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SNC-Lavalin 2.0: Canada's first official Remediation Agreement

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In the May 2020 edition of this Journal I wrote about "SNC-Lavalin: The Final Chapter". As it turns out, this was not the final chapter after all.

The second chapter of the SNC Lavalin affair was written in 2022 when SNC-Lavalin Group Inc. negotiated the first remediation agreement in Canadian history to settle criminal charges related to a bridge contract in Montreal two decades ago. The remediation agreement was negotiated with Quebec's office of criminal prosecutions, known as the Directeur des poursuites criminelles et pénales (DPCP).[1] As part of a three-year agreement, SNC will pay an aggregate amount of $29.6 million which is a combination of fine, confiscation, compensation and surcharge.[2]

This first remediation agreement is a green light that signals that the remediation programme in Canada is inviting organizations to come in from the cold.

(i) The First Chapter

The prior experience with SNC-Lavalin put a chill in the air, given that they were denied a remediation agreement. In an exclusive interview with *The Globe and Mail*, Kathleen Roussel, the director of the Public Prosecution Service of Canada, laid out—for the first time—her reasons for rejecting SNC's request for a deferred prosecution agreement ("DPA"), also known as a remediation agreement. In the interview, Ms. Roussel said it was inappropriate to grant a DPA to the Montreal-based engineering and construction giant because the offences were so serious. They centred on allegations that the company paid $48 million to influence the awarding of government contracts under Moammar Gadhafi's regime and allegedly defrauded various Libyan organizations of roughly $130 million.

"The factor that really weighed against a remediation agreement was really the severity and breadth of the offence", said Ms. Roussel. "It was long in time—if you look at the hierarchy of the company, how high the scheme went in the hierarchy of the company. I think it is a pretty unprecedented offence in Canada and as a result of that, I didn't feel it was in the public interest."[3]

The SNC-Lavalin case was resolved in late 2019 when the company entered a guilty plea to a count of fraud committed against various Libyan authorities. The charges under the *Corruption of Foreign Public Officials Act (CFPOA)* were withdrawn. SNC-Lavalin paid $280 million as a

[1] https://www.theglobeandmail.com/business/article-snc-lavalin-strikes-deal-with-prosecutors-to-settle-bribery-charges/

[2] The aggregate amount includes a fine of 18M and to that amount was added a confiscation (around 3M), a compensation to the victim (around 4M) and the surcharge of 30% of the fine (5.5M).

[3] https://www.theglobeandmail.com/politics/article-top-federal-prosecutor-says-she-felt-no-political-pressure-on-snc/

fine, which is one of the largest fines assessed against a corporation in Canada. Although the plea relates to fraud, the court recognized the elements of corruption that were involved. Justice LeBlond, the sentencing judge, cited the prosecution's submission that determining "the appropriate fine level for organizations is not achieved through a purely arithmetical process under Canadian law, especially in relation to offences such as fraud and corruption where there is limited precedent".[4]

The plea to fraud against Libyan authorities avoided the collateral damage of debarment that would have accompanied a plea or finding of guilt under the *CFPOA*. While fraud committed against the Canadian government is covered under the Public Works Department's integrity regime—and could thus trigger a ban—a fraud offence connected to a foreign government is not. I am on record as having described this deal as a deferred prosecution agreement "through the back door."[5]

As stated in my earlier article in this Journal, this plea resolution can be perceived as a just result that reflected significant risk on both sides. From the defence perspective, a conviction would have brought certain debarment. The resolution allows SNC-Lavalin to continue to bid on federal contracts. This will have positive impacts on those innocent employees who were not complicit in the bribery as well as other innocent stakeholders such as pension funds who hold shares in the company. The court recognized this factor in the sentencing judgment:

> This mitigating factor considers the impact that a fine may have on individuals who are dependent on the corporation and who are not at fault. Such individuals include employees, as well as shareholders and other stakeholders such as pensioners, suppliers and clients.[6]

The prosecution also faced significant risks. Had the case of *SNC-Lavalin* gone to trial with respect to allegations of breaching the *CFPOA*, the issue of scope of authority of senior officers who paid or authorized bribes would have been likely litigated. Under s. 22.2 of the *Criminal Code* this was a hurdle that the prosecution would have had to clear on the standard of proof of beyond a reasonable doubt.

