provisions. As we will see below, the interaction between politics and the substance of these provisions did not end there.

As mentioned above, the remediation agreement regime is a set of rules that allows for the diversion of cases that would otherwise involve “organizational offenders”. Under the *Criminal Code*,¹⁴ an “organization” is defined as follows:¹⁵

organization means

a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
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

For the purposes of this paper and its discussion, this definition is important only to the extent that it would appear to be broad enough to cover any non-human entity that could fall within any reasonable definition of “too big to fail”, in terms of economic actors.¹⁶ This is not to say that all

¹³ See The Canadian Press, “Minority Liberal government survives second of three confidence votes on budget”, *CTV News* (22 April 2021), online: <[Minority Liberal government survives second of three confidence votes on budget | CTV News](https://perma.cc/CA6K-8KG4)> [https://perma.cc/CA6K-8KG4]; Andy Blatchford “Bill quietly introduced in federal budget proposes tool to ease corporate crime penalties”, *Global News* (15 May 2018) online: <[Bill quietly introduced in federal budget proposes tool to ease corporate crime penalties - National | Globalnews.ca](https://perma.cc/K3N2-WSKR?view-mode=client-side&type=image)> [https://perma.cc/K3N2-WSKR?view-mode=client-side&type=image].

¹⁴ *Supra* note 2.

¹⁵ *Ibid.*, s. 2, *sv* “organization”.

¹⁶ When this article was reviewed, one anonymous reviewer claimed that the legislation prohibited consideration of issues of “too big to fail”. I disagree. My disagreement stems from paragraph 715.31(f). The paragraph reads as follows: “715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to

organizations (as defined by the *Code*) would necessarily be too big to fail, and thus, “too big to convict” if the conviction were to lead to the demise of the organization. There would clearly be many organizations that could fail due to a criminal conviction without threatening the economic security of a division of a state, a state itself, a region, or the world. Rather, the point is that anything that could, as an economic actor, cause serious economic consequences in any significant area would most likely fall within the definition of “organization” provided above.

Thus, we need to examine the rules of this diversionary regime. Unlike its US counterpart,¹⁷ Canada's remediation agreement regime relies upon statutory wording for its validity.¹⁸ The first step in this process is 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.” Presumably, the larger an organization is, the more likely it is that there will be a great many people who will not be involved in the wrongdoing, even if that wrongdoing is properly attributed to the organization. To my way of thinking, this creates a classic “too big to fail” scenario. Society may wish to punish the organization for wrongdoing, but society may not wish to make that punishment so severe that the organization as a whole is forced into bankruptcy. The loss of a job, not by one person, but by thousands or tens of thousands, is unacceptable collateral damage to both the economy and the individuals who are without blame. If I am correct in my interpretation of “too big to fail”, paragraph 715.31(f) strongly suggests that this is a valid consideration with respect to the use of remediation agreements.

To be clear, the reference in the main text to “too big to fail” was not meant to evoke the 2008 financial crisis, or anything similar. Rather, the point was that any actor (corporate, partnership, trust or other) that *could* grow large enough to have a significant impact on society (and thus may be “too big to fail”) should be accountable to the basic social compact that is represented by the criminal law.

However, at the same time, I can admit there is a more nuanced argument to be made with respect to the application of the concept of “too big to fail” in this context. However, the current contribution is not, in my view at least, the place to elucidate this more nuanced argument. In other words, this more nuanced argument will have to wait to another day.

¹⁷ The American federal government relies instead on the handbook given to its prosecutors (effectively, an administrative approach dictated by the federal Department of Justice itself). See U.S. Department of Justice, “Justice Manual - 9-28.1000 - Restitution and Remediation” (last modified March 2023), online: Department of Justice <[justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1000](https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1000)> [perma.cc]

¹⁸ As will be discussed in further detail below, the relevant statutory wording can be found

determine whether the offence or offences charged (or which could be charged) against the organizational offender are actually eligible to take advantage of the regime. The Schedule to Part XXII.1 lists the offences to which the regime may be applied.¹⁹ In general, there are four broad classes of offences that can potentially fall within the regime: (a) certain corruption-based offences; (b) financially-motivated offences, including both fraud and theft; (c) two specific offences under the *Corruption of Foreign Public Officials Act*²⁰ and (d) inchoate offences related to other covered offences (such as accessory after the fact, attempt, conspiracy and counselling).

in the *Criminal Code supra* note 2, Part XXII.1 (ss. 715.3-715.43).

- ¹⁹ The Schedule 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).
- 2 An offence under any of the following provisions of the *Corruption of Foreign Public Officials Act*: (a) section 3 (bribing a foreign public official); and b) section 4 (maintenance or destruction of books and records to facilitate or hide the bribing of a foreign public official).
- 3 A conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in section 1 or 2.
- ²⁰ *Supra* note 7.

The second step is to determine whether the acts complained of, caused or likely caused, either (i) serious bodily harm or death to any person; or (ii) injury to the national defence or security of Canada. If such injury or death occurred or was likely (even if it did not occur), the regime cannot be used.²¹

The third step is to look at the identity of the offender. Although all organizations (as defined above) can be charged with *Criminal Code* offences, not all organizations are allowed to access the remediation agreement regime.²² Public bodies, municipalities, and trade unions²³ are excluded.²⁴

Fourth, even if these requirements are met, there is no guarantee of receiving a remediation agreement, or even the commencement of negotiations to that end. In fact, the prosecutor in charge of the prosecution must invite the organization to enter into negotiations with the government with respect to a potential remediation agreement.²⁵ As will be discussed in more detail below, the decision to enter into negotiation with respect to a remediation is a discretionary decision in the hands of the prosecution. However, this discretion is NOT completely unfettered. The prosecutor may only enter into these negotiations if all of the following conditions are met:

(a) The prosecutor is of the view that there is a reasonable prospect of success with respect to prosecution of the underlying offence.²⁶ Generally, this condition is reasonable since no prosecutor in Canada is entitled to bring charges where he or she does not believe that there is a reasonable prospect of success.²⁷ If it is inappropriate to bring charges against an

²¹ *Criminal Code*, *supra* note 2, para. 715.32(1)(b).

²² *Ibid*, s-s. 715.3(1), *sv* “organization”.

²³ I have written an article which explains my view that the exclusion of trade unions from an ability to utilize the remediation agreement regime is unjustified. See Darcy L. MacPherson, “Trade Unions and Remediation Agreements ~ Does the Criminal Law Favour Management Over Labour?” (2022), 45(5) *Manitoba Law Journal* 80-119.

²⁴ See *Criminal Code*, *supra* note 2, s-s. 715.3(1), *sv* “organization”.

²⁵ See *Criminal Code*, *supra* note 2, s-s. 715.32(1).

²⁶ See *Criminal Code*, *ibid*, para. 715.32(1)(a).

²⁷ Brandon Trask, “Standard Concerns: An examination of public-interest considerations with respect to prosecutions of environmental advocates and Indigenous land defenders” in James Gacek & Richard Jochelson, eds, *Green Criminology and the*

organizational offender, it is equally inappropriate to enter into negotiations with respect to a diversionary program for charges with respect to which there is not a reasonable basis to believe that a prosecution would be successful;

(b) The prosecutor is of the view that the offence for which negotiations are to be commenced was not connected to either a criminal organization²⁸ or a terrorist group.²⁹ As may be rather obvious, the term “criminal organization” does not mean any “organization” that is charged with a criminal offence. Otherwise, this diversionary regime could never be used, since virtually by definition, every organization that is given a remediation agreement is or could be charged with a criminal offence. Instead, “criminal organization” is a defined term under the *Code*. It is defined to be a group (of at least three people), whose main purpose is the commission of one or more serious offences.³⁰ The group must be “organized”,³¹ though it need not necessarily meet the definition of “organization” referred to earlier. Even though, in my view, it is clear there would be significant overlap. For example, a criminal gang would meet the definition both of a “criminal organization” (pursuant to section 467.1 of the *Criminal Code*) and the more general definition of an “organization” (pursuant to section 2 of the same statute);

(c) The prosecutor must be of the view that entering into the negotiation of a remediation agreement with an organizational offender is in the “public interest”.³² There are a list of factors provided for in subsection 715.32(2) of the *Code* to assist in making this determination.

Law (Cham, Switzerland: Palgrave Macmillan, 2022) 19 at 22-23.

²⁸ See *Criminal Code*, *supra* note 2, s-s. 467.1(1) *sv* “criminal organization”.

²⁹ *Ibid*, at s-s. 83.01(1).

³⁰ See *Criminal Code*, *ibid*, s-s. 467.1(1) *sv* “serious offence”.

³¹ See *R. v. Venneri*, 2012 SCC 33, [2012] 2 SCR 211, *per* Justice Fish, writing for the Court. This case makes it reasonably clear that the provision is designed to deal with what might be typically referred to as “organized crime”, it is not meant to overwhelm other types of liability provided for in the *Criminal Code* (such as aiding and abetting, conspiracy, and counseling). However, the court does make clear that the organization required to meet the definition of a “criminal organization” is to be applied “flexibly”.

³² See *Criminal Code*, *supra* note 2, para. 715.32(1)(c).

This list is admittedly non-exhaustive.³³ Below, I will set out each factor,³⁴ and then comment on what I believe the factor is attempting to accomplish. The opening words of the subsection are provided immediately below. The direct wording of the statute is provided in bold font.

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

(a) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities ~ If senior members of the organization come forward and report wrongdoing of which the government was previously unaware, it is more likely that it would be in the public interest that negotiations with respect to a remediation agreement be entered into. If, on the other hand, senior members of the organization become aware of the wrongdoing which formed the basis of the underlying offence, and instead of coming forward, wait for the authorities to become aware of the wrongdoing through other sources, it is less likely that the negotiation of a remediation agreement would be in the public interest;

(b) the nature and gravity of the act or omission and its impact on any victim ~ The more serious the impacts of any victim (and presumably, the greater the number of victims who are seriously impacted by the wrongdoing), the less likely it would be in the public interest for there to be a negotiation with respect to a remediation agreement. If a small number of people are only moderately affected by the wrongdoing, it is more likely that the negotiation of a remediation agreement would be in the public interest;

(c) the degree of involvement of senior officers³⁵ of the organization in the act or omission ~ Senior officers are management-level employees of

³³ *Ibid*, para 715.32(2)(i).

³⁴ *Ibid*, s-s. 715.32(2).

