Toronto Law Journal

The Tides Have Turned With *Redwater*: Provincial Environmental Obligations Have Priority Over Secured Creditors In A Bankruptcy

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In the much anticipated decision, *Orphan Well Association v. Grant Thornton Ltd.*[1] (*Redwater*), the Supreme Court of Canada (SCC) held that a bankrupt estate is required to comply with environmental obligations imposed by a provincial regulator before distributing assets to secured and unsecured creditors. *Redwater* alters the scheme of distribution and payment priorities under the *Bankruptcy and Insolvency Act*[2] (BIA), and the expectations of numerous stakeholders in the Canadian energy and financial services industries.

Background

Redwater Energy Corp. (RECorp) was a publicly traded oil and gas company whose primary assets consisted of wells, pipelines and facilities and licenses issued by the Alberta Energy Regulator (AER). When RECorp experienced financial difficulties in 2014, ATB Financial, its senior secured creditor, obtained an order appointing Grant Thornton Limited (GTL) as RECorp's receiver, and eventually, its trustee in bankruptcy.

The dispute in *Redwater* concerned the bankrupt estate's obligation to comply with provincial environmental laws concerning abandonment and remediation of uneconomic oil and gas wells, known as end-of-life obligations. The AER imposes end-of-life obligations on licensees to render spent oil wells environmentally safe at the end of their life span. GTL determined that the cost of the end-of-life obligations for RECorp's spent wells would exceed the sale proceeds for its productive wells and therefore renounced the spent wells. GTL maintained that it was not obligated to fulfil regulatory requirements associated with the renounced assets.

In response, the AER issued abandonment and reclamation orders respecting the renounced wells. GTL asserted that it was not a "licensee" of the wells, refused to comply with the AER's orders, and disclaimed the renounced assets in bankruptcy. AER took the position that GTL's disclaimers were unlawful.

Both the Alberta Court of Queen's Bench and Court of Appeal found that Alberta's environmental regulatory scheme conflicted with the BIA. Both Courts held that the BIA was paramount legislation and therefore the trustee was not required to satisfy provincial abandonment and reclamation liabilities in priority to claims of secured creditors. GTL was justified in disclaiming the end-of-life assets to maximize recovery for the bankrupt's estate.

[1] 2019 SCC 5
[2] RSC 1985, c B-3

The Issues addressed by the SCC

On appeal the SCC focused primarily on the following issues:

- Does Alberta's regulatory regime conflict with the BIA and if so, was the BIA paramount?
- Is AER a creditor of the bankrupt and its environmental claims provable in bankruptcy?
- Is a trustee or receiver a 'licensee" subject to the orders of the AER?
- Can a trustee or receiver use the BIA to disclaim abandoned assets?
- How does the provincial priority claim affect creditors of the bankrupt estate?

The Decision

Conflict and Paramountcy

Chief Justice Wagner, writing for the majority, concluded that there was no "operational conflict" between the BIA and the provincial environmental regulatory regime which would render compliance with both legislative schemes impossible. Applying the principle of co-operative federalism, the SCC held that "courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation".

AER's Status as a Creditor

The Court found that the AER was not a creditor of the bankrupt estate[3]. The SCC reasoned that AER would not be enriched by the super priority it was trying to enforce. It was acting in the public interest, rather than in its own interest, to ensure that abandoned wells were remediated. As the AER was not asserting a claim provable in bankruptcy, the SCC held that AER's claims were outside of the BIA's statutory priority scheme.

Ability to Disclaim Abandoned Assets under the BIA

The SCC found that GTL was a "licensee" of the wells and a stay under the BIA did not prevent this result. The SCC also found that since GTL was not exposed to the risk of personal liability, GTL could not disclaim the abandoned wells under the BIA. The assets of the bankrupt estate were therefore available to satisfy the end-of-life environmental obligations enforced by the AER.

Effect on Priority of Creditors

As the SCC held that the AER was not asserting a “provable claim in bankruptcy”, the BIA did not stay AER's power to enforce end-of-life obligations. Remediation costs are not “debts”, and

[3] the SCC narrowly applied the three-part test established in Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443 to determine whether a claim is provable in bankruptcy

therefore the assets of the bankruptcy estate were available to satisfy pre-existing remediation costs of the abandoned wells, ahead of the secured creditors. The result is a super-priority for environmental remediation.