(ii) SNC-Lavalin 2.0: The second chapter involving the Jacques Cartier Bridge

Quebec prosecutors had charged two of the company's business entities – SNC-Lavalin Inc. and SNC-Lavalin International Inc. – and former SNC vice-presidents Normand Morin and Kamal Francis in connection with a long-standing RCMP investigation into bribes paid on a $128-million contract to refurbish Montreal's Jacques Cartier bridge in 2002. Michel Fournier, the former head of the Federal Bridge Corp., pleaded guilty in 2017 to fraud-related charges for accepting more than $2.3 million in kickbacks from SNC in the Jacques Cartier bridge case and laundering

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[4] *The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodec Inc.)* Court of Quebec (Criminal and Penal Division), N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond, para 9.6

[5] Legal observers noted the settlement's effect is likely similar to what a DPA would have achieved: A hefty fine, a statement of guilt and monitoring of the company for a prescribed period. "One could say it's a DPA through the back door", said Kenneth Jull: https://www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption.

[6] *The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodec Inc.)* Court of Quebec (Criminal and Penal Division), N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond, para. 10.36, citing T. Archibald, K. Jull and K. Roach, "The Changed Face of Corporate Criminal Liability" (2004), 48 Crim. L.Q. 367, at 390.

the funds. He was sentenced to 5½ years, and has since received full parole. The police probe then focused on who arranged the bribes.

The prosecutors said that offering SNC-Lavalin the chance to negotiate a remediation deal is the appropriate path to prevent collateral damage to the company's stakeholders. "I think it fits" as a solution in this case, said Crown prosecutor Patrice Peltier-Rivest of the DPCP. "This is an alternative to a more classic sentence – an alternative that allows for a lessening of the effects on employees, on retirees, on shareholders, on the clientele of SNC-Lavalin."[7] Mr. Peltier-Rivest has said SNC co-operated with authorities during police searches and voluntarily provided relevant information afterward, which contributed to the decision to extend an offer to negotiate a deal.

This agreement is in the public interest," said François Fontaine, a lawyer with Norton Rose representing SNC-Lavalin. "SNC is getting a deal here because it is an important company and there is no reason to punish all of its stakeholders for the actions of a few individuals."[8]

On a pure numbers basis, it would have been inconsistent to debar SNC-Lavalin in relation to the less serious case involving the Jacques Cartier bridge but to spare them from debarment in the more serious Libyan case.

(iii) The Remediation Agreement avoids potential debarment

With respect to the debarment regime, an interesting point is that the decision by a ***provincial*** prosecutor to offer a deferred prosecution agreement has implications for the ***federal*** debarment regime. Given that the effect of the Remediation Agreement is only to "suspend" the charges laid against the organizations, SNC was invited by Public Services and Procurement Canada (PSPC) to negotiate an Administrative agreement in relation to the federal Integrity regime.[9] This agreement allows the Company to continue to do business with the Government of Canada in accordance with its Integrity Regime originally adopted on July 3, 2015.

(iv) The historical and comparative context of the remediation legislation

At the end of May 2022 Justice Downs released extensive reasons for approving the remediation agreement under the legislative framework.[10] The reasons of Justice Downs are the first reasons provided by a Court in Canada in relation to the new remediation agreement scheme, which requires judicial approval.

Justice Downs noted that the legislation to create the remediation regime was introduced in 2018, and this was the first case where a Court ruled under the legislation. The Court referenced section 715.34 of the *Criminal Code* which set out the mandatory contents of any remediation agreement

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[7] https://www.theglobeandmail.com/business/article-snc-lavalin-strikes-deal-with-prosecutors-to-settle-bribery-charges

[8] https://www.theglobeandmail.com/business/article-snc-lavalin-has-won-a-deferred-prosecution-agreement-a-first-in-canada/

[9] https://www.newswire.ca/news-releases/snc-lavalin-announces-the-signing-of-an-administrative-agreement-with-public-services-and-procurement-canada-with-regards-to-events-concerning-the-jacques-cartier-bridge-that-occurred-between-1997-and-2004-850375618.html

[10] *R. c. SNC-Lavalin inc.* [2022] J.Q. no 4581 | 2022 QCCS 1967.

and reviewed the relationship of this legislation to the corporate sentencing provisions in section 718.

Justice Downs traces the history of the invitation to enter into negotiations under section 715.32. Pursuant to section 715.37 (1), when the prosecutor and the organization have agreed to the terms of a remediation agreement, the prosecutor must apply to the court in writing for an order approving the agreement. The Court referred to the U.K. parallel legislation, *Crime and Courts Act 2013* (R-U), 2013, c. 22, Schedule 17, art. 7 et 8, with respect to guidance for the application of the stages of approval. Schedule 17 sets out the detailed provisions for "Deferred Prosecution Agreements". The UK legislation differs from the Canadian legislation in a number of respects. For example, the UK legislation requires Court approval at a preliminary stage, before the terms of the DPA are agreed, and then requires a second approval at a final hearing.

