Federal Court  Cour fédérale

Date: 20190308

Docket: T-1843-18

Citation: 2019 FC 282

Ottawa, Ontario, March 8, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

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

Applicants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

ORDER AND REASONS

[1] The Respondent brings this motion pursuant to Rule 359 of the *Federal Courts Rules*, SOR/98-106, seeking an Order to strike the Applicants' Application for Judicial Review [Application] without leave to amend.

[2] The Application at issue involves a determination made by the Director of Public Prosecutions [DPP] in the context of the DPP's prosecution of the Applicants on charges pursuant to the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] and the *Corruption of Foreign Officials Act*, SC 1998, c 34 [*Corruption of Foreign Officials Act*]. The decision for which the Applicants seek judicial review is the DPP's determination not to offer (or invite) the Applicants to engage in negotiating a remediation agreement, in accordance with section 715.32 of the *Criminal Code*.

[3] Part XXII.1 of the *Criminal Code* (sections 715.3-715.4) governs remediation agreements, which are also referred to, particularly in other jurisdictions, as deferred prosecution agreements. A remediation agreement would be an alternative to pursuing the criminal prosecution and possible conviction of an organization accused of a criminal offence. The provisions were enacted as part of the *Budget Implementation Act, 2018, No 1*, SC 2018, c 12 [*BIA 2018*] and were proclaimed into force on September 21, 2018.

[4] The Respondent, the moving party on this motion, argues, among other things, that the DPP's determination not to invite the Applicants to enter into negotiations for a remediation agreement is purely an exercise of prosecutorial discretion in the context of a criminal proceeding. The Respondent submits that the law is clear; prosecutorial discretion is not subject to judicial review, except where there is an abuse of process. The Respondent adds that the prosecutor's discretion is derived from the common law and not from a federal statute, and as a result, the DPP is not a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], and this Court does not have

jurisdiction to review the DPP's decision in any event. As such, the Application has no chance of success and should be struck.

[5] The Applicants respond that the DPP's decision is an administrative decision based on administrative law principles and is, therefore, subject to judicial review. On this motion, the Applicants argue that the DPP's decision bears the hallmarks of an administrative decision. They submit that the decision differs from other decisions that a prosecutor may make regarding the conduct of a prosecution, which would be within their prosecutorial discretion, because the decision to invite an organization to enter into negotiations is made while the prosecution continues and requires the prosecutor to consider a series of factors set out in section 715.32, which if satisfied requires the invitation to be made.

[6] The Applicants allege in their Notice of Application for Judicial Review that the DPP unlawfully exercised her discretion in refusing to invite the Applicants to enter into negotiations for a remediation agreement. The Applicants assert that they met all the conditions and criteria set out in the relevant *Criminal Code* provisions to permit the negotiation of such an agreement and that there was no reason for the DPP not to invite the Applicants to enter into negotiations for a remediation agreement.

[7] The issue on this motion is whether the Application for Judicial Review of the DPP's decision not to invite the Applicants to enter into negotiations for a remediation agreement should be struck or should proceed. This depends on whether the Application has a reasonable prospect of success. In the present circumstances, this requires the Court to first determine

whether the DPP's decision is an exercise of prosecutorial discretion, which is not subject to judicial review except where there is an abuse of process, or whether the DPP's decision is an administrative decision and, if so, whether it is subject to judicial review by this Court.

[8] For the reasons that follow, I find that the Application shall be struck as it has no reasonable prospect of success in the context of the law and the governing jurisprudence and taking a realistic view. The well-crafted arguments of the Applicants have been carefully considered, as the reasons below will demonstrate. However, the law is clear that prosecutorial discretion is not subject to judicial review, except for abuse of process. The decision at issue—whether to invite an organization to enter into negotiations for a remediation agreement—clearly falls within the ambit of prosecutorial discretion and the nature of decisions that prosecutors are regularly called to make in criminal proceedings. The jurisprudence provides many examples of decisions found to be squarely within the prosecutor's discretion and the decision at issue is analogous. The other issues raised in this motion follow from the finding that the decision is one of prosecutorial discretion.

I. The Background

A. *The Applicants and the charges*

[9] The Applicants describe SNC-Lavalin as a global fully integrated professional services and project management company. SNC-Lavalin employs over 50,000 employees around the world, including many in Canada, who provide, among other things, capital investment, consulting, design, engineering, construction management and operations and maintenance

services to clients in the oil and gas, mining and metallurgy, infrastructure, clean power, and nuclear energy sectors, as well as engineering design and project management.

[10] The Applicants were charged in February 2015 with two offences; pursuant to paragraph 3(1)(b) of the *Corruption of Foreign Officials Act*, with bribing a foreign public official and pursuant to subsection 380(1) of the *Criminal Code*, with fraud. The offences relate to conduct occurring between 2001 and 2011. The DPP is prosecuting both charges. The preliminary inquiry began in the Superior Court of Quebec in October 2018 and was expected to resume in February 2019 (with a view to being completed at that time). Subject to the outcome of the preliminary inquiry, the trial is expected to proceed later in 2019 or in 2020.

B. *The Development of the Remediation Agreement Regime*

[11] The Government engaged in a public consultation process in November and December 2017 to seek the input of interested stakeholders regarding the advantages, disadvantages and other implications of a Canadian model for deferred prosecution agreements. Amendments to the *Criminal Code* were introduced in March 2018 as part of the *BIA 2018*. The *BIA 2018* was passed on June 21, 2018 and the *Criminal Code* amendments, now contained in Part XXII.1, were proclaimed in force on September 21, 2018.

C. *The Applicants' Provision of Information*

[12] The Applicants note that they made overtures to the DPP regarding their interest in and suitability for a remediation agreement based on the proposed legislation as early as April 2018.

The Applicants provided extensive information to the DPP regarding how they met the relevant criteria. The Applicants continued to make submissions to the DPP following the enactment of Part XXII.1, including following receipt of an indication from the DPP on September 4, 2018 that she would not invite the Applicants to negotiate a remediation agreement.

[13] The Applicants note that they provided an extensive amount of information by way of letters and meetings to demonstrate how their actions reflected the objectives and criteria for a remediation agreement. This included information about efforts made since 2012 to implement, monitor and independently evaluate an ethics and compliance program; anti-corruption training for all employees; the turn-over of senior management and the Board of Directors; the dismissal or severance of senior officers associated with the questionable activities; and the serious impact of a continuing prosecution, a lengthy trial and the possible conviction on employees, pensioners, and other stakeholders, including that SNC-Lavalin could be barred from bidding on contracts. The Applicants also note that they advised the DPP of their willingness to provide further information, if they were invited to negotiate a remediation agreement, regarding how they would meet the objectives of a remediation agreement, for example, through the negotiations of reparations to victims, proportionate penalties and measures to denounce the alleged wrongdoing. The information was provided on the understanding that it was confidential and protected by privilege. The Applicants submit that this evidence should be considered on the Application for Judicial Review.

D. *The Remediation Agreement Regime*

[14] Part XXII.1 of the *Criminal Code* is a complete regime for the determination of whether to engage in negotiations for a remediation agreement and, if negotiations are pursued and an agreement is reached, for the approval, conditions, enforcement and consequences, including for non-compliance with the remediation agreement, among other details.

[15] The Applicants and the Respondent describe the provisions in a similar manner, although they differ in how certain provisions should be interpreted and whether the initial decision of the prosecutor to invite an organization to enter into negotiations is an administrative decision or an exercise of prosecutorial discretion. The parties note that remediation agreement regimes have existed in other jurisdictions under other names, such as a deferred prosecution agreement.

[16] In a nutshell, a remediation agreement is a voluntary agreement between a prosecutor and an organization accused of certain economic crimes. It is an alternative to the traditional prosecution of criminal offences against an organization. It is premised on the prosecutor being of the opinion that there is a reasonable prospect of conviction and on the organization accepting responsibility for the alleged conduct, among other conditions. It is defined in subsection 715.3(1) as “an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.(accord de réparation)”

[17] The purpose of a remediation agreement and the conditions for inviting an organization to enter into negotiations for a remediation agreement are set out at sections 715.31 - 715.32. The purpose, as described in section 715.31, includes denouncing wrongdoing, holding organizations accountable and reducing the negative consequences of the wrongdoing on other persons, including employees, who were not responsible.

[18] Section 715.32 sets out the conditions for a prosecutor to enter into negotiations for a remediation agreement, including that the prosecutor is of the opinion that there is a reasonable prospect of conviction and that negotiating the remediation agreement is in the public interest and appropriate. A non-exhaustive list of factors is set out for the prosecutor to consider with respect to the public interest and appropriateness of negotiating the agreement.

[19] Section 715.33 addresses the contents of an offer to negotiate and how the information shared is used and protected. Section 715.34 lists the elements of the remediation agreement, including what must be specifically included and what may optionally be included.
Section 715.36 requires that the prosecutor take reasonable steps to advise any victim that a remediation agreement may be entered into. Section 715.37 governs the approval by the Court (which means the Court of criminal jurisdiction in which the prosecution is proceeding) of any remediation agreement that has been negotiated and provides factors for the Court to consider in determining whether to approve the agreement. Where the agreement is approved, subsection 715.37(7) provides that the prosecutor must direct the clerk of the court to enter on the record that the proceedings are stayed. Sections 715.38 - 715.41 address other aspects of a remediation agreement, including variations of an agreement, termination of an agreement and

the recommencement of proceedings where an agreement is not complied with. Of note, where the Court orders that the agreement has been complied with, the proceedings are deemed never to have been commenced. Section 715.42 requires the Court to publish a remediation agreement approved by the Court, and certain other orders, including an order to stay the proceedings, unless non-publication is necessary for the proper administration of justice.

[20] The key provisions at issue in this motion are set out below and Part XXII.1 is set out in its entirety at Appendix A.

715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:	715.31 La présente partie a pour objet de prévoir l'établissement d'un régime d'accords de réparation applicable à toute organisation à qui une infraction est imputée et visant les objectifs suivants :
(a) to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community;	a) dénoncer tout acte répréhensible de l'organisation et le tort causé par celui-ci aux victimes ou à la collectivité;
(b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;	b) tenir l'organisation responsable de son acte répréhensible par l'imposition de pénalités efficaces, proportionnées et dissuasives;
(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;	c) favoriser le respect de la loi par l'obligation faite à l'organisation de mettre en place des mesures correctives ainsi qu'une culture de conformité;
(d) to encourage voluntary disclosure of the wrongdoing;	d) encourager la divulgation volontaire des actes

répréhensibles;

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

e) prévoir la réparation des torts causés aux victimes ou à la collectivité;

(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.

f) réduire les conséquences négatives de l'acte répréhensible sur les personnes — employés, clients, retraités ou autres — qui ne s'y sont pas livrées, tout en tenant responsables celles qui s'y sont livrées.

715.32 (1) The prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence if the following conditions are met:

715.32 (1) Le poursuivant peut négocier un accord de réparation avec une organisation à qui une infraction est imputée, si les conditions suivantes sont réunies :

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

a) il est d'avis qu'il existe une perspective raisonnable de condamnation pour l'infraction;

(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;

b) il est d'avis que l'acte ou l'omission à l'origine de l'infraction n'a pas causé et n'est pas susceptible d'avoir causé des lésions corporelles graves à une personne ou la mort, n'a pas porté et n'est pas susceptible d'avoir porté préjudice à la défense ou à la sécurité nationales et n'a pas été commis au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste, ou en association avec l'un ou l'autre;

(c) the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances; and

c) il est d'avis qu'il convient de négocier un tel accord dans les circonstances et qu'il est dans l'intérêt public de le faire;

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

d) le procureur général a donné son consentement à la négociation d'un tel accord.