Impact of *Redwater*

- *Redwater* takes a "polluter pays" approach and fundamentally redirects asset value away from secured creditors.
- *Redwater* may directly affect the value of assets in some industries and deter lenders from committing capital to going-concern businesses, or insolvency professionals from accepting mandates in distress situations.
    - Lack of certainty for lenders regarding future outcomes will impact credit applications. Restrictions on liquidity negatively impact pricing and credit limits, particularly with smaller entities in exposed industries and may result in a credit chill, or reallocation of assets and lending covenants used in securing corporate liquidity for committed loans.
    - Increased uncertainty for insolvency professionals (trustees, receivers, etc.) about their ability to use statutory protections in accepted mandates could lead to fewer restructuring or liquidation proceedings to maximize value in an estate falling within regulatory control. Court-supervised sales and other going-concern value recovery proceedings under the CCAA and BIA, among others, may be discouraged in some circumstances.
- Regulatory uncertainty and regulator super-priority may reduce the appetite for going-concern asset sales in formal and out-of-court restructuring situations. Exposing assets to the broader market can result in surprisingly good recoveries, including potential surpluses for subordinate creditors and equity holders. These sales are now less likely.
- By the time a liquidation proceeding is commenced, it is often too late to fully remediate. Regulators may intervene earlier while there is still a business to save.
- With a new super priority given to environmental remediation orders, it is unclear how regulators like the AER will sort out their inter-priority status with others, such as CRA.
- Paramountcy is now much more narrowly applied, rendering bankruptcy proceedings involving provincial regulators more uncertain. While the uncertainty is most acute in the environmental sphere, *Redwater* may affect other areas like priority of pension rights.

Recommendations

Banks and Lenders: As proceeds from collateral must cover environmental liabilities first, lenders should re-examine their credit matrixes for risk assessments in lending or realization

situations. This may require refreshed legal and valuation opinions at the inception of loans, or commencement of insolvency and restructuring proceedings. Secured creditors will be asked to provide more fulsome indemnities to insolvency professionals to cover fees and expenses that may not be recoverable from the estate assets under applicable court orders.

Energy extraction companies: Anticipate increased uncertainty in obtaining credit or in crisis management. Timelines will likely be extended and cost estimates for positive outcomes may change. Situational and fact specific guidance to boards of directors and management of distressed entities and their stakeholders will be required.

Insolvency professionals: With BIA protections including disclaimer rights and assets available for administrative primed charges under court orders curtailed, roll up assessments and valuations are now more important than ever in exposed industries. Before accepting mandates in files with regulatory obligations, the requirement for secured indemnities from sponsoring constituencies is highly recommended.

Businesses generally: If you operate in an area of heightened regulatory compliance, there may be greater expectations imposed by regulators in the shorter term. This will vary depending on the province of operation and the nature of business, with environmental risk being a key factor.

Land owners in Alberta: Take heart in the increased resources allocated to environmental remediation requirements of third parties on your lands.

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One Last Chance: How a Recent Ontario Court of Appeal Decision is Changing the Landscape of Rule 15 Dismissal Motions

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The Ontario Court of Appeal's decisions in *Cunningham v. Hutchings,* 2017 ONCA 938 and *Cunningham v. Hutchings*, 2018 ONCA 365 have made it more difficult to dismiss plaintiff's claims under Rule 15.04(9) *Rules of Civil Procedure*. The Superior Court now regularly cites this case as a basis for refusing dismissal Orders. Where less than six months have passed since the plaintiff's counsel served the plaintiff with an Order removing themselves as solicitor of record, some Masters of the Toronto Court remain unwilling to grant a dismissal.

In *Cunningham*, the plaintiff had commenced an action in March of 2012 after allegedly sustaining injuries from two motor vehicle accidents. In November of 2016, Justice Reilly granted plaintiff counsel's order to be removed solicitors of record. In accordance with the language of Rule 15.03(3), the Order required the plaintiff to either appoint a new lawyer or serve a Notice of Intention to Act in Person. She did neither.

Approximately four months later in March of 2017, the defendant moved to have the action dismissed. Ms. Cunningham did not attend at the motion brought by the defendant and a Dismissal Order was granted by Justice Gordon.

When Ms. Cunningham learned of Justice Gordon's Order she promptly moved before Justice Flynn to have it set aside pursuant to Rule 37.14. Having retained new counsel, the plaintiff argued that the dismissal motion had been made without proper notice. Justice Flynn dismissed the plaintiff's motion, concluding that Ms. Cunningham had been provided with adequate notice of the defendant's March 2017 motion. According to Justice Flynn, Ms. Cunningham's arguments spoke to the merits of the dismissal and thus she ought to have appealed the Order of Justice Gordon to the Court of Appeal.