Justice Downs describes the Canadian legislation as combining the best of both the American deferred prosecution system with the transparency of the U.K. regime, while at the same time recognizing the interests of victims:

> Dans l'élaboration de la partie XXII.1 C.cr., le législateur s'est rapproché davantage des fondements du régime britannique que du régime américain, en ce qu'il a fait le choix d'un contrôle judiciaire et d'une volonté de transparence. Il accorde également une place à la victime.[11]

Justice Downs cites the UK comparative experience with respect to the Canadian adoption of a judicial review model of deferred prosecution agreements. Specifically the Court cites the following passage from Polly Sprenger's *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties*:[12]

> The primary difference envisaged by the UK government, and later enacted by the Crime and Courts Act 2013, was that UK DPAs, unlike their American predecessors, would be overseen, endorsed and enforced by the courts, rather than the prosecutor or regulator: "Under our plans, the judiciary will play a vital independent role in this process to ensure that DPAs are properly scrutinised, transparent and in the interests of justice. They will be empowered to block them if they do not agree that they are an appropriate response to the organisation's wrongdoing". The oversight by the court, would ensure "public scrutiny of the process – the public will know what wrongdoing has taken place and the sanctions for it, including any penalty that has been paid. The final hearing will be held in open court and the final agreement will be published by the prosecutor."[13]

(v) Judicial Approval

Justice Downs reviews the intention of the remediation scheme to reduce the impact of convictions on innocent stakeholders, such as employees who were not involved in the crimes in issue. Justice Downs specifically enumerates the ways in which SNC Lavalin cooperated with

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[11] *R. c. SNC-Lavalin inc*. 2022 QCCS 1967 at paragraph 104.
[12] Polly SPRENGER, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (London: Thomson Reuters, 2015) at p. 24.
[13] *R. c. SNC-Lavalin inc*. 2022 QCCS 1967 at paragraph 109.

the authorities and fundamentally transformed its leadership since 2012. Specifically, Justice Downs cites the first report of the monitor appointed by Justice Lebond in the SNC-Lavalin decision relating to fraud on the Libyan government as follows:

> SNC-Lavalin has expended considerable effort on the remediation of its anti-corruption compliance program and has transformed its culture of ethics and compliance. As further described below, our independent assessment is that these remediation efforts have culminated in the development of one of Canada's leading anti-corruption compliance programs.[14]

Justice Downs concludes that the remediation agreement in the Jacques Cartier case is in the public interest, in denouncing the behavior of those responsible, but also recognizing that those responsible have left SNC and the corporation has made significant steps to enhance compliance measures:

> Toutefois, au regard de l'ensemble des circonstances, le Tribunal estime que l'Accord est dans l'intérêt public. L'Accord permet de dénoncer les actes répréhensibles des Organisations, tout en réduisant les torts qu'entraineraient des condamnations pénales pour des tiers qui ne se sont pas livrés à des actes répréhensibles. Les Organisations ont fait preuve d'une forte coopération, permettant ainsi que les individus responsables soient soumis au système de justice. Il y a eu également des changements importants dans les Organisations : les personnes responsables ne font plus partie de la direction des Organisations et des efforts considérables ont été mis dans l'élaboration de mesures pour éviter que des événements similaires ne se reproduisent. Les individus responsables sont identifiés et ont fait ou feront face à la justice.[15]

A unique aspect of the case is a table reproduced in the judgment that compares the profit from the Jacques Cartier bridge project with the remedial measures to compensate the victims. The Court cited the dicta in the *McNamara* case that *the fact that the contract did not work out as well as the conspirators expected is, in our judgment, of little consequence".*[16]

Justice Downs refers to the well known concept in corporate sentencing that a fine should be more than a licence fee for illegal activity, but less than a fatal blow.[17] Although the SNC-Lavalin Jacques Cartier case is the first remediation agreement to be approved by a Court, Justice Downs did make reference to the precedents for fines paid in relation to corruption in cases such as *R.* v. *Griffiths Energy International*, *Niko Resources Ltd*, and of course the first SNC-Lavalin case where the fine was $280 million.[18]

In conclusion, Justice Downs concludes that in light of the methods implemented to enhance compliance, the remediation agreement was equitable, reasonable and proportionate to the gravity of the offence:

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[14] *R. c. SNC-Lavalin inc.* 2022 QCCS 1967 at paragraph 178.
[15] *R. c. SNC-Lavalin inc.* 2022 QCCS 1967 at paragraph 186.
[16] *R. c. SNC-Lavalin inc.* *2022 QCCS 1967 at paragraph 193 citing R.* v. *McNamara*, (1981) 56 C.C.C. (2d) 516 (Ont. C.A.), p. 523.
[17] *R. c. SNC-Lavalin inc.* *2022 QCCS 1967 at paragraph* 199 citing *R.* v. *Terroco Industries Limited*, 2005 ABCA 141, paragr. 60.
[18] *R. c. SNC-Lavalin inc.* *2022 QCCS 1967 at paragraph* 201. These cases are reviewed in Chapter 15.