³⁵ The term “senior officer” is defined under the *Criminal Code*. The definition reads 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”. See the *Criminal Code*,

an organization. The involvement of senior officers in the wrongdoing that constitutes the offence (in terms of *actus reus*, or *mens rea* or both when we are concerned with *mens rea* offences,³⁶ or knowledge of the wrongdoing of other persons associated with the organization,³⁷ or the individual or collective criminal negligence of a senior officer or the senior officers collectively³⁸). Clearly, given that senior officers are a necessary conduit to the organization, there will always be at least one senior officer involved in the offence to a greater or lesser degree.³⁹ But, if criminal behavior were

ibid, s. 2 *sv* “senior officer”.

³⁶ On this point, see s. 22.2 of the *Criminal Code*, *ibid*.

³⁷ On this point, see, in particular, para. 22.2(c) of the *Criminal Code* which provides 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.”

³⁸ On this point, see, in particular, s. 22.1 of the *Criminal Code* which provides as follows: “22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if (a) acting within the scope of their authority (i) one of its representatives is a party to the offence, or (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and (b) the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.”

³⁹ Some people might suggest that the wording of paragraph 22.2(c), reproduced *supra* note 37, there is not “participation” in the offence. In my view, the choice to do nothing, with the specific intent of benefiting the organization through one’s inaction is a form of participation, at least as I use the term here.

This approach is also consistent with the judgment of *R. v. Pétroles Globales*, 2013 QCCS 4262 [*Pétroles Globales*], at para. 212, *per* Justice Tôth. The judgment in the case is in French. The relevant paragraph (as translated into English) reads as follows: “Payette himself participated in the collusion (para. 22.2(a) of the *Criminal Code*) and allowed the territory managers participate in the collusion with his knowledge and without intervening (para. 22.2(c) of the *Criminal Code*).” I speak French, and I believe that the translation is accurate. Nonetheless, I must give others the opportunity to dispute my translation. The original judgment in the relevant part reads as follows: “Payette a participé lui-même à la collusion (art. 22.2 a) C. cr.) et a laissé les gestionnaires de territoire participer à la collusion à sa connaissance sans intervenir (art. 22.2 c) C. cr.)”

widespread and even perhaps part of the business model of an organization, this would provide a strong reason not to allow an organization to enter into negotiations with respect to a potential remediation agreement. Conversely, if a single senior officer was merely aware of the wrongdoing of another representative of the organization, and did not take appropriate steps to prevent it, while the remaining senior officers were unaware of the wrongdoing, and would have stopped it had they been aware, this may be a reason why entering into negotiations with respect to a potential remediation agreement might be appropriate;

(d) whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission - For me, this element is the most perplexing. Typically, prosecutors would seek to have smaller players in a criminal enterprise provide information as to the wrongdoing of larger players, in order to accumulate evidence against the larger players for the purposes of prosecution and conviction. In order to provide a prudential incentive for the smaller player to provide this information and evidence, reduced sentences for the smaller players (that is, reduced punishment) can be a powerful tool. However, here, it seems as though this general approach has been turned on its head. One of the reasons that we have organizational criminal liability at all is the recognition that organizations have a massive impact on the social and economic fabric of any advanced society. In *Canadian Dredge & Dock Co. v. The Queen*,⁴⁰ Justice Estey, writing for the Supreme Court of Canada, put it as follows:⁴¹

In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person. That is to say that the doctrine of *respondet superior* is unknown in the criminal law where the defendant is an individual. Lord Diplock in *Tesco, supra* [⁴²], stated at p. 199:

Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done,

⁴⁰ [1985] 1 S.C.R. 662.

⁴¹ *Ibid.*, at paras. 31-32.

⁴² *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153 (H.L.).

criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent; because it does not ascribe to him his agent's state of mind. *Qui peccat per alium peccat per se* is not a maxim of criminal law.

On the other hand, the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person.

The final portion of this quotation makes clear that at least part of the reason for organizational criminal liability in Canada was a recognition that leaving corporate activity outside of the ambit of the criminal law would be to ignore an essential part of activity within Canadian society. Put another way, Justice Estey seems to be acknowledging that the ubiquitous presence of the corporation in the lives of modern citizens made it important that the criminal law could hold the corporation accountable for wrongdoing. Even modern history is replete with examples where corporate wrongdoing would have effects that reached far beyond those who had invested in a particular corporation. Individual corporations have much power.⁴³ The corporation as an institution has even more.⁴⁴

If the corporate or other organizational actor is the most powerful determinant of the behaviour found to be criminal, this provision appears to be allowing the most powerful actor (the organization) to lessen its own punishment by punishing its subordinates. This is the inverse of what one would ordinarily expect in a situation where only individuals were involved. In the situation of individuals, those on the periphery of the wrongdoing who are guilty of criminal wrongdoing are offered a plea deal (usually with a guilty plea to a lesser charge, with a lesser sentence attached, or recommended by the prosecution at sentence) to provide evidence against those who are more involved in the same or more serious criminal wrongdoing.

⁴³ For example, SNC Lavalin's market capitalization is 4.287 billion dollars. See Yahoo, "SNC-Lavalin Group Inc. (SNC.TO)" (21 July 2022), online: *Yahoo Finance* <[SNC-Lavalin Group Inc. \(SNC.TO\) Stock Price, News, Quote & History - Yahoo Finance](https://perma.cc/H3EE-SVKR)> [https://perma.cc/H3EE-SVKR].

⁴⁴ On this point, see Joel Bakan, *The Corporation: Pathological Pursuit of Profit and Power* (Toronto: Viking, 2004).

But, on its face, this section allows an organization to improve its chances of avoiding punishment altogether⁴⁵ by, in essence, imposing hard treatment on its subordinates. This is in essence the reverse of what is expected to happen when only individuals are involved in the criminal wrongdoing. If the organization in essence imposes hard treatment on individuals (in the form of lost jobs and thus, reduced earning potential), the state (however one would choose to define that term) might be saved the cost of a trial. If the most powerful actor in the piece (the organization) is willing to impose harsh treatment on its own subordinates, the organization is more likely to be spared punishment.

To me, this is particularly problematic given the opening words to section 22.2 of the *Criminal Code*, which read as follows:⁴⁶

⁴⁵ For the purposes of this paper, any consequences visited upon the organization is not punishment. There are at least two reasons for this. First, it is not punishment because it does not fit the definition of punishment. In brief, the *Criminal Code* is generally based on a retributivist model of punishment that closely mirrors the approach offered by punishment theorist Andrew von Hirsch. On this connection between von Hirsch's approach and the *Code*, see Julian V. Roberts & Andrew von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing" (1995) 37 *Crim. L.Q.* 220 at 226-227.

According to von Hirsch, punishment contains two necessary elements: (i) hard treatment; and (ii) censure. The first of these is generally thought of as a deprivation of some sort (such as the loss of liberty by the imposition of imprisonment, or the loss of financial wherewithal through the imposition of a fine). The second is a statement of moral culpability for wrongdoing. Hard treatment without a message of moral culpability is not punishment.

In the case of organizational wrongdoing, the distinction is an especially important one. Imagine a situation where a corporate customer is killed by the product that the corporation produces. The dead consumer's family sues for wrongful death resulting from a manufacturing defect negligently produced by the corporation. Notwithstanding the name of the tort, the civil liability in such a situation is not the label of "criminal", which would be the consequence if the corporation were pursued criminally. The monetary consequences might be the same (or, even more paradoxically, more severe than the criminal fine for the same behaviour). The tort system even recognizes that the goal of the tort is generally the compensation of victims. When the actions of the tortfeasor are reprehensible to the court, the court may award punitive damages, that is, an award of money designed specifically to punish the tortfeasor for the reprehensible conduct. On this point, see, for example, Philip H. Osborne, *The Essentials of Canadian Law – The Law of Torts*, 6th ed. (Toronto: Irwin Law, 2020) at 6-7.

⁴⁶ See *Criminal Code*, *supra* note 2, s. 22.2.

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.

An organization can only be convicted of a *mens rea* offence where the actions of a senior officer were intended to benefit the organization. Now, an organization can avoid punishment by imposing hard treatment on a representative of the organization (which, by definition, includes all senior officers of the organization⁴⁷) who, by definition must have been seeking to benefit the organization. This does seem somewhat perverse, in

⁴⁷ The definition of “senior officer” requires that each and every senior officer of the organization also be a “representative” of the organization. The definition of “senior officer” makes certain specific inclusions, including directors, the chief executive officer, and the chief financial officer. However, as a general rule, these specific inclusions would, in most cases at least, be representatives of the organization in any event. The only possible exception to this would be a director. Directors are officeholders, and would typically not be considered employees of the organization, at least not for the purposes of employment law. However, most directors would be receiving compensation from the corporations of which they are directors, and therefore would be in some sort of contractual relationship with the organization. Most likely, therefore, directors could be argued to usually fall within the definition of “representative” by virtue of being a “contractor” with the organization. However, for the limited purposes of this paper, I will simply say that the vast majority of senior officers of an organization will clearly be representatives thereof, and leave aside a small minority of senior officers who might be caught by the specific inclusions within that definition, and not technically be “representatives” of the organization.

that the organization is being rewarded for imposing consequences on those that were intending to benefit it,⁴⁸ admittedly, by illegal conduct.⁴⁹

Perhaps a better way to confront this issue would be to look at whether the individual who committed the wrongdoing was handsomely rewarded (in the form of bonuses, promotions and other pecuniary and non-pecuniary benefits) related to the criminal wrongdoing from the organization. If the direct wrongdoer was handsomely rewarded, and those above him or her were not examining his or her methods for achieving these results, then perhaps this is a reason not to provide the opportunity to negotiate a remediation agreement.

On the other hand, if the direct wrongdoer was not heavily compensated for his or her efforts, and the wrongdoer's superiors within the organization had a proper set of internal controls (with respect to which the direct wrongdoer took tremendous care not to trip any alarm bells),

⁴⁸ Paragraph 715.33(1)(e) provides as follows: "715.33 (1) If the prosecutor wishes to negotiate a remediation agreement, they must give the organization written notice of the offer to enter into negotiations and the notice must include: ... (e) an indication that negotiations must be carried out in good faith and that the organization must provide all information requested by the prosecutor that the organization is aware of or can obtain through reasonable efforts, including information enabling the identification of any person involved in the act or omission that forms the basis of the offence or any wrongdoing related to that act or omission;"

Thus, whether or not an organizational offender provides all the relevant information with respect to the offences prior to the negotiation of a potential remediation agreement, the offender is required, as part of the execution of any such agreement, to provide all information requested by the prosecutor. At some level, it seems somewhat redundant to ask oneself whether an offender has volunteered information which, if a remediation agreement is negotiated, and the prosecutor asks for such information, the organizational offender is required to provide it. Despite this apparent redundancy, both paragraphs (paragraph 715.32(2)(f), on the one hand, and paragraph 715.33(1)(e), on the other) are statutory requirements under the *Criminal Code*. As a result, both provisions must be given effect whenever possible as a matter of statutory interpretation. On this point, see Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Markham, Ontario: LexisNexis Canada Ltd, 2022), at §11.02.