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

(2) Pour l'application de l'alinéa (1)c), le poursuivant prend en compte les facteurs suivants :

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

a) les circonstances dans lesquelles l'acte ou l'omission à l'origine de l'infraction a été porté à l'attention des autorités chargées des enquêtes;

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

b) la nature et la gravité de l'acte ou de l'omission ainsi que ses conséquences sur les victimes;

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

c) le degré de participation des cadres supérieurs de l'organisation à l'acte ou à l'omission;

(d) whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;

d) la question de savoir si l'organisation a pris des mesures disciplinaires à l'égard de toute personne qui a participé à l'acte ou à l'omission, parmi lesquelles son licenciement;

(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;

e) la question de savoir si l'organisation a pris des mesures pour réparer le tort causé par l'acte ou l'omission et pour empêcher que des actes ou omissions similaires ne se reproduisent;

(f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;

f) la question de savoir si l'organisation a identifié les personnes qui ont participé à tout acte répréhensible relatif à l'acte ou à l'omission ou a manifesté sa volonté de le faire;

(g) whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;

g) la question de savoir si l'organisation ou tel de ses agents ont déjà été déclarés coupables d'une infraction ou ont déjà fait l'objet de pénalités imposées par un organisme de réglementation ou s'ils ont déjà conclu, au Canada ou ailleurs, des accords de réparation ou d'autres accords de règlement pour des actes ou omissions similaires;

(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

h) la question de savoir si l'on reproche à l'organisation ou à tel de ses agents d'avoir perpétré toute autre infraction, notamment celles non visées à l'annexe de la présente partie;

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

i) tout autre facteur qu'il juge pertinent.

(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.

(3) Malgré l'alinéa (2)i), dans le cas où l'infraction imputée à l'organisation est une infraction visée aux articles 3 ou 4 de la *Loi sur la corruption d'agents publics étrangers*, le poursuivant ne doit pas prendre en compte les considérations d'intérêt économique national, les effets possibles sur les relations avec un État autre que le Canada ou l'identité des organisations ou individus en cause.

715.33 (1) If the prosecutor

715.33 (1) S'il désire négocier

wishes to negotiate a remediation agreement, they must give the organization written notice of the offer to enter into negotiations and the notice must include

un accord de réparation, le poursuivant avise l'organisation, par écrit, de son invitation à négocier. L'avis comporte les éléments suivants :

(a) a summary description of the offence to which the agreement would apply;

a) une description sommaire de toute infraction qui ferait l'objet de l'accord;

(b) an indication of the voluntary nature of the negotiation process;

b) une mention du caractère volontaire du processus de négociation;

(c) an indication of the legal effects of the agreement;

c) une mention des effets juridiques de l'accord;

(d) an indication that, by agreeing to the terms of this notice, the organization explicitly waives the inclusion of the negotiation period and the period during which the agreement is in force in any assessment of the reasonableness of the delay between the day on which the charge is laid and the end of trial;

d) une mention du fait qu'en acceptant les conditions de l'avis, l'organisation renonce explicitement à inclure la période de négociation et la période de validité de l'accord dans l'appréciation du caractère raisonnable du délai entre le dépôt des accusations et la conclusion du procès;

(e) an indication that negotiations must be carried out in good faith and that the organization must provide all information requested by the prosecutor that the organization is aware of or can obtain through reasonable efforts, including information enabling the identification of any person involved in the act or omission that forms the basis of the offence or any wrongdoing related to that act or omission;

e) une mention du fait que les négociations doivent être menées de bonne foi et que l'organisation doit fournir tous les renseignements exigés par le poursuivant dont elle a connaissance ou qui peuvent être obtenus par des efforts raisonnables de sa part, notamment ceux permettant d'identifier les personnes qui ont participé à l'acte ou à l'omission à l'origine de l'infraction ou à tout acte répréhensible relatif à l'acte ou à l'omission;

(f) an indication of how the information disclosed by the organization during the negotiations may be used, subject to subsection (2);

f) une mention de l'utilisation qui peut être faite des renseignements divulgués par l'organisation durant les négociations, sous réserve du paragraphe (2);

(g) a warning that knowingly making false or misleading statements or knowingly providing false or misleading information during the negotiations may lead to the recommencement of proceedings or prosecution for obstruction of justice;

g) une mise en garde portant que le fait de faire sciemment des déclarations fausses ou trompeuses ou de communiquer sciemment des renseignements faux ou trompeurs durant les négociations peut mener à une reprise des poursuites ou à des poursuites pour entrave à la justice;

(h) an indication that either party may withdraw from the negotiations by providing written notice to the other party;

h) une mention du fait que l'une ou l'autre des parties peut se retirer des négociations en donnant un avis écrit à l'autre;

(i) an indication that reasonable efforts must be made by both parties to identify any victim as soon as practicable; and

i) une mention du fait que les parties doivent, dès que possible, faire des efforts raisonnables pour identifier les victimes;

(j) a deadline to accept the offer to negotiate according to the terms of the notice.

j) la date d'échéance pour accepter l'invitation à négocier selon les conditions de l'avis.

(2) 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

(2) Les aveux de culpabilité ou les déclarations par lesquels l'organisation se reconnaît responsable d'un acte ou d'une omission déterminés ne sont pas, lorsqu'elle les faits dans le cadre des négociations d'un accord de réparation, admissibles en preuve dans les actions civiles ou les poursuites pénales dirigées contre elle et relatives à cet

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.	acte ou à cette omission, sauf dans le cas où l'accord est conclu par les parties et approuvé par le tribunal et que ces aveux ou déclarations font partie d'une déclaration visée par les alinéas 715.34(1)a) ou b).

II. The Underlying Application for Judicial Review

A. *The Decision at Issue*

[21] The decision of the DPP is set out in a letter dated October 9, 2018, which indicates that the DPP had conducted a detailed review of the documents submitted by the Applicants, including the submissions made following the DPP's previous indication, communicated on September 4, 2018, that it would not issue an invitation to negotiate a remediation agreement. The letter indicates that the DPP "continues to be of the view that an invitation to negotiate a remediation agreement is not appropriate in this case. Therefore no invitation to negotiate a remediation agreement will be issued and as a result crown counsel shall continue with the prosecution of this case in the normal course".

B. *The Applicants' Notice of Application*

[22] The Applicants seek judicial review of the DPP's October 9, 2018 decision. The Applicants seek an Order to declare that the DPP's decision not to issue an invitation to negotiate a remediation agreement is unlawful and to set it aside. The Applicants also seek an Order by way of *mandamus* to direct the DPP to issue an invitation and to negotiate a remediation agreement in good faith.

[23] In their Notice of Application, the Applicants acknowledge that whether to issue an invitation to negotiate a remediation agreement is a matter of discretion, but submit that this discretion is fettered and must be exercised reasonably and in accordance with the statutory objectives and factors.

[24] The Applicants, characterizing the decision as an administrative decision, allege that the DPP's decision is unlawful because it is unreasonable on several grounds. The Applicants allege that the DPP did not weigh and consider the submissions and extensive information they provided in light of the objectives of a remediation agreement. The Applicants also allege that the DPP's decision indicates only that the invitation to negotiate would not be appropriate in this case, rather than that it would not be "in the public interest and appropriate in the circumstances", which suggests that the DPP had concluded that negotiating a remediation agreement was otherwise in the public interest. The Applicants further allege that the DPP does not provide reasons to justify her decision that negotiating a remediation agreement would not be appropriate.

III. The Respondent's (the Moving Party) Overall Position

[25] The Respondent submits that this Application is bereft of any possibility of success for several reasons and should, therefore, be struck. The Respondent submits that the Applicants seek to compel the DPP to exercise her prosecutorial discretion to invite the Applicants to negotiate a remediation agreement with a view to having the criminal charges against them stayed.

[26] First, the Respondent submits that the determination of the DPP not to invite the Applicants to engage in negotiations for a remediation agreement is clearly an exercise of prosecutorial discretion just like many other determinations made in the course of conducting a prosecution. The determination is not based on administrative law principles.

[27] The Respondent submits that the law is well settled; prosecutorial discretion is not subject to judicial review by the Courts, except for abuse of process, which is not alleged by the Applicants.

[28] Second, the Respondent argues that this Court does not have the jurisdiction to determine this Application because the DPP is not a federal board, commission or tribunal within the meaning of section 2 of the *Federal Courts Act*. The Respondent submits that the prosecutorial discretion exercised by the DPP is derived from the common law, not from an Act of Parliament as required for this Court to have jurisdiction pursuant to section 2.

[29] Third, the Respondent submits that even if this Court has jurisdiction to determine the Application, it should decline to do so and defer to the jurisdiction of the Quebec Superior Court given its expertise in criminal law matters.

[30] Fourth, the Respondent argues that the relief sought by the Applicants in the Application cannot succeed. The test for *mandamus* is not met; the Court cannot compel the exercise of the prosecutor’s discretion in a particular way.

IV. The Applicants' Overall Position

[31] The Applicants describe remediation agreements as an unprecedented and revolutionary change in the criminal law. The Applicants submit that the intention of Parliament in establishing the remediation agreement regime is to provide a way to secure all the elements of a conviction except for the finding of guilt, which reflects the statutory objective of holding organizations responsible for their wrongdoing while at the same time reducing the negative consequences on innocent stakeholders. The Applicants highlight the grave implications of a continuing prosecution and possible conviction, including being barred from bidding on future Government contracts, which will have a significant impact on their employees, pensioners and other stakeholders and on "innocent bystanders".

[32] The Applicants point to the Debate in the Senate on the *BIA 2018* that noted the benefits of remediation agreements, including reparations to victims, stimulating change in corporate culture and allowing companies to continue to operate, thereby sparing jobs and protecting investments.

[33] On this motion, the Applicants acknowledge that the exercise of prosecutorial discretion is not subject to judicial review. The Applicants argue that the DPP's role with respect to offering or inviting an organization to negotiate a remediation agreement does not fall within the ambit of unfettered prosecutorial discretion. Rather, it is an administrative decision which is required to be made with regard to several factors. Therefore, the decision is reviewable for reasonableness and the Application should proceed.

[34] The Applicants submit that the DPP's decision is not typical of other decisions that fall within prosecutorial discretion, including because the decision to invite negotiations for a remediation agreement is made in parallel to the ongoing criminal prosecution. The Applicants also submit that the interpretation of the statutory provisions in the context of the stated objectives and the intention of Parliament support finding that this is an administrative decision and that it is not immune from judicial review.

[35] The Applicants argue that the DPP's decision should not be immune from judicial review, as this would thwart the goal of Parliament. Without judicial review there is no way to ensure that prosecutors have considered and applied the criteria and invited organizations to negotiate a remediation agreement where the criteria are met.

[36] The Applicants submit that this Court has jurisdiction to determine their Application because the DPP derives its authority from the *Director of Public Prosecutions Act*, SC 2006, c 9, s 121 [*DPP Act*] and the *Criminal Code*, which places the DPP within section 2 of the *Federal Courts Act* as a federal board or tribunal.

[37] The Applicants further submit that *mandamus* would be available to them on judicial review because the DPP had a duty to invite them to enter into negotiations once the conditions and criteria were satisfied.

[38] The Applicants argue that the Respondent's motion to strike for the convenience of the Respondent to avoid defending the Application is "shocking". The Applicants submit that their

Application raises novel and complex legal issues, including whether the decision is an exercise of prosecutorial discretion or an administrative decision; the interpretation of Part XXII.1, in particular section 715.32; whether the DPP is a federal board for the purpose of section 2 of the *Federal Courts Act* (i.e., whether the Federal Court has the jurisdiction to review the DPP's decision) which depends on the source of the DPP's authority; whether the DPP should be immune from judicial review; and whether *mandamus* is available as a remedy. The Applicants submit that these issues demonstrate that it is, at least, debatable whether the Application has a reasonable prospect of success. As a result, the Respondent has not delivered the "knockout punch" to permit the Court to strike the Application. The Applicants argue that the Application should be determined by the applications judge with the full record, which is needed to interpret the statute and to determine whether the DPP acted reasonably—i.e., to determine what she did and did not consider.

