Court File No. A- 140 -19

FEDERAL COURT OF APPEAL

B E T W E E N:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC.
AND SNC-LAVALIN CONSTRUCTION INC.

Appellants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellants request that this appeal be heard at the Federal Court of Appeal in Montréal.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellants' solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date April 4, 2019 Issued by _____
(Registry Officer)

IMRANA AHMED
Registry Officer
Agent du greffe

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Solicitors for the Respondent

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Order of Justice Kane (Court File No. T-1843-18) dated March 8, 2019, by which Justice Kane allowed the Respondent's motion to strike the Notice of Application pursuant to Rule 221 of the *Federal Courts Rules* without leave to amend (the "Order").

THE APPELLANTS ASK that this appeal be allowed and that an order be granted:

1. setting aside the Order and dismissing the Respondent's motion to strike;

2. permitting the Appellants to amend their Notice of Application as per the proposed amended pleading attached hereto as **Appendix "A"**;

3. awarding the Appellants their cost of this appeal and the motion below; and

4. such further and other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

1. This appeal arises in the context of an application for judicial review of the decision of the Respondent, the Director of Public Prosecutions (the "DPP"), not to issue an invitation to negotiate a remediation agreement to the Applicants, SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc.

The Parties

2. SNC-Lavalin Group Inc. is a global fully integrated professional services and project management company and a major player in the ownership of infrastructure. From headquarters in Montréal, SNC-Lavalin Group Inc.'s employees provide comprehensive capital investment, consulting, design, engineering, construction management, sustaining capital and operations and maintenance services to clients across oil and gas, mining and metallurgy, infrastructure, clean power, nuclear energy and EDPM (engineering design and project management). SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. are wholly-owned subsidiaries of SNC-Lavalin Group Inc.

3. Pursuant to the *Director of Public Prosecutions Act*, the DPP is tasked with the prosecution of criminal offences in Canada, and is responsible for among other things *"exercising any [...] power or carrying out any [...] duty or function assigned by the Attorney General that is compatible with the office of the Director"* including the administration of remediation agreements.

The Remediation Agreement Regime

4. In June 2018 the Government of Canada enacted certain amendments to the *Criminal Code* to provide for the establishment of a remediation agreement regime applicable to organizations alleged to have committed an offence (the "Remediation Agreement Regime"). These amendments came into force on September 21, 2018.

5. The Remediation Agreement Regime provides legal tools previously unavailable either in the *Criminal Code* or at common law. Most notably, it permits prosecutors to hold organizations and individuals in those organizations responsible for their wrongdoing and any harm caused, while reducing the negative consequences of that wrongdoing on innocent stakeholders through the mechanism of a remediation agreement.

6. The Remediation Agreement Regime permits prosecutors to issue an invitation to enter into negotiations for a remediation agreement when certain conditions are met. These include, among others, a determination that negotiating the agreement *"is in the public interest and appropriate in the circumstances."*

7. Unlike other criminal justice diversion regimes – *e.g.*, the alternative measures provisions in Part XXIII of the *Criminal Code* and the *Youth Criminal Justice Act* – Parliament has prescribed in the Remediation Agreement Regime certain factors that prosecutors must and must not consider in assessing whether negotiating a remediation agreement is in the public interest and appropriate.

The Decision

8. Between April and October 2018, the Appellants provided the DPP, through the Public Prosecution Service of Canada (the "PPSC"), with detailed information which the Appellants

believe demonstrates that the statutory objectives of the Remediation Agreement Regime and the criteria for the issuance of an invitation to negotiate a remediation agreement were met.

9. On September 4, 2018, counsel for the DPP gave the Applicants a preliminary indication that an invitation to negotiate a remediation agreement would not be forthcoming. After further discussion on September 5, 2018, counsel for the DPP agreed to receive additional submissions from the Appellants as to why and how they had met the criteria for the issuance of an invitation.

10. On October 9, 2018, the PPSC advised the Appellants in writing that the DPP had reviewed the Appellants' further submissions and had decided not to issue an invitation to negotiate a remediation agreement (the "Decision"). No reasons for the Decision were given beyond the assertion that "*an invitation to negotiate a remediation agreement is not appropriate in this case.*"

The Application for Judicial Review

11. The Appellants commenced an application for judicial review seeking an order declaring the Decision to be unlawful, and requiring the DPP to issue an invitation to negotiate a remediation agreement and to proceed with good faith negotiations regarding a remediation agreement.

12. In their notice of application, the Appellants allege (*inter alia*) that the Decision was based on an unreasonable exercise of the DPP's discretion which included, among other things, the DPP's failure to provide reasons. Specifically, the Appellants allege that:

> *[F]ar from providing compelling reasons to justify her decision, the DPP's letter gives no reasons to justify or support her conclusion that an invitation to negotiate was "not appropriate". She did not respond in any meaningful way to the voluminous information provided by the Applicants, and her reasoning cannot be discerned. The Applicants are in the dark as to how they failed to meet the requirement of "appropriateness", or why the public interest requirement, though met, has apparently been ignored.*

The DPP's Motion to Strike and the Decision Below

13. The DPP responded to the application by bringing a preliminary motion to strike. The DPP's burden on the motion was to demonstrate that, taking the facts pleaded as true, it is plain and obvious that the notice of application discloses no reasonable cause of action.