⁴⁹ The point of this assertion is not to doubt the illegality of the underlying conduct. Rather, the more important point is that once the organization has already benefited from the wrongful conduct of the senior officer (because, according to the opening words of section 22.2 of the *Criminal Code*, *supra* note 2, the intent of the senior officer must be to benefit the organization) the organization can then disavow both the senior officer (and presumably the benefits as well) in order to reduce responsibility in the criminal law. Also, the corporation is, as a general rule, the more powerful actor, as compared to its employee.

there may be a more compelling reason to consider that it might be in the public interest to negotiate a remediation agreement;

(e) whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions; ~ Unlike the discussion of the prior provision, this provision makes perfect sense to me. Just as a sentencing judge would take into account the demonstration of true remorse by an individual offender, the demonstration of true remorse by an organizational offender would seem to be an appropriate factor to take into account in determining whether the potential admission to a diversionary program (such as the commencement of the negotiation of a remediation agreement) would be appropriate in the circumstances. One way for an organization to show true remorse is to take steps to remedy the harm done to victims;

(f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission; ~ To some, this may appear very similar to paragraph (d) discussed above. In my view, it is not. Paragraph (d) is about the organization imposing harsh treatment on its subordinates. Paragraph (f), on the other hand, is about an offender seeking to enter a diversionary program being required to provide all the information that the offender has about the relevant criminal activity. What the state chooses to do with that information (after it is provided by the offender) is up to the state. Moreover, if the state chooses to act on the information provided by the organization, and lay criminal charges against subordinate players within the organization, the individual subordinate can challenge the imposition of punishment by means of a criminal trial, including all of the procedural protections offered by the *Criminal Code*, the Constitution (especially the *Charter*⁵⁰) and the relevant jurisprudence. Forcing⁵⁰ an offender who wishes to avoid punishment to provide information is very different than providing an incentive to impose harsh treatment in an effort to avoid potential punishment itself;

⁵⁰ *Infra* note 67.

(g) whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions; ~ This paragraph is ambiguous. First, it would seem to put two separate but related elements into the same paragraph. The first element would seem to be focused on prior regulatory sanction. If one were to read the paragraph as ending at the words “regulatory body”, does this suggest that a prior regulatory holding against an organization would make a remediation agreement more or less likely to be entered into? This is not merely hypothetical. In fact, one of the early cases under the organizational criminal liability amendments⁵¹ involved such facts. In *R. v. Metron Construction*,⁵² serious culpable workplace negligence was committed by a site supervisor.⁵³ The organization (Metron) pled guilty to one count of criminal negligence causing death⁵⁴ in the deaths of four employees, and serious injuries to another.⁵⁵ The negligent use and subsequent collapse of a “swing stage” (a movable platform used in the construction and repair of high-rise buildings⁵⁶) was at the heart of the issue. The sentencing judge considered jurisprudence under the *Occupational Health and Safety Act*⁵⁷ in dealing with the sentencing of the organizational offender.⁵⁸ Though consideration was allowed,⁵⁹ Justice Pepall, writing for the Court of Appeal, held that the application on these facts was incorrect:⁶⁰

⁵¹ See *An Act to Amend the Criminal Code (criminal liability of organizations)*, SC 2003, c. 21, s. 2, now *Criminal Code*, *supra* note 2, s 22.1.

⁵² *R v Metron Construction Corporation*, 2012 ONCJ 506, *per* Justice Bigelow [Metron CJ], *rev'd* 2013 ONCA 541, *per* Justice Pepall, for the Court [Metron CA].

⁵³ Metron CA, *ibid*, at paras. 8-13.

⁵⁴ *Criminal Code*, *supra* note 2, s. 220.

⁵⁵ Metron CA, *supra* note 52, at para. 1.

⁵⁶ *Ibid*, at paras. 7-8.

⁵⁷ RSO 1990, c O.1.

⁵⁸ Metron CJ, *supra* note 52, at paras. 23-29.

⁵⁹ Metron CA, *ibid*, at para. 89.

⁶⁰ Metron CA, *ibid*.

In my view, while the sentencing judge was entitled to consider the range of sentences under the OHSA, reliance on the OHSA regulatory jurisprudence and the resulting imposition of a \$200,000 fine (which itself was at the lower end of the OHSA range for fatality cases) reflect a failure to appreciate the higher degree of moral blameworthiness and gravity associated with the respondent's criminal conviction for criminal negligence causing death and the principle of proportionality found in s. 718.1 of the Code. This was in error.

One of the principals of the organizational offender⁶¹ pled guilty to violations under the OSHA⁶² on these facts.⁶³ In other words, this was clearly a case where (although there was no remediation agreement in issue⁶⁴) the fact at issue could be dealt with either through a regulatory framework (that of the OSHA⁶⁵), or under the *Criminal Code*,⁶⁶ or both. Since this is clearly possible, if the organization or any of its representatives has been convicted of a regulatory violation, is this a reason not to allow the offender to enter into a remediation agreement? Alternatively, since the offender has clearly been punished under law (although admittedly not as a criminal), does the punishment that the offender has already suffered create a greater incentive to allow the offender to enter into negotiations with respect to the true criminal offences that may arise from the same facts? In my view, the opening words of the paragraph (namely, paragraph 715.32(2)(g)) do not resolve this issue.

If I were called upon to resolve this, my own view is that the former approach is the better one, namely, that a regulatory conviction is a reason to be less likely to enter into negotiations with respect to a remediation agreement. The label of "criminality" is the highest label of immorality that can be placed upon the action of an offender. Put another way, labeling something as "criminal" shows the importance that, as a society, we place on preventing its recurrence. Given that organizational offenders cannot be meaningfully subject to the most severe punishment recognized by the criminal law in Canada (that is, imprisonment), the public statement of the

⁶¹ Metron CA, *ibid*, at para. 3.

⁶² *Supra* note 57.

⁶³ Metron CA, *supra* note 52, at para. 24.

⁶⁴ The case arose, and was decided, prior to 2018, when the remediation agreement regime was added to the *Criminal Code*.

⁶⁵ *Supra* note 57.

⁶⁶ *Supra* note 2.

breach of the criminal law is all the more important when we choose between potential penalties. This should mean that the conviction for a regulatory breach under provincial statute, while important, should not lessen the importance of the highest level of sanction, that is, the criminal law. Rather, the decision to plead guilty to a regulatory violation is proof of specific wrongdoing by the organization. It makes it easier to prove a criminal violation. Proving that criminal violation may be all the more important to ensure that society knows the powerful organizations cannot avoid the consequences of breaching our criminal law by accepting regulatory sanction.

Of course, the converse argument is also available. If society is punishing the same wrongdoing twice (once by regulatory sanction, and a second time by the imposition of the criminal sanction), it can be argued that the totality of the sanctions are important to ensure that the punishment is not disproportionate.⁶⁷

(h) whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and ~ In my view, this provision is also ambiguous. Read broadly, any allegation of any offence by anyone who also serves as a representative of the organization may be a reason not to enter into negotiations of a potential remediation agreement. In my view, this would be to read the section far too broadly. The better view would be to

⁶⁷ Interestingly, the Supreme Court of Canada recently decided that s. 12 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule “B” to the *Canada Act, 1982*, U.K. 1982, c. 11 [the “*Charter*”], which prohibits cruel or unusual treatment or punishment, did not apply to corporations, and presumably other organizations either, because cruelty could not be felt by a non-human actor. On this point, see *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, per Justices Brown and Rowe, in joint reasons, for the majority. The concurring reasons of Justice Abella, although dissenting on other issues, agreed on this point, as did the concurring reasons of Justice Kasirer, who felt that it was not necessary to address the issues on which the majority reasons (written jointly by Justices Brown and Rowe) disagreed with those of the minority (written by Justice Abella).

Nonetheless, despite the fact that there is not a constitutional guarantee which can be accessed by organizations to ensure that they can prevent grossly disproportionate sentence is, it is still true that the Canadian sentencing regime is based on a theory of sentences that are proportionate to both the gravity of the harm done as a result of the offence, and the responsibility of the offender. On this point, see the *Criminal Code*, *supra* note 2, s. 718.1.

read this provision as dealing only with offences arising out of facts that are directly related to the organization's past conduct. In other words, where a representative of the organization has, in his or her capacity as a representative of the same organization, committed other misdeeds, whether charged or not, which are legitimately connected to his or her role within the organization, these other misdeeds may be considered in determining whether the organization is a proper candidate for the potential negotiation of a remediation agreement. Nonetheless, for example, the fact that a representative of an organization was involved in a bar fight 10 years prior to the offences being considered for a possible remediation agreement now, and was convicted of simple assault⁶⁸ as a result of his or her actions, is not relevant to the discretion given to the prosecutor under Part XXII.1 of the *Criminal Code* now. This is particularly so if the individual who is now a representative of the organization was not a representative of the organization at the time of the offence for which he or she was convicted.

However, it is also possible to read the paragraph too narrowly. In my view, this would occur where the consideration of prior offences was restricted to those offences potentially arising out of the same set of facts. In my view, to decide whether an organization would be entitled to a diversionary outcome in the form of a remediation agreement, all of its prior conduct which might be chargeable to the organization (whether in the form of regulatory offences, or offences under the *Criminal Code*) would be a legitimate consideration in determining whether it would be in the public interest to negotiate a potential remediation agreement with the organization.

(i) any other factor that the prosecutor considers relevant. ~ This provision is quite broad. In fact, one can scarcely imagine broader statutory language for the consideration of any factor that might reasonably be considered objectively relevant to the decision to enter into negotiations with an organizational offender. However, the breadth of this provision is

⁶⁸ See *Criminal Code*, *supra* note 2, s. 265. For more detailed discussion of the elements of the crime of assault, as interpreted by the Supreme Court of Canada, see also *R. v. Jobidon*, [1991] 2 SCR 714, *per* Justice Gonthier, writing for the majority. The *Jobidon* case is mentioned specifically to show that it is usually necessary to look beyond the wording of the statute, and to also consider the judicial interpretation of the words used, in order to fully understand the meaning of the relevant section of the *Code*.

subject to the interpretation of subsection 715.32(3) of the *Criminal Code*, which provides as follows:

(3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of, 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 provision clearly limits the ability of prosecutors to consider all relevant factors where the allegations include offences that could be charged under the *Corruption of Foreign Public Officials Act*.⁶⁹ However, by its terms, subsection 715.32(3) does not affect the potential application of paragraphs 715.32(2)(a) through (h). Thus, it seems as though all of the discussion of those provisions remains valid, even where an organization is charged with the corruption of foreign public officials.