V. The Issues

[39] The issue on this motion is whether the Application should be struck because it has no reasonable prospect of success. This requires consideration and application of the jurisprudence regarding motions to strike an application for judicial review. This also requires consideration of several related issues and arguments advanced by the parties, including:

- Whether and how the exercise of prosecutorial discretion is subject to judicial review;
- Whether the decision at issue—the DPP's decision to not invite the Applicants to enter into negotiations for a remediation agreement—is an exercise of prosecutorial discretion or an administrative decision;

- Whether, in the context of the decision at issue, the DPP is a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act*;

- Whether the Applicants can seek *mandamus* on judicial review; and

- Whether the Application should proceed because it raises novel claims and debatable issues and, as a result, should not be found to have no reasonable prospect of success.

VI. The Test for Striking an Application for Judicial Review

A. *The Respondent's Submissions*

[40] The Respondent submits that the Court can strike a notice of application where it fails to state a cognizable administrative law claim which may be brought to the Federal Court, or where the Federal Court is not able to deal with the claim under the *Federal Courts Act* or some legal principle, or cannot grant the relief.

[41] The Respondent submits that the high threshold to strike the Applicants' Notice of Application is met. The legal principles regarding the exercise of prosecutorial discretion are well established; prosecutorial discretion is not subject to judicial review except in narrow circumstances which do not apply in this case.

[42] The Respondent acknowledges that novel legal issues should generally be allowed to develop, but argues that the issue is whether prosecutorial discretion can be judicially reviewed, which is not a novel issue.

[43] The Respondent submits that the fact that the DPP did not provide reasons for declining to invite the Applicants to enter into negotiations for a remediation agreement does not prevent the Court from striking the Notice of Application. The exercise of the prosecutor's discretion does not need to be justified and reasons are not required (*R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 at paras 54-55 [*Anderson*]).

[44] The Respondent notes that the *Criminal Code* includes many examples where a prosecutor exercises their discretion and there is no requirement for the prosecutor to justify each decision. Courts have recognised that such a requirement would bring the administration of justice to a standstill.

[45] The Respondent submits that the Applicants' argument—that the Application should proceed on a complete record, which they have not yet obtained—overlooks that the obligation to produce a record is tied to what is relevant to the grounds pleaded in the Notice of Application. The Court must first gain a realistic appreciation of the grounds pleaded (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 50, [2014] 2 FCR 557 [*JP Morgan*]).

B. *The Applicants' Submissions*

[46] The Applicants argue that the DPP has failed to identify the "knockout punch" to justify striking out the Application at this preliminary stage. The Applicants argue that motions to strike are best left to the hearing of the Application except in the rarest of cases (*Canada v Chiasson*, 2003 FCA 155 para 6, [2003] FCJ No 477 (QL) [*Chiasson*]).

[47] The Applicants note that Courts have been cautioned against determining the interpretation and the application of a new law on preliminary motions (*Cannon v Funds for Canada Foundation*, 2012 ONSC 399, [2012] OJ No 168 (QL) at 234, 237 [*Cannon*]).

[48] The Applicants also rely on *Paradis Honey Ltd v Canada*, 2015 FCA 89, [2015] FCJ No 399 (QL) at para 116 [*Paradis Honey*], where the Federal Court of Appeal noted that a novel claim should not be struck because it is novel and found that a claim for monetary relief based on public law principles was novel and should be allowed to proceed.

[49] The Applicants submit that the remediation regime raises several novel issues, including statutory interpretation, whether the decision is an administrative decision and whether the DPP is a federal board or tribunal, all of which should be explored by the applications judge given that this is a matter of judicial first impression (i.e., there is no binding authority given that the remediation regime has not been addressed by the Court).

C. *The Principles from the Jurisprudence*

[50] In *JP Morgan*, the Federal Court of Appeal confirmed that the threshold to strike out a notice of application for judicial review is high, noting at para 47:

> The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain*

> *Storage By-Products*, 2012 FCA 286 at paragraph 6; cf. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[51] The Court of Appeal explained, at para 48, that this high threshold is required to reflect that applications for judicial review should proceed in a summary way and that unmeritorious motions frustrate that objective.

[52] The Court of Appeal cautioned, at para 49, that Courts determining a motion to strike should read the notice of application "with a view to understanding the real essence of the application", noting that "skillful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort". The Court of Appeal added at para 50 that "[t]he Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form" (Internal citations omitted). In other words, the Court should look at the whole application and beyond skillful pleading to find the essential character of the allegations.

[53] In *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588, [1994] FCJ No 1629 (QL) at para 15 (CA) [*David Bull*], the Court of Appeal noted that a finding that the application is bereft of any possibility of success is "very exceptional and cannot include cases...where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion".

[54] In *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*], the Supreme Court of Canada addressed the test for striking out a statement

of claim. The Supreme Court noted that the power to strike out a claim is a useful housekeeping tool as it weeds out hopeless claims and this promotes litigation efficiency (at paras 17, 19, 20). The same principles which govern striking out claims apply to striking out a notice of application, as confirmed in *JPMorgan.*

[55] The Supreme Court cautioned, however, that a motion to strike should be used with care. The Supreme Court explained that in determining whether there is a reasonable prospect that the claim will succeed, Courts should bear in mind that new developments in the law may arise in preliminary motions or motions to strike. The Supreme Court noted at para 21, therefore, that "[t]he approach must be generous and err on the side of permitting a *novel but arguable* claim to proceed to trial" [Emphasis added].

[56] The Supreme Court provided additional guidance at para 25, noting that in determining whether the claim has a reasonable chance of success, "[t]he question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding" [emphasis in original].

[57] More recently, in *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176, [2016] FCJ No 605 (QL), the Federal Court of Appeal found that the reasonable prospect of success test applied equally to a motion to grant leave to amend pleadings. The Court of Appeal cited *Imperial Tobacco* regarding the meaning of the test, noting at para 30:

> The standard of "reasonable prospect of success" is more than just assessing whether there is just a mathematical chance of success. In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the context of

> the law and the litigation process, and a realistic view must be taken: *Imperial Tobacco*, above at para. 25.
>
> [Emphasis added]

[58] The Applicants point to *Chiasson* in support of the proposition that motions to strike are best left to the hearing of the Application. However, when read in context, the principle stated is consistent with that in *Imperial Tobacco* and *JP Morgan*. In *Chiasson*, the Federal Court of Appeal stated at para 6:

> It is important to keep in mind that on a motion to strike on the basis that a proceeding raises no cause of action, it is not for the Prothonotary who hears the motion, nor for the Motions Judge on appeal, nor for this Court on appeal from him, to determine finally the issue of whether a reasonable cause of action is raised. Instead, such a motion to strike should be rejected unless it is plain and obvious that the proceeding has no possibility of success.
>
> [Emphasis added]

[59] The Applicants also rely on *Cannon* at paras 234, 237, where the Ontario Superior Court of Justice noted that it should be reluctant to define the scope of new legislation on a pleadings motion. In that case, the Court was dealing with a charitable tax credit scheme in the context of Ontario's *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A [*Consumer Protection Act*]. The Court cited *Wright v United Parcel Service Canada Ltd*, 2011 ONSC 5044, [2011] OJ No 3936 (QL) at para 134, where the Court had found that the jurisprudence on the causes of action in the *Consumer Protection Act* were non-existent or unsettled. I do not agree with the Applicants that *Cannon* supports the proposition that all new legislation raises a novel issue and that this dictates against a motion to strike. The considerations are broader on a motion to strike.

[60] In *Paradis Honey*, the Federal Court of Appeal reiterated that the law continues to evolve. The Court found that the claim raised was novel and that it was a "responsible, incremental change to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning" and should not be struck (at para 118). The Court explained at para 116:

> A claim for monetary relief in public law is novel. In assessing whether a novel claim can survive a motion to strike, we must remember that the common law is in a continual state of responsible, incremental evolution: *R. v. Salituro*, [1991] 3 S.C.R. 654 at pages 665-70, 131 N.R. 161. While our Constitution is a "living tree capable of growth and expansion within its natural limits" (see *Edwards v. Canada (Attorney General)*, [1929] UKPC 86, [1930] A.C. 124), the common law – and particularly public law – is not a petrified forest. A novel claim should not be struck just because it is novel. See *Imperial Tobacco*, above at paragraph 21, *Hunt*, above at pages 979-80 and *Operation Dismantle*, above at pages 486-87. However, as was said in *Salituro*, above, and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108, 176 D.L.R. (4th) 257 at paragraph 42, judge-made reform to judge-made law has its limits.

[61] In my view, *Paradis Honey* conveys that a broader analysis of the claim is required, particularly of a novel claim, to determine whether it should proceed.

[62] The key principles from the jurisprudence which are relevant to the current motion and have been applied are:

- A notice of application must be read holistically to determine the essential character of the allegations;
- A motion to strike a notice of application should only be granted where it has no reasonable prospect of success;

- A debatable issue would not constitute an "obvious fatal flaw" regarding the adequacy of the allegations;

- The Court should err on the side of permitting novel but arguable cases to proceed; and

- A "reasonable prospect of success" should be determined in the context of the law and the litigation process and a realistic view should be taken.

VII. Whether and How is Prosecutorial Discretion Subject to Judicial Review?

A. *The Respondent's Submissions*

[63] The Respondent submits that the decision of the DPP whether to invite an organization to enter into negotiations for a remediation agreement is a classic example of prosecutorial discretion. The Respondent notes that the law is well established that the exercise of prosecutorial discretion is not subject to judicial review (*Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at para 47 [*Krieger*]; *Miazga v Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339 at paras 46-47 [*Miazga*]; *Anderson* at para 37; *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566 at paras 52, 62 [*Nixon*]; *R v Cawthorne*, 2016 SCC 32, [2016] 1 SCR 983 at para 47 [*Cawthorne*]). The Respondent emphasizes that the quasi-judicial role of the Attorney General as prosecutor cannot be subject to interference. The Respondent submits that the same jurisprudence supports the proposition that the DPP's decision falls within the exercise of prosecutorial discretion.

[64] The Respondent notes that although prosecutorial discretion may be reviewed for abuse of process or flagrant impropriety by the prosecutor, this is not alleged by the Applicants.

[65] The Respondent adds that the rationale for prosecutorial discretion being immune from judicial review, except for abuse of process, has been explained in the jurisprudence and that the rationale sheds light on the nature of the decisions that fall within prosecutorial discretion.

[66] The Respondent points to *Anderson* at para 37, noting the Court's emphasis on the long standing principle that prosecutorial discretion is essential to the proper functioning of the criminal justice system. Moreover, prosecutorial discretion advances the public interest by permitting prosecutors to make decisions without judicial or political interference and fulfils a quasi-judicial role.

[67] The Respondent points to *Krieger* at paras 31-32, where the Supreme Court cited *R v Power*, [1994] 1 SCR 601 at 621-623, [1994] SCJ No 29 (QL) [*Power*], stating that Courts should not interfere with prosecutorial discretion, which is derived from the royal prerogative or granted under common law. The Supreme Court noted in *Power* that "[i]f the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal" [emphasis in original].

[68] The Respondent also notes that in *Nixon*, the Supreme Court of Canada found that it is a fundamental error to assess a decision made in the exercise of prosecutorial discretion on a reasonableness standard, as this places the Court in the role of supervising prosecutor. The Court

noted, at para 52, the "constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions".

[69] The Respondent submits that these principles have been consistently applied by trial and appellate courts. For example, in *R v Baptiste*, [2000] OJ No 528 (QL) at paras 29-30, 74 CRR (2d) 333 (Ont Sup Ct) [*Baptiste*], the Court noted that the administration of criminal law would be paralyzed if preliminary decisions of prosecutors were subject to judicial review.

[70] The Respondent also points to jurisprudence where the Courts have found that analogous decisions to that of the DPP are exercises of prosecutorial discretion. For example, in *R v C(EJ)*, 2013 ABPC 28 at paras 10-11, [2013] AJ No 247 (QL) [*R v C(EJ)*], the prosecutor's decision whether to pursue extrajudicial sanctions for a young offender was found to be within prosecutorial discretion. In *Okimow v Saskatchewan (Attorney General)*, 2000 SKQB 311, [2000] SJ No 499 (QL) [*Okimow*], the Court found that the prosecutor's decision whether to pursue alternative measures was within prosecutorial discretion. In *R v T(V)*, [1992] 1 SCR 749, (QL) [*R v T(V)*], the Supreme Court of Canada found that it was inconsistent with prosecutorial discretion to permit a judge to decide whether the prosecutor should have charged a young offender or pursued alternative measures. In these cases, the Court also noted that it was not the Court's role to supervise the exercise of the prosecutor's discretion.