Ms. Cunningham moved for an extension of time to appeal the Order of Justice Gordon. It was this motion that went before Justice Brown of the Court of Appeal who adopted a "holistic" approach to justice and granted the plaintiff's request for an extension.[1] Citing *Laski v. Laski,* 2016 ONCA 337, Justice Brown examined the relief sought by Ms. Cunningham with consideration for the following factors: (i) an intention to appeal within the relevant time period; (ii) the length of an explanation for the delay in filing; (iii) prejudice to the responding party; and (iv) merits on the proposed appeal.

Justice Brown found the first factor to weigh against Ms. Cunningham, and the second and third factors to be neutral. With respect to the fourth factor, however, – "merits on the proposed

[1] *Cunningham v Hutchings,* 2017 ONCA 938, 287 ACWS (3d) 12, at para 24.

appeal" – Justice Brown held that, by ordering the dismissal, Justice Gordon adopted "the most draconian remedy in the circumstances". [2] To date, this language is referred to by Masters of the Superior Court when hearing Rule 15 dismissal motions. Justice Brown opined:

> Why the dismissal of [Ms. Cunningham's] action was a proportionate response to that failure cannot be ascertained in the absence of reasons. ***A party is not obligated to appoint a lawyer to represent her in a civil action; she is entitled to represent herself: Rule 15.01(3). And one would think that if a party does not appoint a new lawyer, that signifies the party intends to represent herself***. [3] (Emphasis added)

Justice Brown explained that for the purposes of Rule 15.03(3), the Notice of Intention to Act in Person "seems designed to ensure the party's address for service and telephone number are known to the court and to the other parties". [4] He observed that, in this case, the responding party knew where Ms. Cunningham resided as she had delivered the motion materials seeking the action's dismissal to the plaintiff's residence. As a result, Justice Brown held that "the justice of the case" favoured granting the plaintiff an extension of time to appeal.[5]

The plaintiff thereafter appealed the Orders of Justice Gordon and Justice Flynn in *Cunningham v. Hutchings*, 2018 ONCA 365. Here, the Court of Appeal set aside both Orders per curiam.

With its decision in *Cunningham,* the Court of Appeal has made it quite clear: dismissals Orders pursuant to Rule 15.04(9) of the *Rules of Civil Procedure* – failure of the plaintiff to appoint new counsel or serve a Notice of Intention to Act in Person – will not come easy to defence counsel.

Though the Superior Court relies more and more on the *Cunningham* case, there are several factors that were taken into account by the Court of Appeal which ought to distinguish that case from most other dismissal motions. Namely, the initial Order of Justice Reilly was deficient in that it did not include the text of Rules 15.04(8) and (9), as required by Rule 15.04(4); the Plaintiff was not given adequate notice that failure to appoint new counsel or act in person could result in a dismissal. [6] Further, the Court of Appeal found that Ms. Cunningham had not been served with the defendant's motion to dismiss as required by the Rules, which may explain why she did not appear before Justice Gordon.

Nonetheless, *Cunningham* has thus far afforded plaintiffs one last chance to pursue their action. Accordingly, defence counsel must be hypervigilant when bringing a Rule 15 dismissal motion. From experience, the more evidence there is of defence counsel's attempts to contact the plaintiff, the more willing the court will be to grant a dismissal. This may include personally placing a phone call to the plaintiff, which in one instance was the pivotal factor that resulted

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[2] *Ibid,* at para 23.
[3] *Ibid,* at para 21.
[4] *Ibid,* at para 22.
[5] *Ibid,* at para 25.
[6] *Cunningham v. Hutchings*, 2018 ONCA 365, 291 A.C.W.S. (3d) 242 at para 3.

in Dutton Brock LLP obtaining its dismissal Order. Whatever the case may be, best efforts should be made in a post-*Cunningham* world to satisfy the court that the plaintiff has abandoned his or her action and that a dismissal is rightly warranted.

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Moore v Sweet: Implications for Insurance and Estate Planning Professionals

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Introduction

Life insurance policies represent an important component of an estate plan. If the beneficiary designation of a policy cannot be honoured following the insured's death, this may result in the complete frustration of his or her testamentary wishes and prevent the estate plan from being implemented in the manner that was intended.

From time to time, decisions of courts in Ontario and other provinces have impacted how Canadians have been able to use life insurance as part of their estate plans. This article focuses on the impact that the Supreme Court of Canada's decision in *Moore v Sweet*[1] has had on life insurance planning, including the ability of Canadians to rely upon irrevocable beneficiary designations and the enforceability of agreements regarding insurance proceeds that are inconsistent with such designations. As outlined below, *Moore v Sweet* has clarified the limitations of irrevocable beneficiary designations, providing guidance to estate planners, family lawyers, and insurance professionals alike.