Nonetheless, parts of this provision (subsection 715.32(3)) remain difficult to interpret. For example, how can one reasonably be expected to determine what other factors are appropriate to be considered under paragraph 715.32(2)(i) if the prosecutor is not allowed to consider “the identity of the organization ... involved”? Clearly, a number of the prior paragraphs in subsection 715.32(2) demand knowledge of the prior actions of the organization with respect to which a remediation agreement is being considered. Therefore, it is unclear to me how, given the wording of subsection 715.23(3), paragraph 715.23(2)(i) could ever be applied to a situation where the *Corruption of Foreign Public Officials Act* is involved.⁷⁰

Assuming that the individual prosecutor believes that it is in the public interest to begin negotiations with the organizational offender, there is still one additional step that must be taken prior to the commencement of negotiations. This is that the Attorney General in the relevant jurisdiction must agree to the commencement of negotiations. The exact wording of the relevant provision is as follows: “**715.32 (1)** The prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence if the following conditions are met: ... (d) the Attorney General⁷¹ has consented to the

⁶⁹ *Supra* note 7.

⁷⁰ *Ibid.*

⁷¹ This is not as clear as one might think. The definition of “Attorney General” under

negotiation of the agreement.” It is this provision that led to a significant scandal for the government of the day, when the Prime Minister apparently tried to influence the Attorney General of Canada to exercise her discretion

the *Criminal Code*, is provided for in s. 2 of the *Code*: “Attorney General (a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his or her lawful deputy or, if those proceedings are referred to in subsection 2.3(1), the Attorney General of Canada or the Attorney General or Solicitor General of the province in which those proceedings are taken and includes the lawful deputy of any of them, (b) means the Attorney General of Canada and includes his or her lawful deputy with respect to (i) Yukon, the Northwest Territories and Nunavut, or (ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of an offence under any Act of Parliament – other than this Act or the *Canada Elections Act* – or any regulation made under such an Act, and (c) means the Director of Public Prosecutions appointed under subsection 3(1) of the *Director of Public Prosecutions Act* with respect to proceedings in relation to an offence under the *Canada Elections Act*”. Paragraph (a) of the definition refers to s. 2.3(1), which provides in part as follows: “2.3 (1) The proceedings for the purposes of paragraph (a) of the definition Attorney General in section 2 are (a) proceedings in relation to an offence under subsection 7(2.01), (2.3) or (2.31) or section 57, 58, 83.12, 103, 104, 121.1, 380, 382, 382.1, 391, 400, 424.1, 431.1, 467.11 or 467.111 or in relation to any terrorism offence”. For current purposes, the most relevant of these offences is that of fraud (s. 380 of the *Code*). This means that with respects to fraud, both the provincial Attorney General in the province where the proceedings are taken up (pursuant to paragraph (a) of the definition of Attorney General under the *Code* directly), and the federal Attorney General (pursuant to the combination of both paragraph 2.3(1)(a) of the *Code* and paragraph (a) of the definition of Attorney General under the *Code*) both maintain jurisdiction and the ability to institute proceedings. When this is applied to remediation agreements, a potential problem arises. If a provincial Attorney General wants to enter into negotiations with respect to a remediation agreement with an organizational offender within provincial jurisdiction, and the federal Attorney General wishes to not do so (presumably because the federal Attorney General believes that it is not in the public interest to do so), can a remediation agreement be negotiated or not? It is beyond the scope of this paper to attempt to resolve this question here. Nonetheless, this issue is raised here to show that the remediation agreement regime has left unresolved several important questions, even in the wording used to establish the regime in the first place.

in favour of SNC-Lavalin,⁷² which would have allowed the negotiation of a remediation agreement for the corporation.⁷³

II. THE SNC-LAVALIN SCANDAL AND THE INTEGRITY REGIME

In recent jurisprudence,⁷⁴ parties related to SNC-Lavalin describe the company as follows, according to the Court:⁷⁵

The Applicants describe SNC-Lavalin as a global fully integrated professional services and project management company. SNC-Lavalin employs over 50,000 employees around the world, including many in Canada, who provide, among other things, 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.

⁷² See Canadian Press “Jody Wilson-Raybould resigns from cabinet”, *Maclean’s* (12 February 2019) online: <[Jody Wilson-Raybould resigns from cabinet - Macleans.ca](https://perma.cc/A986-QZM5)> [https://perma.cc/A986-QZM5] [Canadian Press, “Wilson-Raybould resigns”]; Geddes, *supra* note 3; *Trudeau II Report*, *supra* note 4. Interestingly, it is not clear that the line prosecutor was in favour of entering into negotiations with SNC-Lavalin pursuant to the remediation agreement regime (thereby presumably fulfilling paragraphs 715.32(1)(a) through 715.32(1)(c) of the *Criminal Code*, *supra* note 2), and the Attorney General refused consent pursuant to para. 715.32(1)(d) or whether, as the head of the Department of Justice, Wilson-Raybould declined to order the line prosecutor to find that paragraphs 715.32(1)(a) through 715.32(1)(c) were fulfilled. *SNC-Lavalin Group Inc. v. Canada*, *infra* note 74, para. 4, suggests that the federal Director of Public Prosecutions made the decision not to enter into negotiations. In my view, little turns on this distinction. Either way, the same person did not force (or consent to) the negotiation of a potential remediation agreement.

⁷³ Some authors claim that there is a correct way and an incorrect path in the pursuit of a remediation agreement. See, for example, Kenneth Jull and the Honourable Mr. Justice Todd Archibald *Profiting From Risk Management and Compliance* (Toronto: Carswell, a Thomson Reuters business, 2019, looseleaf, as of July 2019), at 22-17, §22:40:30,

⁷⁴ *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FC 282, [2019] 3 FCR 327, *per* Justice Kane [*SNC-Lavalin Group Inc. v. Canada*].

⁷⁵ *Ibid.*, at para. 9.

Based on what was then alleged wrongdoing in Libya,⁷⁶ SNC was charged with fraud⁷⁷ under the *Criminal Code* and a violation of para. 3(1)(b) of the *Corruption of Foreign Public Officials Act*.⁷⁸ SNC-Lavalin seemed to approach these charges on two major fronts. The first was preparing for the preliminary inquiry, and presumably, the potential trial to follow.⁷⁹ The second was to publicly lobby the government to enter into negotiations with the company, with the intention of entering into a remediation agreement.⁸⁰ The company even went so far as to take out ads in a national newspaper, making its case for why the government should enter into negotiations with respect to the terms of a potential remediation agreement with the company.⁸¹ A third reaction of SNC, where it explicitly attempted to use the courts to get what it wanted, will also be discussed in greater detail below.

One can certainly question the efficacy of using public mass media as a messenger when trying to convince the government of the day to do something, where the media campaign involves an admission of criminal wrongdoing. After all, one of the criteria that needs to be considered before inviting an organizational offender to enter into negotiations with respect to a potential remediation agreement is that it is in the public interest to do so. When the public has been advised, through the campaign of the organizational offender through mass media sources, that the offender is either admitting guilt or coming very close thereto, the idea of public sympathy for the offender is lessened. In fact, the reverse might have been true. When I saw the advertisement taken out by the company stating its case to the public, my first reaction was to equate the company to a child throwing a tantrum. As most parents will already be aware, if a parent

⁷⁶ See for example, Catharine Turney, “As RCMP lies in wait, legal minds ponder whether SNC-Lavalin scandal warrants criminal probe”, CBC News (1 March 2019), online: [https://perma.cc/FCJ6-VHT2].

⁷⁷ *Criminal Code*, *supra* note 2, s-s. 380(1). See also, *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74, para. 10.

⁷⁸ *Supra* note 7.

⁷⁹ *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74, para. 10.

⁸⁰ SNC Lavalin, News Release, “An open letter to Canadians” (19 October 2018) *Globe and Mail* at A6.

⁸¹ SNC Lavalin, News Release, “Thank you for considering our position” (26 October 2018) *Globe and Mail* at A7.

surrenders too often to tantrum behaviour, this only encourages further bad behaviour to achieve what the child wants. Similarly, if the goal is to show that criminal sanction is unnecessary because of the genuine desire of the offender to resolve the harm done (to the extent possible), there is little reason to complain publicly. This is not to suggest that my view is correct, but rather, that public relations of this type can backfire.

Jodi Wilson-Raybould was the Attorney General of Canada when the issues with SNC began.⁸² She was also the first person of Indigenous heritage to hold the position of federal Minister of Justice.⁸³ In public statements, the Prime Minister of Canada, the Right Honourable Justin Trudeau, made it clear that he was very interested in protecting the jobs of employees in Quebec, specifically in response to a question regarding SNC-Lavalin.⁸⁴ Later, Attorney General Wilson-Raybould indicated that she would not consent to the commencement of negotiation of a potential remediation with SNC.⁸⁵ As most Canadians will be aware, in general, Cabinet members are selected from among the members of the caucus of the governing party,⁸⁶ in this case, the Liberal Party of Canada. Thus, the Attorney-General is, to a certain extent, an overtly political actor. It is also clear that the choice of whether to enter into negotiations with respect to a potential remediation agreement is one that is within the discretion of the

⁸² See Canadian Press, “Wilson-Raybould resigns”, *supra* note 73; Peter Zimonjic “After year of political turmoil, SNC-Lavalin gets most of what it wanted in plea deal”, *CBC News* (18 December 2019) online: <[After year of political turmoil, SNC-Lavalin gets most of what it wanted in plea deal | CBC News](https://www.cbc.ca/news/politics/snc-lavalin-plea-deal-1.5388888)> [<https://perma.cc/7B2X-5YAF>] [Zimonjic].

⁸³ See Sandie Rinaldo “A rare look inside the private life of Jody Wilson-Raybould”, *CTV News* (12 November 2021) online: <[Jody Wilson-Raybould: A rare look inside the private life of the former justice minister and attorney general | CTV News](https://www.ctvnews.ca/story/politics/2021/11/12/jody-wilson-raybould-private-life-1.5888888)> [<https://perma.cc/NN9C-2D6C>].

⁸⁴ See The Canadian Press “Timeline: SNC-Lavalin and Jody Wilson-Raybould”, *CBC News* (14 August 2019) online: <[Timeline: SNC-Lavalin and Jody Wilson-Raybould | CBC News](https://www.cbc.ca/news/politics/snc-lavalin-timeline-1.5388888)> [<https://perma.cc/5P2N-HWE5>] [Canadian Press, “Timeline”]; Mark Gollum “What you need to know about the SNC-Lavalin affair”, *CBC News* (13 February 2019) online: <[What you need to know about the SNC-Lavalin affair | CBC News](https://www.cbc.ca/news/politics/snc-lavalin-affair-1.5388888)> [<https://perma.cc/25TJ-JKBD>] [Gollum].