14. The motions judge granted the DPP's motion to strike the application without leave to amend on the basis that the Decision *"clearly falls within the ambit of prosecutorial discretion"* and is therefore unreviewable.

15. The motions judge's decision effectively renders the DPP the sole arbiter of whether or not she has properly considered the prescribed factors in determining whether negotiating a remediation agreement is in the public interest and appropriate.

This Appeal

16. In granting the DPP's motion to strike, the motions judge made reviewable errors of law by:

(a) concluding that the Decision is immune from review on the basis that:

(i) it is an exercise of prosecutorial discretion; and

(ii) the DPP's authority to render decisions regarding remediation agreements derives from the common law and the constitution, not statute;

(b) finding the Decision to be an exercise of prosecutorial discretion on the basis that:

(i) it bears *"a strong similarity"* to the Alternative Measures set out in Part XXIII of the *Criminal Code*;

(ii) it is *"similar to"* the use of extrajudicial sanctions in the context of the *Youth Criminal Justice Act*;

(iii) it *"could also be characterized as restorative justice"*;

(iv) the *"public interest is always a consideration in the exercise of prosecutorial discretion"*; and

(v) the mandatory factors which the DPP must and must not consider in assessing whether negotiating a remediation agreement is in the public interest and appropriate are mere "guides";

(c) concluding, on the basis that the Decision is an exercise of prosecutorial discretion, that the DPP is not a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act*;

(d) interpreting the word "may" in section 715.32(1) of the *Criminal Code* as conferring discretion rather than permission;

(e) shifting the onus on the motion to the Appellants by requiring them to demonstrate:

(i) that the Decision is an administrative decision and not an exercise of prosecutorial discretion; and

(ii) that the application for judicial review has a reasonable prospect of success.

(f) denying the Appellants leave to amend their notice of application, notwithstanding intervening events which indicate that the Decision was a clear abuse of process, as particularized in the proposed Amended Notice of Application.

Intervening events

17. A number of new and deeply troubling facts have come to light regarding the DPP's decision since the motions judge's decision. These facts are alleged at length in the proposed Amended Notice of Application attached as Appendix "A" hereto. To summarize only some of these facts:

(a) Through public testimony before the House of Commons Standing Committee on Justice and Human Rights, the Appellants have learned that on September 4, 2018 the DPP provided the former Attorney General of Canada a memorandum pursuant to section 13 of the *Director of Public Prosecutions Act* entitled "*Whether to issue*

an invitation to negotiate a remediation agreement to SNC-Lavalin." (the "Section 13 Memorandum"). Those reasons have never been provided to the Appellants;

(b) The DPP's use of a Section 13 Memorandum in this context appears to have been an *ad hoc* effort adopted by the DPP apparently in order to inform the former Attorney General about what she intended to do, presumably with a view to obtaining the former Attorney General's approval of the DPP's decision;

(c) The former Attorney General did not receive any further information or Section 13 Memoranda from the DPP subsequent to the Section 13 Memorandum dated September 4, 2018;

(d) By September 16, 2018, the former Attorney General *"had formed the view [...] that it was inappropriate for [her] to intervene in the decision of the DPP"* not to extend an invitation to negotiate a remediation agreement to the Appellants;

(e) In fact, on September 5, 2018, the DPP agreed to the Appellants' request that they be permitted to submit additional information regarding a possible invitation to negotiate a remediation agreement;

(f) The Appellants provided this information on September 7, 2018, as well as further information on September 17, 2018;

(g) The former Attorney General was apparently unaware that additional information was provided by the Appellants to the DPP between September 4, 2018 and October 9, 2018. The DPP apparently failed to update or supplement her September 4, 2018 Section 13 Memorandum or to issue a new memorandum, and seemingly failed to apprise the former Attorney General of the new information provided by the Applicants;

(h) In short, having initially consulted the former Attorney General (based on the former Attorney General's testimony), the DPP chose not to do so when additional information was provided by the Applicants. Among other consequences, this resulted in the checks and balances regarding the accountability of the DPP built

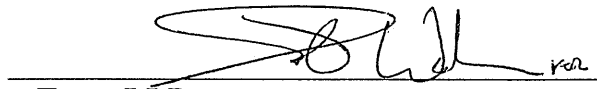
into the *Director of Public Prosecutions Act* being critically circumvented. This failure lies at the heart of the DPP's decision-making process in this matter, and constitutes a clear abuse of process.

18. The *Federal Courts Act*, R.S.C. 1985, c. F-7, including ss. 27(1)(a), 27(2) and 52;

19. Such further and other grounds as counsel may advise and this Honourable Court permit.

20. The Appellants propose that this appeal be heard in the City of Montréal.

April 4, 2019



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Solicitors for the Appellants

APPENDIX "A"

Court File No. T-1843-18

FEDERAL COURT

B E T W E E N:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC. and SNC-LAVALIN CONSTRUCTION INC.