B. *The Applicants' Submissions*

[71] The Applicants do not dispute that the jurisprudence has established that prosecutorial discretion is not subject to judicial review, except for abuse of process. The Applicants

emphasize that the decision at issue is not an exercise of prosecutorial discretion. The Applicants also submit that the jurisprudence has established only that unfettered prosecutorial discretion is not reviewable. This is unlike the discretion exercised pursuant to section 715.32, which is fettered. The Applicants also submit that the jurisprudence which has addressed the scope of prosecutorial discretion and provided the rationale for why the Court should not supervise the exercise of prosecutorial discretion did not consider the issues now raised. Rather, the Courts considered prosecutorial discretion as opposed to tactics or ethical issues and not prosecutorial discretion as opposed to decisions fettered by many criteria. The Applicants submit that the decision at issue is akin to administrative decision-making.

C. *Prosecutorial Discretion is Not Subject to Judicial Review*

[72] The jurisprudence firmly establishes that the independence of the Attorney General is essential and fundamental to the criminal justice system and that the decisions made by and on behalf of the Attorney General in the exercise of prosecutorial discretion are not subject to judicial review. The jurisprudence provides the rationale and also provides many examples of what is encompassed within prosecutorial discretion.

[73] In *Krieger*, the Supreme Court of Canada described prosecutorial discretion at para 43, stating:

> "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

[74] The Court also provided examples of "core" prosecutorial discretion at para 46, including whether to bring the prosecution of a charge, whether to enter a stay of proceedings, whether to accept a plea to a lesser charge and whether to withdraw the criminal proceedings.

[75] The Court explained in *Krieger* at para 30:

> It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada [Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990)], at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).

[76] In *Miazga*, the Supreme Court of Canada highlighted that the independence of the Attorney General as prosecutor is constitutionally entrenched. The Court noted at para 46:

> The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):
>
> . . .
>
> > The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. . . . The quasi-judicial function of the Attorney General cannot be

> subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

[77] In *Miazga*, the Court also highlighted that prosecutors have a quasi-judicial role and make their decisions free of judicial or political interference, explaining at para 47:

> In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as "ministers of justice": *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25, *per* Locke J. In *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, L'Heureux-Dubé J. acknowledged the importance of limiting judicial oversight of Crown decisions in furtherance of the public interest:
>
> > [T]he Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. [Emphasis added.]
>
> Thus, the public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals.

[78] In *Anderson*, the Supreme Court of Canada clarified some confusion that had arisen in the lower Court's interpretation of *Krieger* regarding what is encompassed within "core" prosecutorial discretion. The Court abandoned the term "core" and reiterated at para 37 the principles noted above, including that prosecutorial discretion is a necessary part of a properly functioning criminal justice system and that prosecutors require discretion to fulfill their professional obligations and quasi-judicial role without fear of judicial or political interference.

[79] In *Anderson*, the Court noted that a narrow interpretation of prosecutorial discretion was not appropriate and clarified the term, providing several examples, at para 44:

> [44] In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice.

[80] More recently, in *Cawthorne* at para 28, the Supreme Court of Canada again noted that "[i]t is not open to a court to scrutinize this exercise of discretion, or to question a prosecutor's particular conception of the public interest."

[81] The principles enunciated by the Supreme Court have been consistently applied and reiterated by trial and appellate courts.

[82] The Court noted the implications for the criminal justice system of importing administrative law principles in *Baptiste*. The Court found that the importation of administrative law principles would open the floodgates to the review of countless decisions which are considered to fall within prosecutorial discretion and that this would result in the paralysis of the criminal process. The Court noted at paras 29-30:

> [29] To permit the importation of administrative law principles into the prosecutorial environment of the criminal law deserves reflection upon the potential impact of such a policy. There would be no end to decisions which would be reviewable, including the decision to prosecute or not prosecute an individual; the decision to appeal or not appeal a particular case; the decision to direct further investigation or not direct further investigation in any particular case; the decision to withdraw or not withdraw a particular charge; the decision to stay or not stay a prosecution; the decision to proceed by way of indictment or by summary conviction; the decision to divert a particular case outside the criminal law or not to divert that case outside the criminal law.
>
> [30] It is immediately apparent that to import administrative law principles and apply them to the everyday decision-making functions of the prosecution would effectively result in the complete paralysis of the administration of the criminal law. These decisions are made with obvious frequency in every Crown law office and in every courtroom in the common law world from minute to minute, hour to hour, and day to day. The nature of the workings of prosecutorial discretion make it singularly inappropriate to judicial review.

[83] Similar concerns had been previously noted by the Ontario Court of Appeal in *R v Saikaly*, [1979] OJ No 94 (QL) at para 17, 1979 CarswellOnt 1336 (CA) [*Saikaly*], where the Court stated that "[i]f the Attorney General must give a hearing to anyone who might be affected

every time he proposes to exercise the discretion conferred upon him by virtue of his office the administration of criminal justice would come to a standstill." The Court cited *Gouriet v UPW*, [1978] AC 435, (1977) 3 WLR at 319-320, where the UK Court noted the many powers of an Attorney General, including the power to stop any prosecution, without the need to provide reasons; to institute a prosecution; or to direct the DPP to take over the conduct of a prosecution, noting that the powers were not subject to the control and supervision of the Courts.

[84] In *Zhang v Canada (Attorney General)*, 2006 FC 276, [2006] FCJ No 361 (QL) [*Zhang*], this Court considered an application for judicial review of the Attorney General's decision not to consent to a private prosecution. The Court noted at para 9, that the jurisprudence has "consistently and repeatedly stressed that an exercise of prosecutorial discretion is largely beyond the legitimate reach of the court" [emphasis in original]. The Court cited, as an example of the established principle, *Nelles v Ontario*, [1989] 2 SCR 170, [1989] SCJ No 86 (QL), where the Supreme Court of Canada explained that the Attorney General, in exercising the role of prosecutor "enjoys an absolute and total immunity on the basis that he is performing a judicial function."

[85] In *Zhang*, the Court also cited *Saikaly*, noting at para 23 that the administration of justice would come to a standstill if the Attorney General had to give a hearing to anyone who was affected every time discretion was exercised, adding at para 24:

> [24] In *Krieger*, above, the Supreme Court of Canada reaffirmed the concept that the "quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute […]." (at para. 32). In my view, to accept the applicant's contention that he should have been given an

> opportunity to respond would compromise the independence of the Attorney General in the sphere of prosecutorial discretion.

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

VIII. Is the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement an exercise of prosecutorial discretion or is it an administrative decision?

A. *The Respondent's Submissions*

[87] The Respondent disputes the Applicants' position that the DPP must exercise her discretion to invite an organization to negotiate reasonably and in accordance with the statutory regime, noting that this is based on their mischaracterization of the decision as administrative.

[88] The Respondent submits that Part XXII.1 and in particular, section 715.32, which permits the prosecutor to invite an organization to enter into negotiations for a remediation agreement, is a "classic example" of prosecutorial discretion.

[89] The Respondent notes that a remediation agreement, which if successfully negotiated and approved would result in a stay of proceedings, is clearly within prosecutorial discretion, as would be any decision to continue or stay a prosecution. The Respondent notes that a stay of proceedings is not a novel concept. A stay of proceedings, which would be entered where an agreement is reached and where it is complied with, is governed by section 579 of the *Criminal Code*, which also governs a stay of proceedings entered in other circumstances. The Respondent notes that a decision to stay a criminal proceeding is clearly an exercise of prosecutorial discretion.

[90] The Respondent again notes the jurisprudence which establishes that the Courts are not to be placed in the role of supervising prosecutors. The Respondent submits that the Application asks this Court to become a supervising prosecutor of the DPP's decision whether to invite negotiations for a remediation agreement. The Respondent notes that if this initial decision were reviewable, then every subsequent step would also be reviewable. If that were so, then the Court would also need to supervise the circumstances where the negotiations do not result in an agreement. The wording of the provisions is clear that this is not the case; once negotiations for a remediation agreement begin, the prosecutor may decide to end the negotiation at any time before any agreement is reached. The only role for the criminal court (not this Court) is to approve a remediation agreement if one is successfully negotiated and, if so, to supervise the agreement. There is no role for the Court before that stage.

[91] The Respondent notes that the jurisprudence has provided many examples of analogous decisions made in the course of a prosecution that fall clearly within prosecutorial discretion.

The Respondent also points to the permissive and discretionary wording of the statutory provisions.

[92] The Respondent submits that an organization accused of an offence has no statutory right to be invited to negotiate a remediation agreement. The decision rests with the prosecutor. Section 715.32 sets out the conditions for entering negotiations, but provides the prosecutor with complete discretion whether to extend the offer to negotiate. While guiding factors are set out, they are open-ended and all refer to the prosecutor's opinion. The consent of the Attorney General is also required to extend an offer to negotiate and that consent is not guided by any factors.

[93] Where the prosecutor does not invite an organization to negotiate or having invited the organization to negotiate, fails to reach an agreement, or where an agreement is not approved by the Court, the criminal proceedings continue. In the present case, the DPP advised the Applicants that it would not invite them to negotiate a remediation agreement; therefore, the prosecution continues.

[94] The Respondent points to *Anderson*, at para 40, where the Supreme Court of Canada clarified the meaning of prosecutorial discretion and provided examples. In *Anderson*, the Supreme Court of Canada found that the prosecutor's decision whether to give notice to the accused of the intention to seek a higher penalty in an impaired driving prosecution was an exercise of discretion. The Court clarified the expansive scope of prosecutorial discretion and

provided several examples, including whether to bring a prosecution, continue a prosecution, accept a plea to a lesser offence, or to enter a stay of proceedings.

[95] The Respondent also notes the jurisprudence where the Courts have found that analogous decisions, including whether to pursue alternative measures (*Okimow*), whether to pursue a charge rather than divert a young person (*R v T(V)*), and whether to pursue extrajudicial sanctions for a young offender (*R v C (EJ)*) are exercises of prosecutorial discretion.

[96] The Respondent disputes the Applicants' interpretation of section 715.32 as requiring the prosecutor to invite an organization to enter into negotiations if the conditions for a remediation agreement are established. The Respondent submits that section 715.32, which uses the permissive language, "may" and "the prosecutor is of the opinion", does not support the Applicants' view that the prosecutor is obliged to offer to negotiate. Rather, whether to offer to negotiate is entirely within the prosecutor's discretion.

[97] The Respondent adds that even if the language were considered mandatory (which is disputed), all a prosecutor would need to find is that he or she is not "of the opinion" and no offer to negotiate would be made.

[98] In addition, section 715.32 and the related provisions in Part XXII.1 do not provide any mechanism to address a failed negotiation. The Respondent notes that if there was an obligation, as the Applicants submit, to extend an offer to negotiate a remediation agreement, there would need to be a mechanism to address how to resolve an unsuccessful negotiation.

[99] The Respondent also notes that the language used throughout Part XXII.1 clearly distinguishes between permissive and mandatory language.

[100] The Respondent disputes the Applicants' submission that "may" can mean "shall". The Respondent points to section 11 of the *Interpretation Act*, RSC 1985, c I-21, which provides that "may" is permissive.

[101] The Respondent also disputes the Applicants' argument that section 715.32, which sets out the conditions and factors for the prosecutor, in particular the additional factors to guide the consideration of the public interest, bears the hallmarks of administrative decision-making. The Respondent notes that every prosecutorial decision considers the public interest.