⁸⁵ See *Canadian Press*, “Timeline”, *ibid*; Gollum, *ibid*.

⁸⁶ For example, Attorney General Wilson-Raybould represented the federal riding of Vancouver Granville in British Columbia.

government.⁸⁷ When an overtly political actor is given discretion over a decision, there is often a suggestion that the effect of the decision on the electoral politics may be given too much weight in the decision-making. In some of the news coverage of the SNC affair, it was implied that the Prime Minister's interest in the issues around a potential remediation agreement may have been based on the importance of Quebec in Canadian federal elections, though this is not explicitly discussed.⁸⁸

As one media report later put it:⁸⁹

At the centre of the controversy were claims that Prime Minister Justin Trudeau and his office attempted to bully Wilson-Raybould into offering a deferred prosecution agreement [remediation agreement] to the Quebec engineering firm [SNC-Lavalin] that would have shielded it from prosecution on corruption charges. Wilson-Raybould refused to grant the agreement and was demoted to the Veterans Affairs ministry before she resigned.

The allegations of political interference prompted a parliamentary inquiry that eventually led to the departure of Wilson-Raybould and her close friend Jane Philpott from cabinet [sic], the resignation of one of the prime minister's key aides and opposition calls for Trudeau to step down.⁹⁰

⁸⁷ *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74, at para. 8.

⁸⁸ See Gollum, *supra* note 75; Martin Patriquin “Conservatives hoped SNC-Lavalin would sour Quebecers on Trudeau. Instead, it endeared him to them”, *CBC News* (15 September 2019) online: <[Conservatives hoped SNC-Lavalin would sour Quebecers on Trudeau. Instead, it endeared him to them | CBC News](https://perma.cc/8T97-TXEF)> [https://perma.cc/8T97-TXEF]; Jim Warren “WARREN: The SNC-Lavalin mess is all about Quebec votes”, *Toronto Sun* (16 February 2019) online: <[WARREN: The SNC-Lavalin mess is all about Quebec votes | Toronto Sun](https://perma.cc/6L97-ZHVN)> [https://perma.cc/6L97-ZHVN].

⁸⁹ Ryan Patrick Jones, “Jody Wilson-Raybould won't run in next election, denounces 'toxic' environment in Parliament - Wilson-Raybould kicked out of the Liberal caucus in 2018 during the SNC-Lavalin scandal” *CBC News* (08 July 2021), available online: <https://www.cbc.ca/news/politics/jwr-won-t-run-next-election-1.6094409>.

⁹⁰ There has been discussion in Parliament about the proper role of others in power when discussing a decision that is for the Attorney General to make. On this point, see Standing Committee on Justice and Human Rights of the House of Commons on February 25, 2019: <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence> (particularly relevant is the testimony of Prof. Marty Condon on this point). For academic commentary, see also, Andrew Flavelle Martin, “The Legal Ethics Implications of the SNC-Lavalin Affair for the Attorney General of Canada” 67 *Criminal Law Quarterly* 161, particularly at 164-165

The point I am trying to make here is more basic. Whatever the rules that technically

Thus, the Attorney General was first shuffled out of the Department of Justice (and moved to become Minister of Veterans' Affairs, a lower-profile position in the federal Cabinet). Shortly after, she resigned from Cabinet altogether.⁹¹ The Ethics Commissioner for the federal government would launch an investigation into the matter, and then later determine that undue pressure had been placed on Attorney General Wilson-Raybould by the Prime Minister's office.⁹² The Prime Minister had denied any pressure was placed on Attorney General Wilson-Raybould as soon as the ethics investigation had been launched.⁹³

In addition to preparing for trial and seeking to entice the government of the day to enter into negotiations with respect to a potential remediation agreement through a public relations campaign, SNC-Lavalin also took a third approach to its legal concerns. The company alleged in court that the

apply to this type of decision, the Prime Minister generally has the right to shuffle Cabinet. Such a shuffle can and often will change decision-makers on a variety of issues. In the scandal, once the Prime Minister got a decision with which he appears to have not been in agreement, the power shuffle was used. A broader discussion on the rules that apply to decisions by the Attorney-General (and the appropriateness and application of these rules on the facts of the scandal) could be a tremendously fruitful line of inquiry. It is simply not my line of inquiry herein.

⁹¹ See Canadian Press, "Wilson-Raybould resigns", *supra* note 73; Zimonjic, *supra* note 82; Peter Zimonjic "Gerald Butts gives his version of Wilson-Raybould's shuffle to Veterans Affairs", *CBC News* (6 March 2019) online: <[Gerald Butts gives his version of Wilson-Raybould's shuffle to Veterans Affairs | CBC News](https://perma.cc/2UA9-RW4K)> [https://perma.cc/2UA9-RW4K]; Katie Dangerfield "Trudeau says Brison's departure caused Wilson-Raybould to be shuffled out as attorney general", *Global News* (15 February 2019) online: <[Trudeau says Brison's departure caused Wilson-Raybould to be shuffled out as attorney general - National | Globalnews.ca](https://perma.cc/7BCA-AZ64?view-mode=server-side&type=image)> [https://perma.cc/7BCA-AZ64?view-mode=server-side&type=image].

⁹² See *Trudeau II Report*, *supra* note 4. There have been questions and potential criticism of the Ethics Commissioner's role in this SNC-Lavalin affair, though some of it came in articles written prior to the issuance of this report. As an example of the timing issue, see Kate Bezanson, "Constitutional or Political Crisis: Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair" (2019), 52:3 U.B.C. L. Rev. 761, at 771, at note 28 thereof.

⁹³ See The Canadian Press "SNC-Lavalin CEO urged Ottawa to change anti-corruption rules", *CBC News* (5 March 2019) online: <[SNC-Lavalin CEO urged Ottawa to change anti-corruption rules | CBC News](https://perma.cc/X4YH-WF9Z)> [https://perma.cc/X4YH-WF9Z]; *Trudeau II Report*, *supra* note 4.

government was required to enter into negotiations with respect to a potential remediation agreement with it.⁹⁴

It sought judicial review of the decision of the Director of Public Prosecutions of Canada not to enter into negotiations with it. The company alleged that, as a matter of administrative law, the decision was both made by a public decision-maker and was unreasonable in substance. The unreasonableness of this decision was allegedly based on the fact that all of the objective criteria for the entering into of negotiations were at least allegedly met.⁹⁵ The government moved to have the application for judicial review struck out, because the judicial review had no reasonable prospect of success.⁹⁶

Justice Kane of the Federal Court of Canada (the court that would have jurisdiction to hear an application for judicial review with respect to the decisions of federal boards, commissions or other tribunals under the *Federal Courts Act*⁹⁷) held that the government was correct. While decisions made by government actors are subject to judicial review, this is not universally true. As the Court put it:⁹⁸

The jurisprudence noted above is merely a sample of a long line of cases that have clearly established that prosecutorial discretion is not subject to review by the Court and have established the broad scope of prosecutorial discretion, including providing examples of what is encompassed and noting that the examples are not an exhaustive list. The jurisprudence has also established that the role of the prosecutor is quasi-judicial. The prosecutor conducts the prosecution and all that is included with independence and without political or judicial interference. The Court does not act as a supervising prosecutor given the division of powers and the origins of prosecutorial discretion and because, as noted in *Krieger*, the Court would not be as competent as the prosecutor to consider the various factors involved in the specific decision.

The Court is staying out of the discretionary decision as to whether the government of the day should enter into negotiations with respect to a remediation agreement. I fundamentally agree with Justice Kane on this

⁹⁴ *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74, at para. 5.

⁹⁵ *Ibid*, at para. 6.

⁹⁶ *Ibid*, at para. 8.

⁹⁷ RSC 1985, c. F-7.

⁹⁸ *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74, at para. 87.

point. The negotiations, if there are to be any, must be conducted by two willing parties. Should the government decide, for any reason within its public-interest mandate, not to pursue negotiation of a remediation agreement with any particular organizational offender, the court is ill-equipped to step in and mandate such negotiations. Much like some areas of administrative law,⁹⁹ and certain areas of private law,¹⁰⁰ the courts are instead best-equipped to deal with unreasonable decisions made by the administrative state, or other actors.¹⁰¹

There is another element to the story of SNC-Lavalin, that has yet to be addressed herein. The federal government decided to create what it refers to as the “Integrity Regime”.¹⁰² In essence, the government of the day had decided that if individuals and organizations were charged with, or convicted of, certain types of criminal behaviour, these individuals and organizations would be debarred from receiving government money as contractors in the future.¹⁰³ The period of debarment would depend on the

⁹⁹ On this point, see, for example, decisions from the Supreme Court of Canada including *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, where the court was confident that the decision was unreasonable, and was therefore willing to step in and mandate that the administrative tribunal reconsider its decision.

¹⁰⁰ Court decisions with respect to the reasonableness of decisions reached by corporate directors (and the application of the business judgment rule) show that the court maybe ill-equipped to say what the universally “correct” decision might be, but they are willing to intervene where no reasonable justification for the decision of the directors can be offered. On this point, see, for example, *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 SCR 461; *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560; *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (Sup. Ct.), *aff’d* [2004] O.J. No. 636 (C.A.).

¹⁰¹ Some may question what should happen if a government, regardless of political stripe or ideology, were to simply ignore or refuse to follow the legal rules to which it is subject. The answer, at least to me, is a simple one. The courts have an obligation to ensure that government knows that the law of law applies to the government as well. Even if one is not invoking the *Charter*, *supra* note 67, government can be forced to follow its own laws, through, for example, writs of *certiorari* (invalidating decisions that have made contrary to law) and *mandamus* (requiring that decisions mandated by law actually be made). Government is subject to the rule of law. See *Roncarelli v. Duplessis*, [1959] SCR 121, at 142, *per* Justice Rand (Justice Judson concurring), as part of the majority in the result.

¹⁰² See Government of Canada, “Ineligibility and Suspension Policy” (14 July 2017), online: *Government of Canada* <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>> [<https://perma.cc/6G8L-BSEA>].

¹⁰³ *Ibid.*

seriousness of the offence.¹⁰⁴ SNC-Lavalin received a large amount of revenue from government contracts. Thus, an extended period of debarment would have had a serious impact on the organization. Of particular relevance in the case of SNC-Lavalin, violations of the *Corruption of Foreign Public Officials Act*¹⁰⁵ were sufficient to trigger the Integrity Regime.¹⁰⁶ Yet, in the end, the plea agreement reached in the case of SNC-Lavalin meant that even though SNC-Lavalin was willing to pay one of the largest criminal fines in Canadian criminal-law history (\$280 million), they were able to avoid a conviction under the *Corruption of Foreign Public Officials Act*,¹⁰⁷ thereby preventing the application of the Integrity Regime.¹⁰⁸ But this, in itself, shows one of the potential weaknesses of the Integrity Regime. While not all criminality is serious enough to warrant the application of a debarment procedure, should the Integrity Regime really be so flexible that its provisions can be avoided by a plea agreement which admits to the substance of the criminality to which the Integrity Regime is meant to apply, while nonetheless avoiding its application? While the issues surrounding the Integrity Regime, on the one hand, and those involving the remediation agreement regime, on the other, are separate, they are nonetheless interrelated. A detailed discussion with respect to the issues around the Integrity Regime will have to wait for another day.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Supra* note 7.