Applicants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Montreal, Quebec.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitors WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Amended , 2019
October 19, 2018

Issued by: _____
(Registry Officer)

Address of local office: 30 McGill St.,
Montréal, Québec H2Y 3Z7

TO: THE ADMINISTRATOR
Federal Court
30 McGill St.,
Montréal, Québec H2Y 3Z7

AND TO: THE DIRECTOR OF PUBLIC PROSECUTIONS
160 Elgin Street
Ottawa, Ontario
K1A 0H8

APPLICATION

1. This is an application for judicial review in the matter of the conduct of the Respondent, the Director of Public Prosecutions ("DPP"), in relation to a decision rendered on October 9, 2018 not to issue an invitation to negotiate a remediation agreement, pursuant to section 715.32(1) and following of the *Criminal Code*, RSC 1985, c C-46 to the Applicants, SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc.

2. The Applicants make application for:

   (a) An Order declaring unlawful the decision of the DPP not to issue an invitation to negotiate a remediation agreement pursuant to section 715.32 of the *Criminal Code* to the Applicants;

   (b) An Order requiring the DPP to issue an invitation to negotiate a remediation agreement forthwith to the Applicants, and to proceed with good faith negotiations regarding a remediation agreement, forthwith;

   (c) An Order permitting the hearing of the application, and all proceedings relating thereto, on an expedited ~~and *in camera*~~ basis;

   (d) Such further and other relief as counsel may advise and this Court deems just.

3. The facts giving rise to this decision are described in the following paragraphs.

The Parties

4. The role of the DPP is set out in sections 3(3), (8) and (9) of the *Director of Public Prosecutions Act*, SC 2006, c 9. Pursuant to this statute, the DPP is tasked with the prosecution of criminal offences in Canada. More specifically, pursuant to section 3(3) of the *Director of Public Prosecutions Act*, the Director is responsible for:

(a) initiating and conducting federal prosecutions;

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

(c) issuing guidelines to federal prosecutors;

(d) advising law enforcement agencies or investigative bodies on general matters relating to prosecutions and on particular investigations that may lead to prosecution;

(e) communicating with the media and the public on all matters respecting the initiation and conduct of prosecutions;

(f) exercising the authority of the Attorney General of Canada in respect of private prosecutions; and

(g) exercising any other power or carrying out any other duty or function assigned by the Attorney General that is compatible with the office of the Director.

[emphasis added]

5. The Applicant SNC-Lavalin Group Inc. is a global fully integrated professional services and project management company and a major player in the ownership of infrastructure. From headquarters in Montreal, SNC-Lavalin Group Inc.'s employees provide comprehensive capital investment, consulting, design, engineering, construction management, sustaining capital and operations and maintenance services to clients across oil and gas, mining and metallurgy, infrastructure, clean power, nuclear energy and EDPM (engineering design and project management).

6. The Applicants SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. are wholly-owned subsidiaries of SNC-Lavalin Group Inc.

The Remediation Agreement Regime

7. On March 27, 2018, the Government of Canada introduced Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures* (the "Budget Implementation Act"). Included in the Budget Implementation Act was a series of amendments to Part XXII of the *Criminal Code* intended to establish a remediation agreement regime, similar to regimes which exist in other jurisdictions, applicable to organizations alleged to have committed an offence.

8. Subsequently, on June 21, 2018 the Government of Canada enacted certain amendments to Part XXII of the *Criminal Code* to provide for the establishment of a remediation agreement regime. These amendments came into force on September 21, 2018.

9. The remediation agreement regime represents a major change in Canadian criminal law. It is a legal tool which permits the prosecutor to secure all of the elements of a conviction except for the finding of guilt. In essence, remediation agreements permit the Crown to hold organizations and individuals responsible for their wrongdoing and any harm caused, while reducing the negative consequences of that wrongdoing on innocent stakeholders.

10. This is reflected in new section 715.31 of the *Criminal Code*, which states that the objectives of the remediation agreement regime are:

(a) to denounce an organization's wrongdoing and the harm the wrongdoing has caused to victims or to the community;

(b) to hold the organization accountable for its wrongdoings through effective, proportionate and dissuasive penalties;

(c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;

(d) to encourage voluntary disclosure of the wrongdoing;

(e) to provide reparations for harm done to victims or to the community; and

(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.

[emphasis added]

Invitation to negotiate

11. The amendments provide that the prosecutor may issue an invitation to enter into negotiations for a remediation agreement if certain conditions are met. These conditions are found in new **sections 715.32(1) and (2)**.

12. According to **section 715.32(1)(*a*) to (*c*)**,[1] the prosecutor may issue an invitation if the prosecutor is of the opinion that:

(a) there is a reasonable prospect of a conviction with respect to the offence;

(b) the act or omission that forms the basis of the offence did not cause and was not likely to have caused seriously 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;

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[1] Paragraph 715.32(1)(*d*) also requires the consent of the Attorney General of Canada to the negotiation of the remediation agreement. The authority of the Attorney General of Canada under this provision may have been assigned or delegated to the DPP pursuant to section 3(3)(*g*) of the Director of Public Prosecutions Act referred to above.