Practical Considerations

When assisting clients with estate planning (particularly in the circumstances of a separated or divorced client), it is important to remember that life insurance policies may be subject to claims that result in the imposition of a constructive trust, preventing their proceeds from being paid out to designated beneficiaries.

In *Moore v Sweet*, the Supreme Court of Canada confirmed that the designation of an irrevocable beneficiary in accordance with the provisions of the *Insurance Act* does not preclude the existence of other rights that may take priority over those of an irrevocable beneficiary.

Typically, in family law proceedings, the rights of separated or divorced parties to the proceeds of an insurance policy are clearly set out as terms of a separation agreement and may be subsequently confirmed in a court order that requires one party to maintain a life insurance policy for the benefit of the other party and/or the children of the relationship. For example, in *Dagg v Cameron Estate*,[2] a court order confirmed that support obligations were to be satisfied out of life insurance proceeds upon the predeceasing spouse's death and the interest of the surviving spouse was deemed to have been secured (to the extent of his support obligations)

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[1] 2018 SCC 52.
[2] 2017 ONCA 366.

against a claim for dependant's support by an irrevocable beneficiary designation. However, the presence or absence of a formal written agreement or a court order securing one's interests in a life insurance policy may not necessarily mean that the proceeds are insulated from claims that will take priority over the rights of an irrevocable beneficiary.

The outcome of *Moore v Sweet* confirms that a constructive trust can be imposed with respect to the proceeds of a life insurance policy regardless of the irrevocable nature of a beneficiary designation and regardless of whether there is a written agreement clearly setting out the rights of the parties *vis-à-vis* the policy.

Insurance professionals and lawyers assisting clients with life insurance planning should inquire as to the background and purpose of the policy and any related agreements between the client and other individuals (including and beyond what may be contained in a separation agreement), so that they can advise clients in a manner that reflects the most likely disposition of the asset after death. While any claim against the policy may ultimately need to be assessed by the court, it is important to remember that the *Insurance Act* does not preclude rights outside of its provisions unless it is “irresistibly" clear that it was the intention of the legislature to do so.

Suggested checklist questions for insurance or estate planning clients may include the following:

i. What was the purpose of the life insurance policy when it was first obtained? Was this objective subject to an oral or written agreement?

ii. Has there been any change in the intended purpose of the life insurance policy? If so, has any pre-existing agreement regarding the policy been formally amended to reflect that intention?

iii. Who pays the premiums of the life insurance policy? Is he or she under a legal obligation to do so?

iv. If premiums are paid from a joint account, who contributes toward the account and is it impressed with a resulting trust in favour of only one of the joint account holders?

v. Is the life insurance policy subject to an assignment, either legal or equitable? Has the contract been assigned as security and, if so, to what extent? Has the insured retained the ability to designate an irrevocable beneficiary of the policy?

vi. Have the proceeds of the life insurance policy been promised to any individual? If so, has any consideration been provided?

vii. Is there any court order referring to the life insurance policy and/or any related obligations?

viii. Is the beneficiary designation in place for the policy revocable or irrevocable? If revocable, is it understood by the insured and the beneficiary that the insured is at liberty to designate a new beneficiary (either revocable or irrevocable)?

ix. Are the proceeds of the life insurance policy required for the support of one or more dependants who are anticipated to survive the insured?

Addressing these issues prior to death may assist in preventing litigation surrounding a life insurance policy and its proceeds after death.

Conclusion

In light of the significant impact that new case law can and does continue to have on the ability of Canadians to freely designate beneficiaries of life insurance policies, it is best for insurance advisors, estate planners, and other professionals who deal with life insurance to remain apprised of meaningful developments as they occur. Many individuals rely upon life insurance as an integral part of their estate plans and, absent adequate consideration of the claims that may be made against a policy after death, the client's testamentary wishes may not be fulfilled.

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The Right and the Wrong Way to seek Remediation Agreements

Ken Jull, Gardiner Roberts LLP[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PURPOSES OF ACCOUNTABILITY AND ENCOURAGING VOLUNTARY DISCLOSURE OF WRONGDOING

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

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

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

FROM PURPOSES TO THRESHOLD CONDITIONS

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

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

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

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

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

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

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

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

FROM CONDITIONS TO FACTORS

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

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

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

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

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

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[13] 2019 FC 282

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

THE PROHIBITED ROAD: FACTORS NOT TO CONSIDER

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

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

Three sub routes that are prohibited

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

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

There are, however, contrary views to my opinion.

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

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

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

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

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

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

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

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

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

(i) **the national economic interest**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[28] See above, footnote 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION TO THE SNC-LAVALIN CASE

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

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

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

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

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

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

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

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

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

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

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