¹⁰⁶ See *Trudeau II Report*, *supra* note 4.

¹⁰⁷ *Supra* note 7.

¹⁰⁸ Some may argue that the plea agreement effectively achieves the same result as would the remediation agreement that was rejected by the Attorney General. At one level, this may on the surface appear to be true. It is arguable that the defendant suffered no greater negative consequences under the plea agreement than they would have received under the remediation agreement regime, had that regime been properly invoked. However, in my view, this argument misses two fundamental issues in coming to its conclusions. First, there is no question now that the defendant is in fact a criminal. The defendant cannot claim to be anything but what it is, that is, an entity that engaged in criminal wrongdoing for which it has been punished. Secondly, that punishment is public. For all of its attempts to avoid the conviction, its wrongdoing is transparently available for the public to understand, and for which the public can draw its own conclusions. Though a remediation agreement may or may not be public depending on the decision of the court in this regard (see *Criminal Code*, *supra* note 2, s-s. 715.42(2)), a judgment or the acceptance of a plea is public. These two factors convince me that there is value to the plea, even if the immediate consequences to the organization would have been identical.

III. ARE CHANGES NECESSARY OR ADVISABLE?

A. Introduction

As my analysis up to this point has hopefully made clear, my answer to this question is “yes”. To me, the SNC-Lavalin affair has exposed some basic problems in the way that the remediation agreement regime is set up under the *Criminal Code*.¹⁰⁹ Two of these problems are as follows: (a) the involvement of an overtly political actor (the Attorney General) in the decision to negotiate the remediation agreement; and (b) the lack of clarity with respect to the application of some of the factors to be used by a prosecutor in determining whether the public interest favours the entering into of such negotiations. While, in my view, there are other issues with the remediation agreement regime, these two issues come into sharp relief in the SNC-Lavalin affair. Other concerns arising out of the wording of the remediation agreement regime¹¹⁰ will have to be raised in different writing, in the hope of keeping this contribution within manageable bounds.

B. Political Actor

In my view, there are two basic problems with the idea of allowing an overtly political actor (in this case, the Attorney General) to exercise significant decision-making power in a discretionary area such as whether to enter into negotiations with respect to a remediation agreement with a potential organizational offender. The first is the fact that there are other prosecutors already involved in this decision-making process before it gets to the Attorney General. If the Attorney General is merely meant to be a more senior prosecutor who is providing quality control over more junior line prosecutors who are making day-to-day decisions about the prosecutions in which they are involved, there are clearly other, less political, actors who can fill that role. In fact, in the decision in the *SNC-Lavalin*¹¹¹ case at the Federal Court of Canada, the Attorney General was

¹⁰⁹ *Ibid*, Part XXII.1.

¹¹⁰ For an example of one such issue, see *supra* note 71.

¹¹¹ *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74.

not the named defendant; the Public Prosecutions Service of Canada (an administrative actor¹¹²) was the named defendant.¹¹³

Relatedly, even if one could legitimately make the argument that an Attorney General must be given the benefit of the doubt (as a matter of law) that his or her decisions as Attorney General were taken on the basis of the law as it then existed, rather than political considerations, a public-perception problem continues to exist. The maxim that “justice should not only be done, but should manifestly and undoubtedly be seen to be done” is often associated with a case in administrative law.¹¹⁴ Nonetheless, in my view, the various procedural and constitutional protections available in the realm of criminal law (not the least of which is the presumption of innocence¹¹⁵) demonstrate the importance of this maxim in the criminal sphere as well. In other words, the public perception matters. This is particularly so when the day-to-day head of the executive branch of government (the Prime Minister)¹¹⁶ makes clear that certain political and economic considerations were driving him toward a conclusion that negotiations toward a remediation agreement for a particular organizational criminal offender should be commenced. In such circumstances, the idea that the Attorney General would simply ignore the political outcomes that might arise from the decision and act against the

¹¹² See Public Prosecution Service of Canada, “About the PPSC” (Last modified 20 June 2022) online: PPSC <PPSC - About Us (ppsc-sppc.gc.ca)> [https://perma.cc/Q5KF-Q96G].

¹¹³ See the style of cause in *SNC-Lavalin Group Inc. v. Canada*, *supra* note 74. Though there can be little doubt that at least some of the people within the Public Prosecutions Service of Canada would be political appointees by the government of the day, these appointees would at least be somewhat more removed from political considerations than would Members of Parliament drawn from the caucus of the governing party.

¹¹⁴ See *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256 (KBD), at 259.

¹¹⁵ See, for example, *Woolmington v. Director of Public Prosecutions*, [1935] UKHL 1, *per* Viscount Sankey, L.C., for the House (discussing the importance of the presumption of innocence as a matter of English common law); and para 11(d) of the *Charter, supra* note 67, provides constitutional protection to the same right. The provision reads, in the relevant portion, as follows: “11 Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

¹¹⁶ Of course, certain roles, both ceremonial and otherwise, are given to the monarch, or her viceroy (the Governor-General) to complete. However, from both a political perspective, and, to a large extent a practical one, the Prime Minister rests at the head of the government.

avowed wishes of her *de facto* boss – remember that the Prime Minister has the ability to shuffle his Cabinet, and exercised it in the context of the facts described here – takes an unusual degree of fortitude. But, perhaps even more importantly, the fact that the next Attorney General (Attorney General Lametti) was questioned on whether his views were different from that of his predecessor (Attorney General Wilson-Raybould)¹¹⁷ on the same set of known facts suggests the political factors may have been more important than the legal ones.

The second element is the rule of law. The rule of law demands, among other things, that the discretion given to government actors is to be exercised in a manner consistent with the reasons for the grant of that discretion.¹¹⁸ As Justice Rand put it in a well-known decision of the Supreme Court of Canada:¹¹⁹

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

¹¹⁷ Rachel Aiello, "Justice system did its work': Current, former AGs react to SNC-Lavalin guilty plea" *CTV News* (18 December 2019), available online: <https://www.ctvnews.ca/politics/justice-system-did-its-work-current-former-ags-react-to-snc-lavalin-guilty-plea-1.4735511?cache=yesclipId10406200text%2Fhtml%3Bcharset%3Dutf-80404%2F7.578962%2F7.246408%2F7.281562>.

¹¹⁸ On this point, see the judgments of the majority in *Roncarelli v. Duplessis*, [1959] SCR 121.

¹¹⁹ *Ibid.*, at 140.

Prosecutors are given the right to decide whether to pursue prosecutions.¹²⁰ The prosecutor is supposed to put aside questions of winning or losing.¹²¹ In the SNC-Lavalin case, in my view, there were at least two matters that fell into the category of the rule of law. The first of these is that the correct decision-maker must make the decision. In issues regarding remediation agreements, the decisions are to be made by, first, front-line prosecutors (represented in court by the Director of Public Prosecutions), and then, by the relevant Attorney General. In my view, the argument here is not only that the substantive decision must be correct, but also that it must be made by the correct actor. In the SNC-Lavalin affair, it was clear that the federal Attorney General would have to consent before negotiations driven toward a remediation agreement could be commenced.¹²² For this purpose, I will deal with that as Jody Wilson-Raybould, who was the Attorney General when the matter came forward for original decision.¹²³ When she refused to order her staff to negotiate,

¹²⁰ See *R. v. Boucher*, [1955] SCR 16.

¹²¹ *Ibid* at 24.

¹²² *Criminal Code*, *supra* note 2, para. 715.32(1)(d).

¹²³ As mentioned earlier, there is an additional argument that it never even rose to the level of the Attorney General. There was news coverage that seemed to indicate that the Prime Minister wanted Attorney General Wilson-Raybould to order her staff prosecutors to negotiate a remediation agreement with SNC-Lavalin. On this point, see Robert Fife, Steven Chase & Sean Fine, “PMO pressed Wilson-Raybould to abandon prosecution of SNC-Lavalin; Trudeau denies his office ‘directed’ her” (last modified 8 February 2019), online: *Globe and Mail* <www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/> [perma.cc/2DWH-49WU].

If this description is accurate, the Attorney General's consent to negotiation (under paragraph 715.32(1)(d) of the *Criminal Code*, *supra* note 2) may technically not even have been reached because the other obligations of the line prosecutors under paragraph 715.32(1)(a) through 715.32(1)(c) had not yet been met, meaning that the Attorney General may not yet have had the right to consent. However, as the head of the federal Department of Justice, the Prime Minister clearly believed that the Attorney General would have the right to order his or her line prosecutors to behave in accordance with departmental guidance provided by the Attorney General. I suspect this is probably correct, but it is beyond scope of this paper to deal with whether or not any such potential order by the Attorney General to such effect would have had to have been followed by his or her subordinates. Nonetheless, the organization of the remediation agreement regime would seem to suggest that the consent of the Attorney General was necessary before a line prosecutor could begin to negotiate a remediation agreement. To accede to the alleged view of the Prime Minister, that the Attorney

she was removed from her office. Her successor, shortly after taking the office, indicated a different view from his predecessor on this very matter. Even if, as the Prime Minister claimed, Attorney General Wilson-Raybould was not removed from office because of her decision with respect to the potential for the negotiation of a remediation agreement with SNC-Lavalin, the abrupt reversal of the amenability of the Department of Justice after the change in leadership would lead a reasonable person to believe that the Prime Minister may have been looking for someone who was more amenable to his point of view with respect to the SNC-Lavalin file. Certainly, this leads to three questions: (a) Is seeking a decision maker in criminal law (the Attorney-General) in which the Prime Minister is not to have a say a valid reason for a Cabinet shuffle?; (b) If the answer to this is “yes”, are we still a country of laws, or are we subject to the whims of political leaders?; and regardless of the answers to the questions posed immediately above, (c) is the Department of Justice a continuing body, which should depart from its own precedent not when there is a change in membership, but when there is a change in approach which should not appear within the confines of a single case?

Again, my goal here is not to answer all three of these questions. I expect there will be political scientists and lawyers who will have a variety of answers to any and all of these questions. But, lest I be accused of posing a question without providing even a semblance of an answer, here are my non-exhaustive thoughts on these issues, to at least begin the conversation.