(c) negotiating the agreement is in the public interest and appropriate in the circumstances.

[emphasis added]

13. For the purposes of assessing whether negotiating a remediation agreement is in the public interest and appropriate in the circumstances, **section 715.32(2)** further provides that the prosecutor must consider certain additional factors namely:

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

(b) the nature and gravity of the act or omission and its impact on any victim;

(c) the degree of involvement of senior officers of the organization in the act or omission;

(d) whether the organization has taken disciplinary action, including termination of employment, against any person;

(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;

(g) whether the organization – or any of its representatives – was convicted of an offence or sanction 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;

(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

(i) any other factor that the prosecutor considers relevant.

[emphasis added]

14. As can be seen, the decision to issue an invitation to negotiate a remediation agreement is a matter of discretion on the part of the prosecutor. However, the Applicants submit that the prosecutor's discretion is not unfettered and must be exercised reasonably in accordance with the statutory objectives and factors set out above.

15. In this regard, it is also noteworthy that, in the event that an invitation to negotiate is issued and that negotiations are successful, the resulting remediation agreement must contain certain components including a statement of facts related to the offence; an acknowledgment of responsibility; an acknowledgment of the obligation to pay any fine imposed; and a warning that the breach of any term of the agreement may lead to an application by the prosecutor for termination of the agreement and a recommencement of proceedings. The remediation agreement

must also be approved by the Court pursuant to an application in writing by the prosecutor (sections 715.34 and 715.37(1) of the *Criminal Code*).

Similar regimes in other jurisdictions

16. The remediation agreement regime is similar, although not identical, to regimes providing for "deferred prosecution agreements" in other jurisdictions, including the United States and the United Kingdom. Indeed, Canada was considerably influenced in choosing to adopt a remediation agreement regime by the examples and experience of the United States and the United Kingdom.

17. Deferred prosecution agreements have a lengthy history in the U.S. They have existed since approximately 1992, and are available in a broad range of corporate criminal matters. Unlike the Canadian remediation agreement regime, however, deferred prosecution agreements in the United States are negotiated between the prosecutor and the accused, and are not subject to Court review and approval.

18. Deferred prosecution agreements have existed in the United Kingdom since February 24, 2014, under the provisions of Schedule 17 of the *Crime and Courts Act 2013 (UK), 2013*, c 22. Pursuant to this legislation, and unlike the Canadian approach, both the initial application for a deferred prosecution agreement and any eventual agreement reached by the parties are subject to Court approval.

19. According to various public sources, numerous large, multi-national businesses, including various competitors of the Applicants, have availed themselves of deferred prosecution agreements or similar legislative provisions in other jurisdictions. The Applicants believe that this was one of the reasons for the introduction of a similar regime in Canada.

The Charges

20. On or about February 19, 2015, the DPP caused criminal charges to be laid against the Applicants with respect to allegations of misconduct, contrary to the section 3(1)(*b*) of the *Corruption of Foreign Public Officials Act*, SC 1998, c 34 and section 380(1) of the *Criminal Code*, in relation to certain construction contracts in Libya. The offences are alleged to have taken place between 2001 and 2011.[2]

21. The preliminary inquiry into these charges is scheduled to commence on October 29, 2018 and to last for 3 weeks. If the Applicants are committed to trial on the charges, the trial will likely take place in 2019 or 2020.

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[2] The preliminary inquiry concluded on April 1, 2019 and the presiding judge has reserved his decision. The Applicants deny any wrongdoing and further state that the activities in question were carried out without their knowledge and consent by two former employees and were unknown to the Applicants prior to the execution of the RCMP search warrants relating to the charges in 2012.

Discussions with the DPP

22. In or about the month of April 2018, shortly after the Government of Canada introduced the proposed legislative changes to implement a remediation agreement regime, the Applicants contacted the lawyers within the Public Prosecution Service of Canada ("PPSC") responsible for the prosecution of the charges against the Applicants under the direction of the DPP.

23. Because neither the DPP nor the PPSC chose to undertake any formal steps towards a remediation agreement regarding this matter (or any other) prior to the enactment of the legislation, the purpose of this contact, and of the discussions which followed, was to ensure that the DPP possessed all relevant information the Applicants could provide in relation to the eventual issuance of an invitation to negotiate a remediation agreement, once the enabling legislation was in force.

24. During the next three months, pursuant to requests made by the PPSC, the Applicants provided detailed information (on a without prejudice basis) which, the Applicants believe, demonstrates that the statutory objectives of the remediation agreement regime and the criteria for the issuance of an invitation to negotiate a remediation agreement are easily met in this instance. The Applicants made repeated submissions to this effect to the PPSC based on the information provided and the comprehensive remedial action they had taken.