> Outre les conditions financières analysées ci-dessus, il faut ajouter au cadre de l'Accord les mesures de maintien et d'amélioration des mesures de conformité, ainsi que la nomination d'un surveillant indépendant alors même que les Organisations font l'objet d'une surveillance depuis déjà dix (10) ans. Prises dans leur ensemble, le Tribunal estime que les conditions de l'accord sont équitables, raisonnables et proportionnelles à la gravité des infractions.
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> Malgré le sérieux des accusations, l'Accord met en place les mesures nécessaires pour éviter que de tels comportements ne se reproduisent. Les dispositions financières sont suffisamment conséquentes pour dénoncer les actes répréhensibles et tenir les Organisations responsables. De plus, les torts de la victime sont adressés adéquatement.[19]

(vi) Coming in From the Cold: Self-reporting carries considerable weight in a Court's approval of a remediation agreement but is not a mandatory precondition.

The zone of non-discovery is a central concept, in my view, with respect to the concept of deferred prosecutions. The zone of non-discovery is recognized in the purpose section of the legislation that states that a remediation agreement have an objective of "(d) to encourage voluntary disclosure of the wrongdoing." A primary benefit to the government is that organizations come in from the cold in circumstances where the government may never find out about misconduct, and they provide details of an internal investigation into those matters. The primary benefit for the organization is the absence of a criminal conviction and its implications.

It would appear that the factor of "the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities" is not a condition precedent. This conclusion is derived from the placement of this consideration in the factors section as contrasted to the conditions section. The listing of "the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities" as only one factor would appear to make a remedial agreement potentially available to an organization that discloses wrongdoing after being discovered by the government. An organization that is caught could argue that it is not precluded from applying for a remediation agreement, as there is no condition precedent that such agreements are only available to those who report "prior to an imminent threat of disclosure or government investigation".

In SNC-Lavalin Jacques Cartier case, Justice Downs ruled that self-reporting carries considerable weight in a Court's approval of a remediation agreement but is not a mandatory precondition. Strong cooperation, as in the SNC-Lavalin Jacques Cartier case, can also play a role in favour of the Court approving a remediation agreement.

Legislation permitting remediation agreements commenced in force effective on September 21st, 2018. In the SNC-Lavalin matter, it appears that one of the reasons given by the DPP to not offer a remediation agreement was the failure to self-report.[20] This factor is unique in the circumstances, because in 2012 when SNC announced an investigation of $35 million in

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[19] *R. c. SNC-Lavalin inc. 2022 QCCS 1967 at paragraph*s 239-240.

[20] SNC-Lavalin v. DPP Notice of Appeal by SNC-Lavalin, Federal Court of Appeal, Amended Notice of Action, section 43.

undocumented payments, there was no remediation regime and no safe harbour to come into from out of the cold.

Material changes relating to serious alleged bribery require self-reporting. But the absence of a safe harbour at the time would be a factor that should be considered.

(vii) Potential risk analysis in relation to the decision to self-report

To be blunt, if an organization can get a deferred prosecution agreement (remedial agreement) *after* being caught, this may create its own risk dynamic in which an organization will decide to not self-report and hope that they are not caught. If a company is caught, it would then come in and seek a deferred prosecution agreement on the basis of the other factors listed. The company would argue that because self-reporting is not a condition precedent, but only a factor, it should be considered for a remediation agreement based on the balancing of other factors.

I would ***not*** recommend that a corporation undertake this type of risk analysis. The government will likely apply a sliding scale in analyzing the reasons for a failure to report before being discovered. At the low culpability end of the scale are those cases where senior management was not aware of the non-compliance before a search warrant was issued. At the high end of the culpability scale are those cases where senior management was aware of the non-compliance and took the calculated risk to not self-report. The culpability scale will be one of the relevant factors to weigh under factor (a).