First, it is telling, to me at least, that the *Criminal Code* in this scenario gives power to the Attorney General (the chief law enforcement officer of the federal government¹²⁴) and not to the Governor in Council (the typical

General could require his or her staff to enter into a remediation agreement is to overwhelm the judgment of the individual prosecutor with that of the Attorney General. As a practical matter, this is unlikely to arise, as most prosecutors would undoubtedly be very reticent not to follow the instructions provided to them by the head of the department for which they work. But, the statutory scheme is set up that both the line prosecutor, on the one hand, and the Attorney General, on the other, must believe that the conditions precedent to negotiations are fulfilled. For the Attorney General to order a line prosecutor to enter into negotiations with respect to a remediation agreement is to remove that power of a line prosecutor – that second set of eyes, as it were – from the equation.

¹²⁴ Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: Lexis Nexis, 2018) at 30.

statutory way to refer to the federal Cabinet¹²⁵). Arguably, had the amendments introducing the concept of a remediation agreement into the *Criminal Code* intended to give a role to the broader political ramifications, providing discretion to the Governor in Council would have been one way to do so.¹²⁶ Instead, the matter was left to the Attorney General, perhaps signaling that broader political concerns were less important than legal ones. Following from this, then, if the purpose of the choice of the Attorney General as the decision-maker was to reduce, if not eliminate, to the extent possible, explicit considerations from the political realm, as opposed to the legal one, then to allow a more political act, that is, a Cabinet shuffle,¹²⁷ to in essence at least potentially undo the earlier decision is to use one power (the Cabinet shuffle) given to one decision-maker (the Prime Minister) to potentially undo the power given to another (in this case, the Attorney General). In this case, the Prime Minister claims that that was not his intention, that is, that Attorney General Wilson-Raybould was not shuffled out of the Justice portfolio for that reason. For the purposes of this argument, I will simply accept without question the Prime Minister's assertion in this regard.

However, for me, even making that acceptance does not end the matter. The *effect* of what the Prime Minister did was to throw into doubt the continuing effectiveness of the decisions of the former Attorney General. The intent of the Prime Minister aside, certainty in the criminal law is something in which all participants in the criminal-justice system

¹²⁵ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 1 (Scarborough, Ontario: Thomson Carswell, 2007) at 1-29 to 1-30 (loose-leaf revision 2019-1).

¹²⁶ Of course, given that the government that introduced the amendments to the *Criminal Code* to add the concept of remediation agreement to the *Code* is still in power (and still led by the same man, Justin Trudeau), the Prime Minister is the one who is attempting to use his power to alter decisions that were apparently made, the idea that we can be certain that his government did not intend him to have this power may be more suspect than if it had been created by a federal government led by a different Prime Minister.

¹²⁷ The political nature of a Cabinet shuffle becomes clear to me when one considers the choices that the vast majority of Prime Ministers (at the federal level) and Premiers (in the provinces) make in choosing their respective Cabinets. Cabinet members are generally chosen from the caucuses of the ruling party, that is, people who were elected under the banner of the ruling party. I am not suggesting that this practice is in any way corrupt or even questionable. Elections have consequences. Rather, the only point that I am making here is that there is an overt political element to the power given to the Prime Minister to shuffle his or her Cabinet.

must have confidence. One of the elements that puts this into sharp relief for me in this particular case is a thought-exercise. Reverse the actual facts: Imagine that Attorney General Wilson-Raybould had consented to the negotiation over a mediation agreement, and such a remediation agreement had been concluded. But subsequent to the conclusion of this remediation agreement, but before it was carried out, the Attorney General was replaced. In these hypothetical circumstances, could the government resile from its commitment to the remediation agreement simply because there had been a Cabinet shuffle? In my view, there is at least a strong argument that it could and should not resile from the commitment previously made. If this is so, there is at least an argument that a Cabinet shuffle should not throw the decision of the Attorney General not to enter into negotiations into doubt either.

The second point is drawn from the judgment of Justice Rand in *R. v. Boucher*,¹²⁸ when he wrote as follows:¹²⁹

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

There is an argument that another of the reasons that one might select a lawyer to make this type of choice¹³⁰ (whether to potentially divert

¹²⁸ *Supra* note 120.

¹²⁹ *Ibid.*, at 23-24.

¹³⁰ As a general rule, the federal Attorney General is a member of the bar. Attorney General Wilson-Raybould was a practicing lawyer prior to her political careers. The history of Attorney General Lametti is less clear on this point. Biographical sketches focus on his academic progression, rather than service as a lawyer. However, following his first set of legal studies, he apparently went straight on to clerk at the Supreme Court of Canada, for the Honourable Justice Peter deCartaret Cory. In some jurisdictions, clerking at the Supreme Court of Canada can count toward, or entirely replace, the articling experience. Therefore, there is a slight possibility that Attorney-General Lametti is not a practicing lawyer. Nonetheless, Attorney General Lametti deserves the benefit of any doubt that I might have in this regard.

organizational offenders away from the system of trial or alternatively, if allegations are proven, conviction and punishment that is generally the hallmark of the criminal law) is to make it less political, not more so.

Oddly enough, the Prime Minister's intervention may not have been about the matter of winning or losing a criminal trial. Rather it may have had more to do with winning a federal election. In the 1997 Canadian federal election, the Liberal Party of Canada formed a majority government, and won 26 out of 75 seats in Quebec-based ridings.¹³¹ Similarly, in the 2000 Canadian federal election, the Liberal Party of Canada formed a majority government, and won 36 out of 75 seats in Quebec-based ridings.¹³² In the 2004 Canadian federal election, conversely, the Liberal Party of Canada formed only a minority government, winning only 21 out of 75 seats in Quebec-based ridings.¹³³ In the 2006 Canadian federal election, the Liberal Party of Canada's electoral fortunes continued to sink, as the party fell to Official Opposition status, winning only 13 out of 75 seats in Quebec-based ridings, while the Conservative Party of Canada formed a minority government.¹³⁴ In the 2008 Canadian federal election, the Liberal Party of Canada's electoral fortunes sank further, losing 26 seats overall, though the party did maintain Official Opposition status, winning only 14 out of 75 seats in Quebec-based ridings, while the Conservative Party of Canada maintained a minority government.¹³⁵ In the next federal election, in 2011, the Liberal Party of Canada won only 34 seats, and only

¹³¹ Elections Canada, "Thirty-sixth General Election 1997: Official Voting Results: Synopsis" (Last modified 27 August 2018) online: *Elections Canada* <[Thirty-sixth General Election 1997: Official Voting Results: Synopsis - Elections Canada](https://perma.cc/MVC4-G8TZ)> [https://perma.cc/MVC4-G8TZ].

¹³² Elections Canada, "Thirty-seventh General Election 2000: Official Voting Results" (Last modified 7 April 2020) online: *Elections Canada* <[Thirty-seventh General Election 2000: Official Voting Results: Synopsis: Table 7 \(elections.ca\)](https://perma.cc/LG5G-SAY5)> [https://perma.cc/LG5G-SAY5].

¹³³ Elections Canada, "38th General Election 2004: Official Voting Results" (Last modified 14 January 2022) online: *Elections Canada* <[ERmap \(elections.ca\)](https://perma.cc/GY9R-TSCH)> [https://perma.cc/GY9R-TSCH].

¹³⁴ Elections Canada, "39th General Election 2006: Official Voting Results" (Last modified 14 January 2022) online: *Elections Canada* <[ermap.mxd \(elections.ca\)](https://perma.cc/CCL7-X2Q7)> [https://perma.cc/CCL7-X2Q7].

¹³⁵ Elections Canada, "40th General Election 2008: Official Voting Results" (Last modified 18 January 2022) online: *Elections Canada* <[40official.pdf \(elections.ca\)](https://perma.cc/27LS-RSPX)> [https://perma.cc/27LS-RSPX].

seven of those were in Quebec.¹³⁶ The party lost its Official Opposition status (the New Democratic Party formed the Official Opposition in this Parliament), while the Conservative Party of Canada formed a majority government.¹³⁷ In the 2015 Canadian federal election, the Liberal Party of Canada came back with a vengeance, forming a majority government, and won a majority of Quebec-based ridings, taking 40 out of 78 seats in province.¹³⁸ In the 2019 Canadian federal election, the Liberal Party of Canada formed a minority government, and won 35 of 78 Quebec-based ridings.¹³⁹ These facts and figures remained unchanged following the most recent Canadian federal election in 2021.¹⁴⁰

My goal here is not to suggest that the political fortunes of the Liberal Party of Canada can be traced entirely to the province of Quebec. Nonetheless, I believe that these numbers show, at least in the recent past, a significant correlation between electoral results in the province of Quebec for the Liberal Party of Canada, on the one hand, and the overall success in forming governments by the same party. However, even that is not particularly necessary here. The only argument which I wish to make is that it is possible that the Prime Minister's avowed concerns regarding the possibility of job losses in the province of Quebec due to the potential prosecution of SNC-Lavalin were concerned not only with general economic development, but also the electoral fortunes of the party of which he is the leader. Add to this the fact that the Prime Minister's own seat in Parliament is in the province of Quebec,¹⁴¹ and one may have significant

¹³⁶ Elections Canada, "41st General Election 2011: Official Voting Results" (Last modified 18 January 2022) online: *Elections Canada* <[Map of official results for the 41st general election \(2011\) | Elections Canada Online](https://perma.cc/74UL-PKVC)> [https://perma.cc/74UL-PKVC].

¹³⁷ *Ibid.*

¹³⁸ Elections Canada, "42nd General Election 2015: Official Voting Results" (Last modified 18 January 2022) online: *Elections Canada* <[untitled \(elections.ca\)](https://perma.cc/4CHQ-UGEK)> [https://perma.cc/4CHQ-UGEK].

¹³⁹ Elections Canada, "43rd General Election 2019: Official Voting Results" (Last modified 13 October 2021) online: *Elections Canada* <[Test RGB with logos \(elections.ca\)](https://perma.cc/SZM3-2RTM)> [https://perma.cc/SZM3-2RTM].

¹⁴⁰ Elections Canada, "44th General Election 2021: Official Voting Results" (Last modified 6 July 2022) online: *Elections Canada* <[THEMA CANADA PARLIAMENT 44 EN 2022 03 01 RGD 300dpi FINAL \(elections.ca\)](https://perma.cc/44Rj-QKH3)> [https://perma.cc/44Rj-QKH3].

¹⁴¹ The Prime Minister represents the riding of Papineau, in Montreal. See online: [https://www.ourcommons.ca/members/en/constituencies/papineau\(691\)](https://www.ourcommons.ca/members/en/constituencies/papineau(691)) [Accessed

circumstantial evidence (though perhaps not definitive proof) that the decision that was made may likely have been influenced by partisan political considerations. If this is the case, even the public perception of such may diminish the public acceptance of the remediation agreement regime.