25. Without limiting the generality of the foregoing, the Applicants provided substantial information pertaining to the relevant criteria for the issuance of an invitation to negotiate a remediation agreement, as set out in section 715.32(1) and (2), including the public interest criterion, as follows:

(a) information pertaining to the efforts undertaken by SNC-Lavalin to adopt and implement a world-class ethics and compliance program since the events in question came to light in 2012, with a view to ensuring that the alleged wrongdoing is not repeated (in accordance with the requirements of section 715.32(2)(*e*), "*whether the organization has* [...] *taken other measures* [...] *to prevent the commission of similar acts or omissions*");

(b) information attesting to the successful assessment of SNC-Lavalin's implementation of its ethics and compliance program by independent monitors (section 715.32(2)(*e*));

(c) information pertaining to the complete turn-over of the SNC-Lavalin's senior management and Board of Directors since the events in question (section 715.32(*e*));

(d) information pertaining to the severance or dismissal of senior officers who could be considered as having been even remotely associated with the activities in question (section 715.32(2)(*d*), "*whether the organization has taken disciplinary action, including the termination of employment, against any person who was involved in the act or omission*" and (*e*));

(e) information pertaining to the dramatic consequences of continued legal proceedings, the possibility of an eventual conviction and of subsequent debarment from bidding, on the Applicants' employees, customers, pensioners and other

stakeholders who did not engage in the wrongdoing ("*to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing* [...]", section 715.31(*f*)).

26. The Applicants presented specific information regarding the criteria for an invitation to negotiate a remediation agreement, including information regarding:

(a) the Anti-Corruption training program provided to virtually all employees; the Applicants' Code of Ethics; the Applicants' Compliance Procedure;

(b) the steps taken by the Applicants with respect to employees who participated in, knew of or condoned the alleged wrongdoing;

(c) the changes in personnel at the most senior levels, including a 100% turnover at the level of the Board of Directors and the Executive Committee of the Company;

(d) the negative impact of the charges on the Applicants' business, including in particular the impact on employment and business activity in Canada;

(e) the negative impact of the ongoing uncertainty related to the charges on the Applicants' business; and

(f) the unfair repercussions on the Applicants' business of a lengthy criminal trial with possible appeals including the impact on employment and business activity in Canada, particularly given an environment in which competitors of the Applicants

can and have availed themselves of deferred prosecution agreements in other jurisdictions.

27. During the course of these exchanges, the Applicants also confirmed their willingness to address the following questions which pertain to the objectives of the remediation agreement regime, in the event that an invitation to negotiate were issued:

(a) the denunciation of the wrongdoing and the harm caused through the negotiation of a statement of facts related to the offence (section 715.31(*a*)) and through an undertaking not to make or condone any public statement that contradicts those facts (as required by section 715.34(1)(*a*));

(b) the negotiation of effective, proportionate and dissuasive penalties (section 715.31(*b*)); and

(c) the negotiation of reparations for harm done to victims or to the community (section 715.31(*e*)).

28. The Applicants also made it plain that negotiating a remediation agreement would reduce the significant ongoing negative consequences the continued prosecution of the charges would have on employees, customers, pensioners and others who did not engage in the wrongdoing (section 715.31(*f*)), even in the event of an eventual acquittal on the pending charges.

29. It is also self-evident that a remediation agreement, if successfully negotiated, would *ipso facto* offer the following additional benefits or advantages from the public interest perspective:

(a) a remediation agreement would permit the DPP to avoid the costs and uncertainties inherent in any criminal prosecution, while nevertheless exacting a substantial financial penalty and related undertakings, all within an independent mechanism that requires Court approval;

(b) the DPP would know that the Applicants have made permanent transformative changes to their business practices such that the alleged misconduct is most unlikely to be repeated;

(c) the DPP would be able to ensure that the Applicants adhere to their new governance practices through direct monitoring, reporting and oversight for a reasonable period of time;

(d) the DPP would also have the option of reinstituting legal proceedings against the Applicants in the unlikely event that they failed to comply with the terms of the remediation agreement at a future date; and

(e) as the Applicants will not enter a guilty plea and have substantial defences to the charges, the alternative to a remediation agreement is a long, expensive and contentious criminal proceeding, the outcome of which is uncertain for both parties.

30. The Applicants also requested an opportunity to meet with the DPP, in order to better explain the materials and submissions provided, respond to any questions she might have and, generally to discuss these issues and the extremely negative consequences of ongoing legal proceedings on the Applicants and their stakeholders including employees, suppliers, pensioners and shareholders, in the event that an invitation to negotiate was not issued by the Respondents. The Applicants proposed that their President and Chief Executive Officer, Mr. Neil Bruce, would participate in such a meeting.

The Decision of the DPP

31. By letter dated October 9, 2018, the DPP, through her prosecutor (the PPSC), informed the Applicants in writing of her decision not to issue an invitation to negotiate a remediation agreement on the grounds, baldly stated, that she was of the view that "*an invitation to negotiate a remediation agreement is not appropriate in this case.*" She also declined the Applicants' request for an in-person meeting, as she "*did not believe there was a need for it, given all the material and submissions provided to her.*" A copy of the DPP's letter is attached as Appendix "A" hereto.

32. The decision of the DPP is based on an unreasonable exercise of her discretion and must be set aside for several reasons.