[102] With respect to the Applicants' reference to the Public Prosecution Service of Canada [PPSC] Deskbook, which guides prosecutors to consider the public interest in decisions to prosecute, and the Applicants' submission that the inclusion of the public interest in section 715.32 differs from the general consideration, the Respondent submits that prosecutors are guided to consider the public interest in all circumstances. The Deskbook notes that a prosecution will generally be in the public interest where there is a reasonable prospect of conviction "without more". The Respondent notes that although there may be a reasonable prospect of conviction, it may not always be in the public interest to prosecute. There is always discretion whether to pursue a prosecution. The inclusion of the public interest as a factor in section 715.32 does not turn the prosecutor's discretion into an administrative decision.

[103] The Respondent also notes that the DPP was created to be at arm's length from the Government. The *DPP Act* was introduced as part of the *Federal Accountability Act*, SC 2006, c 9 in 2006 for the purpose of highlighting the independence of that function from that of the Attorney General's dual role as Minister of Justice. The Respondent points to excerpts from the Parliamentary debates where the Government explained that the purpose of the *DPP Act* is to ensure that there is no appearance of political interference with the Attorney General in the role of prosecutor given that the Attorney General has a dual role as Minister of Justice.

B. *The Applicants' Submissions*

[104] The Applicants argue that the decision to invite or offer an organization to enter into negotiations for a remediation agreement is an administrative decision. The Applicants submit that, properly interpreted, section 715.32 is empowering, not discretionary, and that where the criteria are met, the prosecutor is required to offer to negotiate. The Applicants also submit that the remediation regime is a parallel process to the prosecution because the prosecution continues. The Applicants further submit that the decision whether to offer to negotiate differs from other decisions, including decisions made regarding alternative measures, which the Courts have found to be part of prosecutorial discretion. In addition, the Applicants argue that the public interest considerations included in section 715.32 reflect an administrative decision.

[105] The Applicants argue that the many issues they have raised demonstrate that the characterization of the DPP's decision as an administrative decision is at least debatable.

[106] The Applicants submit that the remediation regime does not involve prosecutorial discretion because the prosecution continues up to the point that a remediation agreement is approved by the Court and ultimately complied with. The remediation regime is a parallel process to the prosecution and to decisions made within the prosecution. It is not part of "core" prosecutorial discretion regarding whether to continue a prosecution; the prosecution does continue.

[107] Citing the legislative summary of Bill C-74 (the *BIA 2018*) prepared by the Library of Parliament, the Applicants rely on the statement that "the new regime will alter the primary role of the prosecutor, which is to bring criminal cases to trial". The Applicants submit that this supports their view that the decision made by the DPP is outside the primary role of the prosecutor and not within the scope of prosecutorial discretion.

[108] The Applicants further submit that basic principles of statutory interpretation require that statutory provisions be interpreted in their plain and ordinary meaning, in the context of the statute and harmoniously with the overall scheme and intention of Parliament. The Applicants argue that applying this approach requires that the objectives of remediation agreements inform the interpretation of section 715.32.

[109] The Applicants note the objectives of Parliament for the remediation regime at section 715.31, including to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community, to hold the organization accountable, to impose obligations on the organization to put in place corrective measures and promote a

compliance culture, to encourage voluntary disclosure of the wrongdoing, to provide reparations to victims or to the community, and "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." The Applicants emphasize that these objectives, in particular the impact on stakeholders, will not be met unless the prosecutor's decisions are subject to review.

[110] The Applicants add that although section 715.32 uses the words "may" and "the prosecutor is of the opinion", when the provisions are read in context with the scheme and the intention of Parliament, it is apparent that this is empowering language. The Applicants argue that the use of "may" in section 715.32 should be understood as "shall"; it is a power coupled with a duty. The DPP is required to consider the factors. If the factors are established and extending an offer to negotiate a remediation agreement would meet the statutory objectives of the regime, the prosecutor shall do so.

[111] The Applicants note that Ruth Sullivan, *Sullivan on the Interpretation of Statutes*, 6th ed (Markham, ON: LexisNexis, 2004) at para 4.64 explains that the use of the word "may" can be interpreted as a duty once all the conditions for the exercise of the power conferred are met. The Applicants also point to jurisprudence where "may" has been interpreted as "shall" or "must" (*R v Lavigne*, 2006 SCC 10 at para 27, [2006] 1 SCR 392 [*Lavigne*]).

[112] The Applicants dispute that the decision whether to invite an organization to negotiate is like other examples of decisions found to be within prosecutorial discretion, including alternative

measures. The Applicants argue that the remediation regime differs from the provisions of the *Criminal Code* permitting alternative measures, which do not include specific factors for the prosecutor to consider, for example the interests of stakeholders other than victims.

[113] The Applicants submit that jurisprudence relied on by the Respondent to support the view that the decision is an exercise of prosecutorial discretion assumes that the discretion exercised is unfettered, which is not the case in section 715.32. For example, in *Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920 at para 46, [2008] 3 FCR 571 [*Ochapowace*], the Court canvassed the law regarding prosecutorial discretion, noting it was purely discretionary and unbridled by statute. This is not the case here because the prosecutor must consider several mandatory factors.

[114] The Applicants point to the PPSC Deskbook, which guides prosecutors in deciding whether to prosecute to consider if there is a reasonable prospect of conviction, and if so, to consider whether the prosecution would serve the public interest. The Applicants argue that once the prosecutor determines that there is a reasonable prospect of conviction, it will necessarily follow that it is also in the public interest to prosecute. The Applicants submit that, unlike the exercise of prosecutorial discretion in deciding whether to prosecute, the decision to offer to negotiate a remediation agreement entails many more considerations. The remediation regime reflects that even where there is a reasonable prospect of conviction, it may not be in the public interest to prosecute an organization.

[115] The Applicants submit that section 715.32 bears the hallmarks of administrative decision-making. The Applicants note that paragraph 715.32(1)(c) includes the condition that "the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances" [emphasis added]. The determination of "public interest" is further guided by a list of factors in subsection 715.32(2). The Applicants submit that the decision to invite an organization to negotiate a remediation agreement does not only affect the accused and the prosecutor, but many others who are not usually considered in a decision to prosecute. The remediation agreement has a specific focus on particular public interests—including that of stakeholders—which sets the decision apart from other decisions a prosecutor may make.

[116] The Applicants add that decisions guided by the public interest are considered to be administrative decisions. The Applicants point to a passage in Patrice Garant, *Droit Administratif*, 7e ed (Cowansville, QC : Éditions Yvon Blais) at page 169 [*Droit Administratif*], where the author states "*La décision reste administrative si elle porte « sur l'examen du bien-être de la collectivité plutôt que sur les droits des parties au litige »*". ([TRANSLATION] – "The decision remains administrative if it deals "with considerations of the collective good of the community as a whole rather than on the rights of the parties to the litigation".")

C. *The DPP's decision is an exercise of prosecutorial discretion*

[117] Despite the Applicants' submissions regarding how the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement could be characterized as an administrative decision, this decision is clearly an exercise of prosecutorial discretion. The

statutory language of Part XXII.1, and in particular section 715.32, read in the context of the Part XXII.1 regime, supports the conclusion that the decision is purely discretionary. The nature of the decision and the jurisprudence which has identified many other decisions, some very similar to the decision at issue, as exercises of prosecutorial discretion confirm that this decision falls squarely within the prosecutor's discretion. The consideration of the public interest and the specific factors to guide the public interest does not transform section 715.32 into an administrative decision.

(1) The statutory language

[118] Part XXII.1 is set out in full in Appendix A. The choice of wording reveals what is permissive and what is mandatory. For example, the "prosecutor may enter into negotiations…", "the prosecutor must consider….", "a remediation agreement must include…", "a remediation agreement may include…", and "the prosecutor must take reasonable steps to inform any victim".

[119] Section 715.32 provides that the prosecutor "may" enter into negotiations if the conditions are established—all of which are drafted as requiring that "the prosecutor is of the opinion" that the condition is met. Even where the prosecutor is of the opinion that the conditions are met, the consent of the Attorney General is required. With respect to the prosecutor's opinion that "negotiating the agreement is in the public interest and appropriate in the circumstances" (paragraph 715.32(1)(c)), several additional factors are set out at subsection 715.32(2), including paragraph (i) "any other factor that the prosecutor considers

relevant", which signals that the factors related to the consideration of the public interest are non-exhaustive.

[120] The wording of subsection 715.33(1) also clearly conveys that the decision to give notice of an offer to negotiate is within the prosecutor's discretion. It states, "[i]f the prosecutor wishes to negotiate a remediation agreement…" [emphasis added].

[121] As noted by the Respondent, other provisions within Part XXII.1 also clearly convey that prosecutorial discretion is preserved in the remediation agreement regime. For example, subsection 715.36(1) requires the prosecutor to inform any victims or third parties that may be affected that the prosecutor is negotiating and may enter into a remediation agreement. However, subsection 715.36(2) makes it clear that the duty to inform a victim should be interpreted and applied in a reasonable manner that is not likely to interfere with the administration of justice "including by causing interference with *prosecutorial discretion* or compromising, hindering or causing excessive delay to the negotiation of an agreement or its conclusion" [emphasis added].

(2) "May" does not mean "shall"

[122] I do not agree with the Applicants' proposed interpretation of section 715.32 that the term "may" really means "shall" and couples permission or empowerment with a duty to invite an organization to negotiate where the conditions are met. Applying the principles of statutory interpretation and reading section 715.32 holistically and harmoniously in the context of Part XXII.1 and the *Criminal Code* more generally leads only to the conclusion, as explained

above, that "may" means "may". The statutory language conveys that the decision to invite an organization to negotiate is within the prosecutor's discretion, albeit guided by several factors.

[123] The Applicants' reliance on *Lavigne* at para 27 to support their view that "may" does not confer discretion is not persuasive. In *Lavigne*, the issue was the penalty for a conviction for a proceeds of crime offence and the provision that the judge *may* impose a fine instead of forfeiture. The Supreme Court of Canada stated at para 27:

> The effect of the word "may" cannot therefore be to grant a broad discretion. The exercise of the discretion is necessarily limited by the objective of the provision, the nature of the order and the circumstances in which the order is made.

I do not view *Lavigne* as stating any general principle with respect to the word "may". Rather, the Court considered the use of "may" in the specific context, as has been done in this case.

[124] The Applicants' theory that "may" should be interpreted as "shall" and that where the conditions are met, the prosecutor is required to invite an organization to enter into negotiations for a remediation agreement, begs the question of who would decide whether the conditions have been met? The views of the organization and the prosecutor may differ. The statutory provisions make it clear that it is the prosecutor who must be of the opinion that the conditions have been met.

(3) The scope of prosecutorial discretion

[125] The jurisprudence from the Supreme Court of Canada has provided many examples of decisions that fall within the ambit of prosecutorial discretion, all of which support that a

prosecutor's decision to invite an organization to enter into negotiations for a remediation agreement is also an exercise of prosecutorial discretion.

[126] In *Krieger*, *Nixon* and *Anderson*, the Supreme Court noted the following decisions as falling within prosecutorial discretion: whether to bring the prosecution of a charge, whether to proceed summarily or by indictment, whether to prefer an indictment, whether to enter a stay of proceedings, whether to accept a guilty plea to a lesser charge, whether to repudiate a plea agreement, whether to withdraw from criminal proceedings altogether, whether to take control of a private prosecution, whether to pursue a dangerous offender application, and whether to pursue an appeal. As noted in *Anderson* at para 44, "[a]ll pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice."

[127] In *R v T(V)*, the Supreme Court of Canada considered whether the decision of the prosecutor to pursue a charge against a young offender rather than to pursue diversion could be supervised or interfered with by the Court. The Court considered the arguments—which were similar to those advanced by the Applicants in the present case regarding empowering language of the statutory provisions and the need to ensure that the overall objectives of the legislation were respected—and concluded that the decision remained within prosecutorial discretion. The Court found that it was inconsistent with prosecutorial discretion to permit a judge to decide whether a charge should have been laid or other measures pursued.