There is some precedent in both the United States and the United Kingdom for the granting of deferred prosecutions in cases where a company did not self-report but provided extraordinary co-operation throughout the investigation. In the *Panasonic*[21] case, the company did not receive voluntary disclosure credit because the company's disclosures occurred only after the Securities and Exchange Commission ("SEC") requested documents from Panasonic related to possible violations of anti-corruption laws. This was several years after Panasonic first became aware of the allegations of bribery through a whistleblower complaint and civil lawsuit, which the company took steps to investigate internally but chose not to voluntarily report to the relevant authorities. Panasonic did receive credit for its cooperation with the Fraud Section's investigation, including conducting a thorough internal investigation, voluntarily making U.S. and foreign employees available for interviews and in one instance, proactively alerting the Fraud Section to material information relevant to the investigation and disclosing to the Fraud Section conduct in the Middle East of which the Fraud Section was previously unaware.

Panasonic agreed to disgorge $126,900,000 in profits and in addition pay a monetary penalty in the amount of $137,403,812. The conduct in this case was between 2007 and 2013, wherein employees, including senior executives, engaged in a scheme to retain consultants for improper purposes other than for providing actual consulting services. Through this process, Panasonic or related employees hid more than $7 million in payments to at least thirteen sub-agents, some of which had not passed due diligence checks, by improperly reporting them as legitimate

[21] United States District Court for the District of Columbia Case No. 18-CR-00118, United States of America v. Panasonics Avionics Corporation Filed 04/30/18.

commission payments. The scheme involved payment to foreign officials who had influence in the decision by Middle Eastern airlines to buy Panasonic's entertainment systems.

In the United Kingdom, Rolls Royce was charged with bribery and corruption to secure equipment export contracts, in offences that were persistent and multi-jurisdictional. The charges involved three of the company's major business divisions, and activities in seven countries over a period of 24 years—from 1989 to 2013. Rolls Royce received a deferred prosecution agreement, approved by the court (as is required). Although the company did not self-report the offences, the Serious Fraud Office (SFO) stated that the company provided "extraordinary" co-operation throughout the investigation. The company started its own investigation, reviewed over 250 of its business relationships with third parties and issued regular reports of its findings to the SFO.[22]

(viii) Matrix analysis

The legislation for remediation agreements is complex. The legislation requires consideration of eight plus factors flowing from the six enumerated purposes. Multiple factors inject uncertainty into the process.

The problem with uncertainty is that an organization may be wary of coming in from the cold only to be told that they do not have a warm safe harbour to enter. As a strict matter of law, if an organization is denied a remediation agreement, the information that they provide cannot be used against them. Section 715.34(2) of the *Criminal Code* explicitly protects the negotiating process on the same level of settlement discussions:

> No admission, confession or statement accepting responsibility for a given act or omission made by the organization during the negotiations is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts or admission of responsibility referred to in paragraphs 715.34(1)(a) and (b), if the parties reach an agreement and it is approved by the court.

Despite the protection of the above section, the practical reality is that an organization that comes in from the cold has put itself on the radar of law enforcement. If there is significant uncertainty about whether or not a remediation agreement will be granted, this may be a disincentive to come in.

The first remediation agreement in the SNC-Lavalin Jacques Cartier case is a green light that signals that a remediation agreement may indeed be available, particularly where there is evidence of strong cooperation.

Matrix analysis can assist with analysing the eight factors flowing from the six enumerated purposes.[23] The following illustrates a potential approach:

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[22] https://business.financialpost.com/opinion/whether-snc-lavalin-gets-the-rolls-royce-treatment-is-now-david-lamettis-call.

[23] Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance* (Toronto:Thomson Reuters 2021), Chapter 23 IV, Deferred Prosecution Agreements: the Concept

Impact			
Significant	(e) Provide reparations for harm done		(a) Failure to disclose to authorities from zone of non-discovery increases likelihood of harm
Moderate	(d) Disciplinary action against those involved and (f) Identified persons involved	(b) Accountable through penalties	(b) Gravity of the act and impact on victims
Minor	(a) Early disclosure to authorities reduces likelihood of harm	(c) Degree of involvement of senior officers	(g) Prior record of company and (h) other offences
	Low	*Medium*	*High*
			Likelihood

In the above, the vertical axis represents the impact of harm caused by financial crimes. The horizontal axis represents the likelihood of misconduct being repeated.

Factor (a) and the circumstances of disclosure will inform the interpretation of the other factors. While this factor does not "trump" the other factors, it will impact them. Early self-disclosure, as soon as an organization determines that something is amiss, will minimize any future impact of the illegal act as well as eliminating the potential for a repetition of the conduct. This then impacts the other factors such as reparations for harm done and the gravity of the act and its impact on victims. Conversely, late disclosure of details after the authorities have already discovered the illegal act will not have prevented harm to victims as early as was possible and may have permitted those responsible to repeat the illegal acts. The matrix developed above demonstrates how this factor informs the others.