33. **First,** the DPP apparently failed to properly weigh the information and submissions provided by the Applicants in the light of two key objectives of the remediation agreement regime: reducing the negative consequences of the wrongdoing on innocent stakeholders who did not engage in the wrongdoing, while holding responsible those who did engage in the wrongdoing.

34. Specifically, the DPP failed to consider or properly assess:

(a) the extensive information provided by the Applicants regarding the turnover of senior management and the severance of any individuals who might have directed, condoned or participated in the wrongdoing which gave rise to the charges. It is particularly noteworthy in this regard that only one individual, who left SNC-Lavalin Group Inc. seven years ago and is being civilly pursued by the company for a massive related embezzlement, has been charged regarding the same matter;

(b) the willingness of the Applicants to address, in the negotiation of a remediation agreement, all of the issues regarding the objectives of the remediation agreement regime and the criteria for receiving an invitation to negotiate not otherwise covered in the information provided by the Applicants; and

(c) the extensive information provided regarding the extremely negative consequences the underlying legal proceedings have had and will continue to have (even in the event of an acquittal) on the Applicants and innocent stakeholders, including employees, suppliers, pensioners and shareholders, in the absence of an invitation to negotiate. In fact, the significant harm to innocent stakeholders became apparent immediately following the announcement that the DPP did not intend to issue an invitation to negotiate to the Applicants, and continues to steadily mount in impact, as will be shown at the hearing of this application.

35. **Second,** as stated above in paragraph 12, section 715.32(1)(*c*) permits the prosecutor to enter into negotiations for a remediation agreement if he or she is of the opinion that "*negotiating the agreement is in the public interest and appropriate in the circumstances.*" [emphasis added].

36. The DPP's decision refers only to the second requirement, namely, her conclusion that negotiations would not be "*appropriate in this case*". This suggests that the Applicants had satisfied the first requirement – *i.e.*, that negotiations would be in the public interest – and that the DPP concluded that negotiations would not be appropriate despite this fact.

37. This is an incoherent application of the relevant criteria. When the DPP concludes that negotiations "would be in the public interest", it must follow that they would also be "appropriate", absent clear and compelling reasons to the contrary. No such reasons were given or exist in this situation. The DPP's conclusion – stated without explanation and seemingly without regard to the public interest – negates the very purpose of the legislation.

38. **Third,** far from providing compelling reasons to justify her decision, the DPP's letter gives no reasons to justify or support her conclusion that an invitation to negotiate was "not appropriate". She did not respond in any meaningful way to the voluminous information provided by the Applicants, and her reasoning cannot be discerned. The Applicants are in the dark as to how they failed to meet the requirement of "appropriateness", or why the public interest requirement, though met, has apparently been ignored.

39. Given the information submitted by the Applicants in support of their request for an invitation to negotiate, there was no basis on which the DPP could reasonably have concluded that the statutory criteria were not satisfied. Coupled with the DPP's failure to provide meaningful reasons for her decision of October 9, 2018, it is evident that the DPP failed to observe principles of natural justice, erred in law, and based her decision on erroneous findings of fact she made in a perverse or capricious manner, without regard to the material before her. Her decision constitutes an abuse of process, including specifically the *sui generis* process which surrounds whether an invitation to negotiate a remediation agreement should be extended to the Applicants.

The public testimony of the former Attorney General and others

40. This abuse of process is corroborated by the recent testimony given by the former Attorney General and other senior government officials to the Standing Committee on Justice and Human Rights.

41. Based on this evidence, the facts previously unknown to the Applicants but now publicly disclosed are as follows:

(a) On **September 4, 2018**, the DPP provided the former Attorney General a memorandum pursuant to section 13 of the *Director of Public Prosecutions Act*[3] entitled *"Whether to issue an invitation to negotiate a remediation agreement to SNC Lavalin"*. The DPP's "Section 13 Memorandum", which the Applicants have

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[3] Referred to in the former Attorney General's testimony variously as a Section 13 "Memorandum", "Note" or "Notice".

never seen, apparently provides some explanation for the DPP's indication of September 4, 2018, according to the former Attorney General's public testimony;

(b) On September 4, 2018 the former Attorney General was out of the country on government business, followed by a vacation, and did not return until September 12, 2018;

(c) The former Attorney General did not receive any further information or Section 13 Memoranda from the DPP subsequent to the Section 13 Memorandum dated September 4, 2018;

(d) By September 16, 2018, the former Attorney General *"had formed the view [...] that it was inappropriate for [her] to intervene in the decision of the DPP"*;

(e) For this reason, the former Attorney General refused to accede to what she described as improper attempts by government officials to persuade her to intervene in the matter, as she was entitled to do under the DPP's enabling legislation, the *Director of Public Prosecutions Act*.

42. Section 13 of the *Director of Public Prosecutions Act* does not specifically contemplate the issuance of a Section 13 Memorandum in the context of remediation agreements. The DPP's use of a Section 13 Memorandum in this context appears to have been an *ad hoc* effort adopted by the DPP apparently in order to inform the former Attorney General about what she intended to do, presumably with a view to obtaining the former Attorney General's approval of the DPP's September 4 preliminary indication. It should be noted that section 715.32(1)(d) involves the

Attorney General, since it provides that the Attorney General must consent to the negotiation of a remediation agreement.