[128] The Court stated, at paras 30-31:

> In any event, I have come to the conclusion that the argument advanced by the respondent is not at all consonant with recent pronouncements of this Court on the nature of s. 3(1). In *R. v. S. (S.)*, [1990] 2 S.C.R. 254, the accused, a young person, had been charged with possession of stolen goods but before entering a plea brought a motion alleging that the failure of the Ontario government to designate an alternative measures program constituted a violation of his s. 15 rights as guaranteed by the *Charter* . He relied on ss. 3(1) (*d*) and (*f*), arguing that in conjunction with s. 4 , they showed the government to be under a positive duty to initiate such programs. The trial judge accepted this argument as did the Court of Appeal. This Court reversed. Speaking through Dickson C.J., the Court held that no such mandatory duty could be inferred from the language Parliament had chosen in drafting the legislation. At page 274 Dickson C.J. states:
>
> > . . . the use of the term "should" in s. 3(1) (*d*) does not provide evidence of a mandatory duty. While I agree that s. 3(2) dictates that a liberal interpretation be given to the legislation, in my opinion that does not require the abandonment of the principles of statutory interpretation nor does it preclude resort to the ordinary meaning of words in interpreting a statute. In the context of s. 3(1) (*d*), I find that the word "should" denotes simply a "desire or request" . . . and not a legal obligation.
>
> In the circumstances of this case I am of the view that this pronouncement significantly undermines the submission of the respondent since she is arguing, in effect, that pursuant to s. 3(1) (*d*) the prosecutor is under a positive obligation to consider the bringing of no charges where doing so would be consistent with the underlying philosophy of the Act and, if the prosecutor fails to abide by this obligation and brings charges where they are not warranted, the Youth Court has authority to dismiss those charges. As seen from the decision in *R. v. S. (S.)*, no such positive obligation may be gleaned from the wording of s. 3(1) (*d*) and, consequently, none may be imputed to the authorities.

[129] In *R v C(EJ)*, the Crown refused to approve extrajudicial sanctions for a young offender—i.e., an alternative to prosecution, very similar to the alternative measures provisions

in the *Criminal Code*. The Court noted that it is the role of the Crown to decide whether to proceed with a prosecution.

[130] In *Okimow*, alternative measures in accordance with section 717 of the *Criminal Code* were denied to an accused. The accused sought judicial review of the decision. The Court found that alternative measures were authorized but not obligatory.

[131] The Court identified the issues as "whether, or to what extent, the statutory discretion conferred by s. 717 of the *Criminal Code* upon an Attorney General and/or upon his agent, a local prosecutor, in the creation of and in the execution of a program of alternative measures, is subject to judicial review."

[132] The Court noted the binding jurisprudence that exercise of prosecutorial discretion is not subject to judicial review except for abuse of process, noting at paras 13-14:

> 13 A prosecutor has the right to decide whom to prosecute or not prosecute, whether to prosecute or whether not to prosecute, when to prosecute and when not, what charge to prefer, and how many, and so on. A court will not, save for the exceptions, review these kinds of decisions. See *R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.); *Balderstone v. R.* (1983), 8 C.C.C. (3d) 532 (Man. C.A.); *Johnson v. Saskatchewan (Attorney General)* (1997), 156 Sask. R. 233 (Sask. Q.B.).
>
> 14 The prosecutorial decision challenged by the applicant is of the same genre as those discussed in the cases cited. In my opinion this court should for the same reasons cited decline to enter upon a review of the prosecutor's decision in this case. I quote from Balderstone, supra, at p. 539:
>
> > The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen

> to cases brought to their attention and decide them on their merits or on meritorious preliminary matters.
>
> If a judge should attempt to review the actions or conduct of the Attorney-General — barring flagrant impropriety — he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.

For these reasons therefore I decline to order the review requested by the applicant.

[133] In my view, *Okimow* captures the state of the law as established and reiterated by the Supreme Court of Canada on the same issue raised in the present case and in the context of a very analogous decision. The remediation regime in Part XXII.1 of the *Criminal Code* is recently enacted but it bears a strong similarity to alternative measures which have been authorized in the *Criminal Code* for decades. Both are measures that permit an alternative to the normal or traditional prosecution of an offence. Both are premised on the prosecutor's determination that there is a reasonable prospect of conviction and on the acceptance of responsibility for the alleged wrong doing by the accused. Where the accused meets the conditions of the alternative measures program, the charges are dismissed. Although the statutory language of section 717 of the *Criminal Code* is not identical to that of section 715.32, a condition for alternative measures to be offered is that the prosecutor "is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and the victim" (paragraph 717(1)(b)). Unlike the remediation regime, alternative measures programs are established within the province and territory and the additional relevant conditions are included within the specific program rather than directly in the *Criminal Code*. Also unlike the remediation regime, alternative measures are for individuals, not organizations. However, these

differences are minor and do not detract from the many similarities in the objectives, the nature and the key features of both regimes.

[134] The remediation agreement regime as an alternative to a prosecution is also similar to the use of extrajudicial sanctions in the context of the *Youth Criminal Justice Act*, SC 2002, c 1 [*Youth Criminal Justice Act*], which are accepted as matters of prosecutorial discretion.

[135] The remediation agreement regime could also be characterized as restorative justice, an approach which recognizes that a prosecution of an accused which may lead to a conviction will not necessarily address the harm done to society, victims or communities that may be affected, and that broader interests should be considered. Restorative justice approaches have also existed, without any specific provisions in the *Criminal Code*, for over 25 years. The determination by a prosecutor to pursue a restorative justice approach rather than to prosecute involves many considerations. Where pursued and depending on the circumstances, the charges could be stayed or dismissed. Such approaches fall clearly within prosecutorial discretion.

[136] I do not accept the Applicants' submission that the remediation agreement regime is a parallel process and, as such, is not in the same category as decisions made regarding a prosecution which have been found to be within prosecutorial discretion. There would not be a remediation agreement regime or the possibility of being invited to enter negotiations for a remediation agreement unless an organization was charged with an offence and a prosecution had been launched. The remediation agreement regime is not a pre-charge type of diversion. The goal of a successful remediation agreement—one that is negotiated, approved and complied

with—is a stay of proceedings. The very definition of a remediation agreement in Part XXII.1 is "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement" [emphasis added]. The prosecutor would not take the first step without considering the possible end result of a stay of the criminal proceedings. The remediation agreement regime exists within the criminal proceedings and offers an approach to permit a stay of those proceedings.

[137] The Applicants' submission that the jurisprudence that establishes that prosecutorial discretion is not subject to review should be distinguished because it is premised on unfettered discretion, which is unlike the discretion provided in section 715.32, does not detract from the principles established. As noted above, the Courts have continued to find that decisions guided by factors remain within the ambit of prosecutorial discretion given that the overall context is whether and how the prosecution continues. The inclusion of factors in section 715.32 does not fetter the discretion to the extent that it takes away or constrains the prosecutor's authority to continue or stay a prosecution or to take other decisions within the course of the prosecution. As noted in *Anderson* at para 44, "all pertain to the nature and extent of the prosecution."

(4) The consideration of the public interest

[138] I do not agree that the requirement to consider the public interest and the factors included in subsection 715.32(2) to guide the consideration of the public interest is an indication that this is an administrative decision and subject to administrative law principles. The public interest is always a consideration in the exercise of prosecutorial discretion. As noted by the Respondent,

although there may be a reasonable prospect of conviction in many contexts, the public interest may dictate that the prosecution not be pursued. The inclusion of the public interest factor in the decision whether to invite an organization to negotiate a remediation agreement elaborates on the considerations that are relevant in the context of a remediation agreement and on those that are not. In particular, subsection 715.32(3) provides that where an organization is alleged to have committed an offence under the *Corruption of Foreign Officials Act*, as in this case, the prosecutor is not to consider the national economic interest when forming an opinion that a remediation agreement is in the public interest. The inclusion of the public interest factors does not point to administrative decision-making, but to informed and thoughtful prosecutorial discretion.

[139] The Applicants' reliance on *Droit Administratif* at page 169, to characterize the decision as an administrative decision is not persuasive. The relevant passage states:

> « Lorsque la décision est prise en vertu d'un pouvoir discrétionnaire et que le décideur est surtout guidé par l'intérêt public, le fait qu'il tienne une audition ou entend les représentations des administrés concernés ne change pas la nature de la décision. La décision reste administrative si elle porte « sur l'examen du bien-être de la collectivité plutôt que sur les droits des parties au litige ». La décision est administrative lorsque le décideur « dans une mission de protection de l'intérêt public » contrôle un secteur d'activité, « ce qui inclut la délivrance, le renouvellement, la suspension et la révocation du permis aux conditions et dans les limites prescrit par la loi ».

[140] This passage does not assist in characterizing the DPP's decision as administrative. The reference to the public interest in paragraph 715.32(1)(c) or the factors in subsection 715.32(2) which elaborate on what to consider in the context of determining whether the prosecutor "is of the opinion that negotiating the agreement is in the public interest and appropriate in the

circumstances" do not convert the decision into an administrative decision. This approach overlooks that the public interest is always a consideration in the exercise of prosecutorial discretion. It is also an oversimplification to suggest that consideration of the public interest in the exercise of discretion converts the decision to an administrative decision. That approach would mean that countless decisions of a prosecutor would be administrative.

[141] In conclusion, the decision for which the Applicants seek judicial review is an exercise of prosecutorial discretion that falls within the prosecutor's role in bringing and continuing the prosecution and all that entails.

IX. Is the DPP a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act* for the purpose of this decision?

A. *The Respondent's Submissions*

[142] The Respondent submits that the Application must be struck in any event because this Court does not have jurisdiction to review the DPP's decision not to invite the Applicants to enter into negotiations for a remediation agreement. The Respondent submits that the DPP is not a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act* for the purpose of the decision at issue.

[143] The Respondent submits that to fall within the definition in section 2 the person or body—in this case, the DPP—must derive their powers under an Act of Parliament. The Respondent submits that the source of the DPP's power or authority to invite an organization to enter into negotiations for a remediation agreement is not the *Criminal Code*, the *DPP Act* or any

other Act of Parliament. Rather, the source of the DPP's prosecutorial discretion, as delegated by the Attorney General, is the common law and the constitution.

[144] The Respondent points to *Anisman v Canada (Border Services Agency)*, 2010 FCA 52, [2010] FCJ No 221 (QL) [*Anisman*], which established a two-step test to determine whether a body or person meets the section 2 definition. First, the jurisdiction or authority exercised must be identified. Second, the source of the jurisdiction must be identified.

[145] The Respondent submits that applying the *Anisman* test to the decision at issue reveals that the jurisdiction or power being exercised is the power to decide whether to continue the prosecution or to pursue negotiations with a view to ultimately entering a stay of proceedings. The source of the power is the historical power of Attorneys General which has been delegated to the DPP. Although the DPP is created by a federal statute, which explains that the DPP exercises the powers of the Attorney General of Canada (section 3, *DPP Act*), when the DPP decides whether to pursue a prosecution or whether to offer or invite an organization to enter into negotiations for a remediation agreement, the DPP is exercising the prosecutorial discretion of the Attorney General, which is derived from the common law (*Krieger* at paras 26, 31, 32, *Miazga* at para 46).

[146] The Respondent submits that the fact that Parliament has passed a statute defining the duties or powers of a body does not mean that the source of the powers is the statute (*Southam Inc v Canada (Attorney General)*, [1990] 3 FC 465, [1990] FCJ No 712 (QL) at para 26 [*Southam Inc*]). In the present case, the *Criminal Code* elaborates on the powers of the

prosecutor to exercise prosecutorial discretion, but the discretion is derived from the common law and the constitution.

[147] The Respondent notes that in *George v Canada (Attorney General)*, 2007 FC 564, [2007] FCJ No 752 (QL) [*George*], the Court found that the decision of an RCMP officer to pursue a criminal investigation of the applicant's conduct could not be judicially reviewed because the RCMP officer was engaged in law enforcement and acting pursuant to common law powers, not pursuant to the statute that created the RCMP. The Court stated at para 44:

> While I recognize that the powers of peace officers are incorporated into the *RCMP Act*, nevertheless, it is well established that when peace officers conduct criminal investigations they are acting pursuant to powers which have their foundation in the common law independent of any Act of Parliament or Crown prerogative. In other words, the *RCMP Act* imports and clothes with statutory authority police powers, duties and privileges which remain largely defined by common law: *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Div. Ct.).
>
> [Emphasis added]

[148] In *George*, the Court explained that the RCMP could be found to be acting as a federal board, tribunal or commission for some other purposes, but when an RCMP officer acts in the course of a criminal investigation, he or she is independent of the control of the executive.