C. Rethinking the Organization of Subsection 715.32(2)

As mentioned above, I have some very deep concerns about some of the provisions contained within subsection 715.32(2) of the *Criminal Code*.¹⁴² The comments that follow are not meant to be an exhaustive discussion of these concerns. Rather, I hope to set up the idea that the government may want to rethink its organization of this subsection with respect to some of the issues addressed there.¹⁴³

In my view, some of the factors referred to in subsection 715.32(2) of the *Code* could legitimately be described as “two-way factors”. As I use the term here, this suggests that the presence of the factor may increase or decrease the likelihood of it being in the public interest for the government to enter into negotiations with respect to a remediation agreement, while the absence of the factor would point in the opposite direction. An example of such a “two-way factor” can in my view be found in paragraph 715.32(2)(c) of the *Code*, where one considers the number and level of involvement of the senior officers of an organization in determining whether the negotiation of a remediation agreement would be in the public interest. Where many senior officers knew of the wrongdoing, and actively participated in it – where it became the *de facto* business plan of the organization – there is every reason to think that such an organization should not be entitled to negotiate a potential remediation agreement. Conversely, where a single senior officer became aware of wrongdoing by a junior representative of the organization and did not take every reasonable step to prevent that wrongdoing, pursuant to paragraph 22.2(c) of the *Code*,

12 August 2022].

¹⁴² *Supra* note 2.

¹⁴³ There are many factors to be discussed with respect to s. 715.32. However, the legislation does not purport to prioritize one factor over any other. In my view, this is akin to factors in sentencing. Each factor should be considered in each case, but the overall circumstances of the case may legitimately affect the weight given to each factor, rather one or factors always being more important than any other. As two other authors (Archibald and Jull) put it with respect to s. 715.31, no one factor “trumps” any other. See The Hon. Todd Archibald and Kenneth Jull

the organization is technically liable for the wrongdoing done. However, just as where the support by the senior officers of the organization for the adoption of the criminal behaviour as part of the business plan of the organization makes a remediation agreement not in the public interest, where the other senior officers can show that had they known anything was amiss, they would have taken active steps to stop not only the junior representative who was an active participant in the wrongdoing, but they would have viewed the inaction of the senior officer who became aware of that wrongdoing as betraying their organizational culture, there is every reason to think that entering into a remediation agreement with that organization would be more likely to be in the public interest because the likelihood of repetition was lower due to the corporate culture that existed independent of the wrongdoing.¹⁴⁴

While there are certainly some “two-way” factors within subsection 715.32(2), in my view, there are also certain “one-way” factors. As I use the term here, “one-way” factors are those factors which only go against the public interest. One example of a “one-way” factor is the termination of employees and other actors over which the organization has control, as provided for in paragraph 715.32(2)(d) of the *Code*.¹⁴⁵ In my view, there is much to dislike about this particular factor. It tells organizations to blame others, foist hard treatment on those others (in the form of demotion or termination) in the hopes to achieve leniency from the authorities.

Moreover, the provision makes no distinction between the demotion or termination of an employee before or after the investigative authorities become involved. If the organization holds those who have committed wrongdoing responsible for actions against the organizational culture and intervene before knowing that the investigative authorities are likely to become involved, this may show a desire to hold those who are responsible truly accountable for their actions. If, on the other hand, the organization only takes action after it is clear that the investigative authorities are likely to hold the organization itself accountable, the action to demote or

¹⁴⁴ As *Pétroles Globales*, *supra* note 39, makes clear, paragraphs 22.2(a), (b) and (c) each establish a path to organization liability independent of the others. Liability may be established on more than one ground simultaneously. See para. 212. Also, the organizational culture may be relevant to the issues of liability as well. See para. 128. Where criminal conduct is a daily part of the activities of the organization, the courts should be reticent to approve a remediation agreement.

¹⁴⁵ *Supra* note 2.

terminate employees directly involved in the wrongdoing may be more of an attempt to diffuse blame and shift that blame away from the organization. To allow the organization to use employees as a type of “human shield” against organizational criminal punishment only increases the need for that punishment.

If this is accurate, then the demotion or termination of employees directly involved in the wrongdoing is expected as soon as the organization becomes aware of that wrongdoing, not as a matter of shifting blame away from the organization, but rather, as a way of ensuring that these individuals will no longer have the organizational platform with which to continue or repeat their wrongful behaviour. When viewed in this way, the demotion or termination of employees directly involved in organizational criminal wrongdoing can be considered a “one-way” factor. The demotion or termination of employees directly involved in the wrongdoing should not make it more likely that it will be in the public interest to enter into the negotiation of a remediation agreement, but the failure to discipline employees directly involved in the wrongdoing will be viewed as a demonstration that the organization either actively supports, or at the very least is not directly opposed to the use of criminal wrongdoing as a means to achieve its ends. As such, the diversion of such an organization away from true criminal punishment is much less likely to be in the public interest. As such, it would be very unusual for the public interest to favour the negotiation of a remediation agreement where the employees directly involved in the wrongdoing have essentially remained untouched by those above them in the organizational hierarchy.

Such an approach to “one way” factors is not foreign to our criminal law. Where a criminal defendant puts the government to the proof of its case, the fact that the defendant relied on his or her right to a trial cannot be used as an aggravating factor in sentencing.¹⁴⁶ However, where the same criminal defendant pleads guilty to the charge, and relieves the government of the time and expense of fulfilling its burden to prove its case, this is legitimately used as a mitigating factor in sentencing.¹⁴⁷ In other words, the plea of the defendant is a “one way” factor in sentencing. While this is not the place to discuss all of these factors in detail, I believe that the discussion above gives only some rather glaring examples. These examples, in my view,

¹⁴⁶ *R. v. Terroco Industries Ltd.*, 2005 ABCA 141 at para. 39.

¹⁴⁷ *Ibid.*

show that a more nuanced approach to the factors referred to in subsection 715.32(2) would be an improvement to the remediation agreement regime. In my view, serious consideration should be given to describing which of these factors is considered to be “aggravating” in the majority of circumstances (meaning that they make it less likely that entering into negotiations with respect to a potential remediation agreement will be in the public interest), those that will be “mitigating” (meaning that they make it more likely that entering into negotiations with respect to a potential remediation agreement will be in the public interest) (each “one-way” factors), and those factors that could be either aggravating or mitigating depending on the circumstances. This could easily be done in a schedule to Part XXII.1 to ensure that attempts by organizations to lessen their punishment by foisting that punishment onto others would be less successful.

In fact, I would actually put a provision into subsection 715.32(2) to suggest that any actions taken by the organization following knowledge that the authorities were investigating the organization could not be relied upon to increase the likelihood of the availability of a remediation agreement. These actions (or inactions, if no action were taken) could however be viewed as aggravating factors, thereby decreasing the likelihood of the availability of a remediation agreement. It is not my goal here to make a full defence of this approach. Undoubtedly, much more thought is needed before legislative change would be appropriate. However, it is my goal here to suggest that, as drafted, there are significant weaknesses within subsection 715.32(2) of the *Code*.¹⁴⁸ Improving those weaknesses should be a concern for both Parliament, as well as legal academics interested in the criminal law in general, and organizational criminal liability, in particular.

IV. CONCLUSION

In Part I, the short legislative development and history of remediation agreements in the context of the *Criminal Code* was set out. The procedural elements of the remediation agreement regime were detailed, including the need for the Attorney General to consent to the negotiation of any remediation agreement. Another requirement was that the negotiation of a remediation agreement had to be in the public interest. The *Criminal Code*

¹⁴⁸ *Supra* note 2.

provides a list of factors to be considered in this regard. However, in my view, a number of these factors are ambiguous, questionable or problematic.

The requirement for the consent of the Attorney General was one of the contributing factors to a serious scandal for the federal government, under the leadership of Prime Minister Justin Trudeau, the SNC-Lavalin affair. In the scandal, the Prime Minister expressed a view that he wished to protect jobs in the province of Quebec, while the Attorney General at the time (Jody Wilson-Raybould) indicated that she was not willing to consent to the utilization of the remediation agreement regime in the case of SNC-Lavalin. Shortly thereafter, the Prime Minister shuffled Wilson-Raybould out of her role as Attorney General. Though the Prime Minister claimed that her decision on the SNC file was not the reason that Wilson-Raybould was removed from her post, an ethics investigation found that the Prime Minister's Office had pressured Wilson-Raybould. SNC-Lavalin was able to avoid the application of the Integrity Regime (which is designed to ensure that federal contractors obey the law, lest they be debarred from bidding on future contracts if they are found to have violated the Integrity Regime) simply by pleading guilty to a different offence. This was allowed even though the facts would appear to support a potential conviction on an offence which would at least allow debarment, had the matter gone to trial. In my view, this shows a major hole in the Integrity Regime.

In Part III, two arguments were put forward. First, the remediation agreement regime puts a political actor (the Attorney General) at the centre of the decision as to whether or not the regime should be available to a putative organizational offender. The SNC-Lavalin affair would seem to indicate that this allows significant political pressure to be brought to bear, which may not have been Parliament's intent. Further, regardless of Parliamentary intent, the very fact that the change in the post of Attorney General brought about a significant change in governmental position on a particular case (that of SNC-Lavalin) leads to questions of a lack of certainty in the criminal law, which, up until now, had not been a position that the courts had seemed to countenance. In my view, such uncertainty is to be avoided.

Finally, the argument was made for changes to make more explicit which factors that had to be considered in terms of determining the public interest should be considered as aggravating factors (making it less likely that negotiation should be commenced with respect to a remediation

agreement), as well as mitigating factors (which make it more likely that a remediation agreement would be in the public interest), and which factors may be either mitigating or aggravating, under appropriate circumstances.

Though I have some views on what the appropriate answers to these questions might be, the reality is also that these provisions are relatively new, and in large part untested, as there is only a single case that has been reported where a remediation agreement has been granted (paradoxically, SNC-Lavalin was granted a remediation agreement by the Attorney General of Quebec for different wrongdoing than that which led to the scandal with the federal government).¹⁴⁹ I can only hope that some of the ideas presented here will spark conversations (or continue and energize those which have already begun) on when and how the remediation agreement regime should be used (and perhaps amended by Parliament, or interpreted by the courts) so that we get better outcomes in the criminal law both in terms of substantive outcome and predictability both for participants in the criminal justice system and for victims who may not wish to participate.

¹⁴⁹ See *R. v. SNC-Lavalin Inc.*, 2022 QCCS 1967, dealing with different *Criminal Code* offences with which SNC-Lavalin was charged in 2021.