43. The evidence provided by the former Attorney General stands in contrast with the DPP's interactions with the Applicants during the same period:

(a) On September 4, 2018, counsel for the DPP gave the Applicants a preliminary indication that an invitation to negotiate a remediation agreement would not be forthcoming. This indication was given during a telephone conversation which took place on that day;

(b) During that call, the Applicants asked what was the basis for the DPP's preliminary indication. In response to that question, counsel for the DPP indicated that he was not authorized to provide any explanations, but undertook to seek instructions in this regard;

(c) Counsel for the DPP contacted the Applicants the following day. During a brief telephone conversation, counsel for the DPP provided the Applicants with a very cursory explanation for the DPP's preliminary indication. The Applicants were told that there were three factors, none of which had ever been raised by the DPP during the many months of discussions that had already taken place, namely:

(i) The *"nature and gravity"* of the acts alleged;

(ii) The *"degree of involvement of senior officers of the organization"*; and

(iii) The fact that *"the Company did not self-report"* the conduct which gave rise to the charges;

(d) Upon being so informed, the Applicants immediately asked whether they could submit additional information to address the DPP's three newly-communicated concerns. Counsel for the DPP agreed to this request, implying that any additional information provided would be fairly considered by the DPP. The Applicants' further written submissions were contained in letters dated **September 7** and **September 17, 2018.**

44. The former Attorney General made no mention of these developments during her testimony, and given her testimony that there was only one Section 13 Memorandum (given to her on September 4), was likely not aware of them. The Applicants submit that this is because the DPP failed to advise the former Attorney General that she (the DPP) had agreed to receive further information from the Applicants; failed to update her original Section 13 Memorandum to convey the additional information she had received from the Applicants to the former Attorney General; and failed to issue a fresh Section 13 Memorandum after reviewing the additional information eventually provided by the Applicants.

45. Put differently, the former Attorney General testified that she had concluded by September 16, 2018 that she would not intervene or question the DPP's indication of September 4, 2018 as the former Attorney General was entitled to do under the *Director of Public Prosecutions Act*. It is now clear that this conclusion was based on incomplete information in that the former Attorney General did not know that the Applicants had provided additional information to the DPP on

September 7, 2018; and could not have known, on September 16, 2018 that the Applicants would be submitting even more information on September 17, 2018.

46. In short, having initially consulted the former Attorney General (based on the former Attorney General's testimony), the DPP chose not to do so when additional information was provided by the Applicants. Among other consequences, this resulted in the checks and balances regarding the accountability of the DPP built into the *Director of Public Prosecutions Act* being critically circumvented. This failure lies at the heart of the DPP's decision-making process in this matter, and constitutes a clear abuse of process.

47. These facts were unknown to the Applicants and could not have been known by them prior to the former Attorney General's testimony before the Standing Committee on Justice and Human Rights on February 27, 2019.

The additional information provided by the Applicants

48. One of the DPP's three justifications for her preliminary indication of September 4, 2018 was the Applicants' supposed failure to "self-report" the conduct which gave rise to the charges.

49. The Applicants addressed this issue in great detail in their letter of September 7, 2018 to the DPP. On the basis of the information thus provided, there is simply no basis for the DPP's concern regarding self-reporting.

50. In addition, however, the Applicants have learned from the DPP in the course of these proceedings that she had received a report on this very issue, prepared by Sergeant Alexandre Beaulieu of the RCMP. Sgt. Beaulieu's report confirms that the Applicants provided a full

measure of cooperation to the authorities during the course of their investigation into the matters which are the basis for the charges. Sgt. Beaulieu's report reads in relevant part:

> *Le présent rapport a pour but de détailler les contacts entre la compagnie SNC-Lavalin et la GRC ainsi que la coopération donnée par la compagnie au cours de trois enquêtes [...].* ***Les renseignements contenus dans ce rapport pourront être pris en considération dans la décision d'inviter la compagnie SNC-Lavalin à négocier un accord de réparation.*** *[...]*
>
> *[...]*
>
> ***Donc somme toute, la compagnie a fourni un soutien aux différentes enquêtes de la GRC, bien que ces enquêtes aient un impact négatif sur la compagnie.***
>
> [emphasis added]

51. Sgt. Beaulieu's report is undated but there is every reason to assume that the DPP had either the report itself, or access to the information contained therein, well in advance of rendering her decision on October 9, 2018. There is nothing to suggest that the former Attorney General was made aware of this document.

52. In any event, the Applicants have recently provided yet more information on this topic by letter dated April 4, 2019. This letter includes a memorandum prepared by the external independent counsel to the Applicants' Board of Directors in 2012 which describes in detail the circumstances surrounding the Applicants' voluntary disclosures to the RCMP in that year and its commitment to cooperate thereafter.