[149] The Respondent also points to *Ochapowace*. The Federal Court found that the decision of the RCMP, in its law enforcement role, not to pursue charges for trespass was not reviewable. The Respondent notes that the Court extensively reviewed the jurisprudence regarding prosecutorial discretion and the rationale for why it is immune from judicial review (at paras 40-

45). At para 56, the Court held that the decision could not be found to have been made by a federal board because the police officer was exercising powers found in the common law.

[150] The Respondent submits that the same reasoning applies to the DPP's exercise of prosecutorial discretion. The DPP is not a federal board when exercising its prosecutorial discretion, but could be so considered in the exercise of other powers.

[151] The Respondent further submits that even if this Court found that it had the jurisdiction to review the DPP's decision, it should decline to do so given that the considerations in criminal matters differ from those within the expertise of the Federal Court. The Respondent notes that in *George* at para 38, the Court stated, "The Federal Court is a statutory court that derives all of its jurisdiction from the *Federal Courts Act*, and unlike provincial superior courts, it has no general or inherent jurisdiction to deal with criminal matters." The Court added that the limited criminal jurisdiction in the Federal Courts is circumscribed by express statutory provisions.

[152] The Respondent suggests that if the Applicants seek to challenge the DPP's decision to not invite them to negotiate a remediation agreement, they should do so within the context of the criminal proceeding in Quebec. The Respondent relies on the principle that criminal proceedings should not be fragmented by interlocutory proceedings that take on a life of their own (*R v Basi*, 2009 BCSC 1685, [2009] BCJ No 2436 (QL); *R v DeSousa*, [1992] 2 SCR 944, [1992] SCJ No 77 (QL)).

B. *The Applicants' Submissions*

[153] The Applicants dispute the Respondent's position that the DPP is not a federal board, commission or other tribunal within the definition in section 2 of the *Federal Courts Act.* The Applicants submit that the power exercised by the DPP is derived from the *Criminal Code*, a federal Act, not from any common law power of the prosecutor, and that as a result, the DPP is a "federal board".

[154] The Applicants do not dispute that the two-part test established in *Anisman* (paras 29-30) applies first, to determine the power the body seeks to exercise and, second, to determine the source or origin of the power. However, the Applicants submit that *Anisman* does not resolve the issue of whether the DPP is a federal board, because it depends on whether the power being exercised is characterized as prosecutorial discretion or an administrative decision. The Applicants' position remains that the DPP's decision is not an exercise of prosecutorial discretion, but an administrative decision.

[155] The Applicants rely on *Douglas v Canada*, 2014 FC 299 at para 80, [2015] 2 FCR 911, where the Court noted, "to fall within the scope of the definition, a body need only exercise or purport to exercise jurisdiction or powers conferred under an Act of Parliament or under an order made pursuant to a Crown prerogative".

[156] The Applicants argue that the DPP is exercising the authority granted under Part XXII.1 of the *Criminal Code*, not the common law. The Applicants note that the authority to offer to negotiate a remediation agreement did not exist previously so it could not be derived from the common law.

[157] The Applicants also argue that the decision made by the DPP is derived from the assignment of powers under the *DPP Act*, paragraph 3(3)(g), which provides that the Director, under and on behalf of the Attorney General, "exercises any other power or carries out any other duty or function assigned to the Director by the Attorney General that is compatible with the office of Director." The Applicants argue that this demonstrates that the DPP's power is not derived from the common law, but from statute, and that the DPP is a federal board and the Federal Court can review the DPP's decision.

[158] The Applicants also dispute the Respondent's suggestion that the DPP's decision could be challenged in the Court of Quebec, which is the court of criminal jurisdiction. The Applicants submit that the Quebec *Code of Civil Procedure* governs judicial review and limits review to decisions made by a person under the authority of the Parliament of Quebec.

[159] The Applicants submit that the Respondent has lost sight of the remedy they seek in their Application, which is to set aside the DPP's decision and to be offered to negotiate a remediation agreement. They do not allege abuse of process or seek a stay of proceedings.

[160] The Applicants argue that by precluding this Court from reviewing the decision, there is no way to ensure that the DPP has considered their submissions and the relevant factors and is respecting the objectives of the remediation agreement regime.

[161] The Applicants dispute the Respondent's submission that the DPP's decision does not have legal consequences for them. The Applicants note that their Notice of Application sets out

the benefits of a remediation agreement for the company and its innocent stakeholders—and highlights the grave consequences of a continuing prosecution.

C. *The DPP—in its exercise of prosecutorial discretion—is not a "federal board, commission or other tribunal"*

[162] The *Federal Courts Act* provides the definition of federal board, commission or other tribunal as meaning;

> any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; (office fédéral)

[163] The Federal Court of Appeal explained the test to determine whether a body falls within the section 2 definition and the jurisdiction of this Court in *Anisman* at para 29:

> The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.

[164] I acknowledge the Applicants' submission that *Anisman* does not resolve the issue in dispute regarding the characterization of the DPP's decision. The key issue is whether the DPP is

exercising prosecutorial discretion. Given the Court's finding that the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement is an exercise of prosecutorial discretion, the only conclusion that can be reached is that—with respect to this decision—the DPP is not a "federal board, commission or other tribunal" within the section 2 definition and this Court does not have jurisdiction.

[165] The jurisprudence has found that the source of prosecutorial discretion is derived from the common law and the constitution.

[166] In *Krieger* at paras 26 and 31, the Supreme Court of Canada explained that prosecutorial powers are derived from prerogative powers, which are derived from the common law, stating:

> 26 In Canada, the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*. Although the specific duties conventionally exercised by the Attorney General are not enumerated, s. 135 of that Act provides for the extension of the authority and duties of that office as existing prior to Confederation.
>
> …
>
> 31 This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. In *R. v. Power*, [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:
>
> > It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive . . . .
> >
> > Donna C. Morgan in "Controlling Prosecutorial Powers—Judicial Review, Abuse of Process and

> Section 7 of The Charter" (1986-87), 29 *Crim. L.Q.* 15, at pp. 20-21, probes the origins of prosecutorial powers:
>
> > Most [prosecutorial powers] derive . . . from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.

[167] In *Krieger* the Court added at para 32, in explaining that prosecutorial discretion is not subject to review by the Courts, "the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution."

[168] In *Miazga* at para 46, the Supreme Court of Canada reiterated that the independence of the Attorney General as prosecutor is constitutionally entrenched and that the role of the Attorney General as prosecutor is quasi-judicial.

[169] In *George* at para 46, the Court noted the distinction between the role of a police officer in exercising common law powers and other powers. The source of the power being the common law precluded the Federal Court's jurisdiction.

[170] In *Ochapowace*, the Court reached the same conclusion reached in *George*, noting at para 56:

> The only possible source of jurisdiction was section 18.1 of the *Act*, which confers jurisdiction to review decisions made by "a federal board, commission or other tribunal", as these entities are defined in section 2 of the same *Act*. After reviewing the legislation and the case law on the subject, Justice Tremblay-Lamer came to the conclusion that the decision to initiate a criminal investigation cannot be properly characterized as a decision by a "federal board, commission or other tribunal". In her view, police officers are independent from the Crown when conducting criminal investigations, and their powers have their foundation in the common law. Being independent of the control of the executive, they cannot be assimilated to a "federal board, commission or other tribunal". I fully agree with this most compelling analysis of my colleague.

[171] The same reasoning applies in the present case. The prosecutor is not exercising powers conferred by the *DPP Act* or the *Criminal Code*. The DPP is exercising prosecutorial discretion which is derived from the common law and the constitution. Therefore, the DPP is not a federal board, commission or other tribunal for the purpose of the decision at issue. The DPP could fall within the section 2 definition with respect to other decisions made that are not derived from common law powers, for example, decisions made as an employer.

[172] The Applicants' submission that the powers are not derived from the common law because they are new powers and that the *DPP Act* governs in assigning certain powers of the Attorney General to the DPP does not change the finding that the decision at issue is an exercise of prosecutorial discretion. The new provisions in Part XXII.1 guide the exercise of the discretion within the criminal proceedings. In *Southam Inc* at para 26, the Federal Court of Appeal found that the privileges of the Senate were not conferred by the *Parliament of Canada Act*, RSC 1985, c P-1, but by the constitution. The Act elaborated on the powers but is not the source of the powers. Similarly, as noted above in *George*, the *Royal Canadian Mounted Police*

Act, RSC 1985, c R-10 set out specific powers, but the underlying source of the power at issue was the common law. To borrow wording from *George* at para 44, in the present case, Part XXII.1 of the *Criminal Code* "imports and clothes" the Attorney General—i.e. the prosecutor—with powers which are derived from the common law.

[173] The Applicants' submission that if Parliament intended to exclude the DPP from the section 2 definition, it should have done so in express language misses the distinction between a decision of the DPP that falls within the exercise of prosecutorial discretion and other decisions of the DPP, which, depending on their nature, could be subject to judicial review (as in *George*). The nature of the power being exercised and the source of the power are determinative.

X. *Mandamus*

[174] It is not necessary to address the question of whether *mandamus* would be available as a remedy for the Applicants on judicial review, given the finding that the decision whether to invite an organization to enter into negotiations for a remediation agreement is an exercise of prosecutorial discretion, which leads to the additional finding that the DPP is not a federal board, commission or other tribunal for this decision.

[175] The Court notes that the availability of *mandamus* would also be determined by the same findings. The test for *mandamus* established in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, [1993] FCJ No 1098 (QL) (CA), aff'd [1994] 3 SCR 1100, [1994] SCJ No 113 (QL), requires among other elements that there is a public duty to act. As found above, there is no duty

imposed on the DPP to invite the Applicants to enter negotiations for a remediation agreement. In addition, *mandamus* cannot be used to compel the exercise of discretion in a particular way.

XI. The Application for Judicial Review does not raise novel claims and debatable issues which should be allowed to proceed

[176] The Applicants note that a motion to strike is an exceptional remedy to be used carefully. They submit that the Respondent has not delivered the "knockout punch" required to strike their Application. They emphasize that novel claims and debatable issues should be allowed to proceed and to be determined by the applications judge with a full record. The Applicants submit that many of the issues raised are novel—in particular, the interpretation of Part XXII.1. They also submit that many issues are debatable, including the characterization of the decision as administrative or as prosecutorial discretion, the impact of fettered discretion, whether the DPP is exercising authority based on a federal statute or the common law, and whether *mandamus* is a remedy.

[177] With all due respect to the Applicants' well-articulated arguments, the fact that the Applicants have raised many issues, which are then debated with the Respondent, does not mean that the issues are debatable as that term was used in *David Bull* and does not mean that the issues should be determined by the applications judge. All the issues raised have been canvassed on this motion and, in my view, the jurisprudence has clearly addressed the determinative issues; there is no lack of certainty. Raising issues on which there will inevitably be argument does not turn them into debatable issues for the purpose of avoiding a motion to strike; the test remains whether there is reasonable prospect of success on the Application.

[178] Similarly, the fact that the DPP's decision arises in the context of new legislation does not necessarily mean that the issue raised is novel and should proceed to be determined. The issue is whether the DPP's decision falls within the exercise of prosecutorial discretion. That issue has been squarely addressed and determined. As noted above, many analogous decisions have been found to be within prosecutorial discretion. Other *Criminal Code* provisions (for example alternative measures), former *Young Offenders Act*, RSC 1985, c Y-1 provisions (diversion) and *Youth Criminal Justice Act* provisions (extrajudicial sanctions) have been found to be within prosecutorial discretion. As with the remediation agreement regime, these provisions exist within prosecutorial discretion, which originated long before the statutory amendments. At the heart of the remediation agreement regime is a stay of the criminal proceedings—again, not a novel concept or a new legal principle.