53. The two other summary justifications provided by counsel to the DPP for the DPP's preliminary indication of September 4, 2018 related to the "nature and gravity" of the alleged wrongdoing and the "degree of involvement of senior officers of the organization". Both of these explanations, for which no detail or substantive basis was ever provided, are similarly unfounded, capricious and an abuse of process. As the DPP was well aware from the materials provided by the Applicants, including materials appended to the letter of September 7, 2018, numerous deferred prosecution agreements have been entered into in other jurisdictions involving alleged misconduct that, on its face, appears to be more reprehensible than the conduct allegedly involving the Applicants and, what is more, involved amounts that were in many cases more significant than the amount at issue in the charges pending against the Applicants. The DPP's reliance on the seniority of the corporate officers involved in the wrongdoing was similarly flawed, as the Applicants' letter of September 7, 2018 makes abundantly clear.

54. On September 13, 2018, counsel for the DPP advised the Applicants that the DPP required additional information in respect of certain elements raised in the Applicants' letter of September 7, 2018. This led the Applicants to provide the DPP with still further information in a letter dated September 17, 2018.

55. The DPP's decision of October 9, 2018 does not address or respond to any of the submissions and information provided by the Applicants on September 7 and 17, 2018 or otherwise, nor does it disclose the real reasons for the DPP's October 9, 2018 decision. To this day, the Applicants are still completely in the dark as to the DPP's reasoning. The only conclusion which can be drawn from the DPP's conduct during this period is that despite having agreed to

receive further submissions from the Applicants after issuing her preliminary indication of September 4, 2018 she never intended to extend an invitation to negotiate a remediation agreement to the Applicants and was therefore not negotiating in good faith. The DPP's conduct in this regard and throughout constitutes an abuse of process.

The November 9, 2018 Memorandum of the Deputy Minister of Justice

56. Section 715.32(2) sets out the factors the DPP was required to consider in deciding whether a remediation agreement would be *"in the public interest and appropriate in the circumstances"*. Section 715.32(i) entitles the DPP to consider *"any other factor"* that she considers relevant.

57. In this regard, the Applicants made several written submissions concerning the serious negative impact of the ongoing proceedings on the Company as well as on its stakeholders, even in the absence of a conviction.

58. During the course of the public testimony referred to above, the Deputy Minister of Justice testified that the Privy Council Office had requested an opinion from her Department on the potential impacts on the Applicants if the prosecution were to result in a conviction. The Deputy Minister of Justice further testified that her Department prepared a memorandum on this issue, but that she was instructed by the former Attorney General not to provide this memorandum to the Privy Council Office. Because of these instructions, the Deputy Minister of Justice did not provide the memorandum to the Privy Council Office.

59. On April 4, 2019, this memorandum was made public. The memorandum, dated November 9, 2018, is in fact addressed to the Clerk of the Privy Council, even though it was apparently never sent to him on the instructions of the former Attorney General.

60. It is not clear whether the substance of the memorandum was ever communicated by the former Attorney General to the DPP in order to assist her in her decision regarding whether to extend an invitation to the Applicants. Nor is it clear whether the DPP or the former Attorney General ever considered the voluminous information provided to her by the Applicants which addressed this specific issue. What is clear, however, is that the entire process of assessing whether an invitation to negotiate a remediation agreement should be issued was completely flawed and that little or no serious, principled or fair consideration was given by the DPP or the former Attorney General to the information provided by the Applicants.

Additional statements attributed to the former Attorney General

61. On April 4, 2019, various media reports were aired concerning discussions between the former Attorney General and the Prime Minister regarding the former Attorney General's decision to resign from the Cabinet. These reports stated that the former Attorney General "*set multiple conditions for ending the rift with*" the Prime Minister.

62. According to these media reports, one of these conditions was that her successor "*would not overrule Director of Public Prosecutions Kathleen Roussell and direct her to give SNC-Lavalin a deferred prosecution agreement.*"

63. If these reports are accurate, and to date they have not been disavowed, they reflect either a fundamental misunderstanding of the part of the former Attorney General regarding the duties and responsibilities of the Attorney General of Canada or betray a deep animus against the Applicants. They are also a further reflection of the fundamentally flawed decision-making process adopted by both the former Attorney General and the DPP in this matter. It should be noted that under the framework established by the *Director of Public Prosecutions Act*, the DPP is the Deputy Attorney General and is also subject to the directives of the Attorney General regarding the conduct of prosecutions generally.

Conclusion regarding the newly-disclosed facts

64. In addition to revealing a fundamentally flawed decision-making process by the former Attorney General and the DPP, the disclosure of this information in the context of this proceeding violates the *sub judice* prohibition against comments by public officials regarding ongoing legal proceedings, which comments might be prejudicial to the interests of the Applicants.

Jurisdiction of the Court

65. The Federal Court has jurisdiction to hear this application for judicial review of the matter described above and to grant the relief sought pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. In addition, the Applicant relies on the *Federal Court Rules* and such additional grounds as counsel may identify.

66. This application will be supported by the following material:

(a) The confidential affidavits of one or more individuals;

(b) Such further and other materials as counsel may advise and this Honourable Court permit.

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