[179] Moreover, if a novel claim were raised, the test for a motion to strike would not change. Rather, the Court would be more cautious in its determination and would consider the nature of the novel claim and whether it is a "responsible, incremental change to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning" or a "claim divorced from doctrine" (*Paradis Honey* at para 117). The Notice of Application, read holistically to determine its essential character, leads to the conclusion that the Applicants seek to compel the prosecution to exercise its discretion to invite the Applicants to negotiate a remediation agreement. The Applicants have articulated why this is of the highest importance to them. However, the essential character of the Application does not reveal a novel claim. It is a long established principle that the exercise of prosecutorial discretion is not subject to judicial review, except for abuse of process.

[180] In conclusion, for the reasons explained above, and having considered the submissions of the parties and the jurisprudence, the Application for Judicial Review is struck, without leave to amend. The Application has no reasonable prospect of success in the context of the law and the governing jurisprudence and when a realistic view is taken. The law is clear that prosecutorial discretion is not subject to judicial review, except for abuse of process. The DPP's decision to not invite the Applicants to enter into negotiations for a remediation agreement clearly falls within the ambit of prosecutorial discretion. In addition, this Court would not have jurisdiction to review a decision of the DPP which is an exercise of prosecutorial discretion because in this context, the DPP derives its authority, as the delegate of the Attorney General, from the common law, not a federal statute. It would, therefore, not fall within the definition of "federal board, commission or other tribunal" in section 2 of the *Federal Courts Act*.

ORDER in T-1843-18

THIS COURT ORDERS that

1. The Application for Judicial Review is struck without leave to amend.

2. The Respondent shall have its costs on this motion.

"Catherine M. Kane"
Judge

Appendix A

***Criminal Code*, RSC 1985, c C-46**

PART XXII.1	**PARTIE XXII.1**
Remediation Agreements	**Accords de réparation**
715.3 (1) The following definitions apply in this Part.	715.3 (1) Les définitions qui suivent s'appliquent à la présente partie.
court means a superior court of criminal jurisdiction but does not include a court of appeal.	**tribunal** Une cour supérieure de juridiction criminelle, à l'exception de toute cour d'appel.
offence means any offence listed in the schedule to this Part.	**infraction** Toute infraction mentionnée à l'annexe de la présente partie.
organization has the same meaning as in section 2 but does not include a public body, trade union or municipality.	**organisation** S'entend au sens de l'article 2, exception faite des corps constitués, des syndicats professionnels et des municipalités.
remediation agreement means an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.	**accord de réparation** Accord entre une organisation accusée d'avoir perpétré une infraction et le poursuivant dans le cadre duquel les poursuites relatives à cette infraction sont suspendues pourvu que l'organisation se conforme aux conditions de l'accord.
victim has the same meaning as in section 2 but, with respect to an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, it includes any person outside Canada.	**victime** S'entend au sens de l'article 2, mais, à l'égard d'une infraction visée aux articles 3 ou 4 de la *Loi sur la corruption d'agents publics étrangers*, vise notamment une personne qui se trouve à l'étranger.
Acting on victim's behalf	**Agir pour le compte de la victime**
(2) For the purposes of this Part, a third party not referred to in section 2.2 may also act on a victim's behalf when authorized to do so by the court, if the victim requests it or the prosecutor deems it appropriate.	(2) Pour l'application de la présente partie, une tierce partie non visée à l'article 2.2 peut aussi agir, avec l'autorisation du tribunal, pour le compte de la victime, si celle-ci le demande ou le poursuivant l'estime indiqué.

Purpose

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

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

(b) to hold the organization accountable for its wrongdoing 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.

Objet

715.31 La présente partie a pour objet de prévoir l'établissement d'un régime d'accords de réparation applicable à toute organisation à qui une infraction est imputée et visant les objectifs suivants :

a) dénoncer tout acte répréhensible de l'organisation et le tort causé par celui-ci aux victimes ou à la collectivité;

b) tenir l'organisation responsable de son acte répréhensible par l'imposition de pénalités efficaces, proportionnées et dissuasives;

c) favoriser le respect de la loi par l'obligation faite à l'organisation de mettre en place des mesures correctives ainsi qu'une culture de conformité;

d) encourager la divulgation volontaire des actes répréhensibles;

e) prévoir la réparation des torts causés aux victimes ou à la collectivité;

f) réduire les conséquences négatives de l'acte répréhensible sur les personnes — employés, clients, retraités ou autres — qui ne s'y sont pas livrées, tout en tenant responsables celles qui s'y sont livrées.

Conditions for remediation agreement

715.32 (1) The prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence if the

Conditions préalables

715.32 (1) Le poursuivant peut négocier un accord de réparation avec une organisation à qui une infraction est imputée, si les conditions suivantes sont

following conditions are met:

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

(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

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

Factors to consider

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

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

(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

réunies :

a) il est d'avis qu'il existe une perspective raisonnable de condamnation pour l'infraction;

b) il est d'avis que l'acte ou l'omission à l'origine de l'infraction n'a pas causé et n'est pas susceptible d'avoir causé des lésions corporelles graves à une personne ou la mort, n'a pas porté et n'est pas susceptible d'avoir porté préjudice à la défense ou à la sécurité nationales et n'a pas été commis au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste, ou en association avec l'un ou l'autre;

c) il est d'avis qu'il convient de négocier un tel accord dans les circonstances et qu'il est dans l'intérêt public de le faire;

d) le procureur général a donné son consentement à la négociation d'un tel accord.

Facteurs à prendre en compte

(2) Pour l'application de l'alinéa (1)c), le poursuivant prend en compte les facteurs suivants :

a) les circonstances dans lesquelles l'acte ou l'omission à l'origine de l'infraction a été porté à l'attention des autorités chargées des enquêtes;

b) la nature et la gravité de l'acte ou de l'omission ainsi que ses conséquences sur les victimes;

c) le degré de participation des cadres supérieurs de l'organisation à l'acte ou à l'omission;

d) la question de savoir si l'organisation

disciplinary action, including termination of employment, against any person who was involved in the act or omission;

a pris des mesures disciplinaires à l'égard de toute personne qui a participé à l'acte ou à l'omission, parmi lesquelles son licenciement;

(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;

e) la question de savoir si l'organisation a pris des mesures pour réparer le tort causé par l'acte ou l'omission et pour empêcher que des actes ou omissions similaires ne se reproduisent;

(f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;

f) la question de savoir si l'organisation a identifié les personnes qui ont participé à tout acte répréhensible relatif à l'acte ou à l'omission ou a manifesté sa volonté de le faire;

(g) whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;

g) la question de savoir si l'organisation ou tel de ses agents ont déjà été déclarés coupables d'une infraction ou ont déjà fait l'objet de pénalités imposées par un organisme de réglementation ou s'ils ont déjà conclu, au Canada ou ailleurs, des accords de réparation ou d'autres accords de règlement pour des actes ou omissions similaires;

(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

h) la question de savoir si l'on reproche à l'organisation ou à tel de ses agents d'avoir perpétré toute autre infraction, notamment celles non visées à l'annexe de la présente partie;

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

i) tout autre facteur qu'il juge pertinent.

Factors not to consider

Facteurs à ne pas prendre en compte

(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

(3) Malgré l'alinéa (2)i), dans le cas où l'infraction imputée à l'organisation est une infraction visée aux articles 3 ou 4 de la *Loi sur la corruption d'agents publics étrangers*, le poursuivant ne doit pas prendre en compte les considérations d'intérêt économique national, les effets possibles sur les

Canada or the identity of the organization or individual involved.

relations avec un État autre que le Canada ou l'identité des organisations ou individus en cause.

Notice to organization — invitation to negotiate

Avis à l'organisation — invitation à négocier

715.33 (1) If the prosecutor wishes to negotiate a remediation agreement, they must give the organization written notice of the offer to enter into negotiations and the notice must include

715.33 (1) S'il désire négocier un accord de réparation, le poursuivant avise l'organisation, par écrit, de son invitation à négocier. L'avis comporte les éléments suivants :

(a) a summary description of the offence to which the agreement would apply;

a) une description sommaire de toute infraction qui ferait l'objet de l'accord;

(b) an indication of the voluntary nature of the negotiation process;

b) une mention du caractère volontaire du processus de négociation;

(c) an indication of the legal effects of the agreement;

c) une mention des effets juridiques de l'accord;

(d) an indication that, by agreeing to the terms of this notice, the organization explicitly waives the inclusion of the negotiation period and the period during which the agreement is in force in any assessment of the reasonableness of the delay between the day on which the charge is laid and the end of trial;

d) une mention du fait qu'en acceptant les conditions de l'avis, l'organisation renonce explicitement à inclure la période de négociation et la période de validité de l'accord dans l'appréciation du caractère raisonnable du délai entre le dépôt des accusations et la conclusion du procès;

(e) an indication that negotiations must be carried out in good faith and that the organization must provide all information requested by the prosecutor that the organization is aware of or can obtain through reasonable efforts, including information enabling the identification of any person involved in the act or omission that forms the basis of the offence or any wrongdoing related to that act or omission;

e) une mention du fait que les négociations doivent être menées de bonne foi et que l'organisation doit fournir tous les renseignements exigés par le poursuivant dont elle a connaissance ou qui peuvent être obtenus par des efforts raisonnables de sa part, notamment ceux permettant d'identifier les personnes qui ont participé à l'acte ou à l'omission à l'origine de l'infraction ou à tout acte répréhensible relatif à l'acte ou à l'omission;

(f) an indication of how the information disclosed by the organization during the negotiations may be used, subject to subsection (2);

f) une mention de l'utilisation qui peut être faite des renseignements divulgués par l'organisation durant les négociations, sous réserve du paragraphe (2);

(g) a warning that knowingly making false or misleading statements or knowingly providing false or misleading information during the negotiations may lead to the recommencement of proceedings or prosecution for obstruction of justice;

g) une mise en garde portant que le fait de faire sciemment des déclarations fausses ou trompeuses ou de communiquer sciemment des renseignements faux ou trompeurs durant les négociations peut mener à une reprise des poursuites ou à des poursuites pour entrave à la justice;

(h) an indication that either party may withdraw from the negotiations by providing written notice to the other party;

h) une mention du fait que l'une ou l'autre des parties peut se retirer des négociations en donnant un avis écrit à l'autre;

(i) an indication that reasonable efforts must be made by both parties to identify any victim as soon as practicable; and

i) une mention du fait que les parties doivent, dès que possible, faire des efforts raisonnables pour identifier les victimes;

(j) a deadline to accept the offer to negotiate according to the terms of the notice.

j) la date d'échéance pour accepter l'invitation à négocier selon les conditions de l'avis.

Admissions not admissible in evidence

Non-admissibilité des aveux

(2) 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.

(2) Les aveux de culpabilité ou les déclarations par lesquels l'organisation se reconnaît responsable d'un acte ou d'une omission déterminés ne sont pas, lorsqu'elle les faits dans le cadre des négociations d'un accord de réparation, admissibles en preuve dans les actions civiles ou les poursuites pénales dirigées contre elle et relatives à cet acte ou à cette omission, sauf dans le cas où l'accord est conclu par les parties et approuvé par le tribunal et que ces aveux ou déclarations font partie d'une déclaration visée par les alinéas

715.34(1)a) ou b).

Mandatory contents of agreement

715.34 (1) A remediation agreement must include

(a) a statement of facts related to the offence that the organization is alleged to have committed and an undertaking by the organization not to make or condone any public statement that contradicts those facts;

(b) the organization's admission of responsibility for the act or omission that forms the basis of the offence;

(c) an indication of the obligation for the organization to provide any other information that will assist in identifying any person involved in the act or omission, or any wrongdoing related to that act or omission, that the organization becomes aware of, or can obtain through reasonable efforts, after the agreement has been entered into;

(d) an indication of the obligation for the organization to cooperate in any investigation, prosecution or other proceeding in Canada — or elsewhere if the prosecutor considers it appropriate — resulting from the act or omission, including by providing information or testimony;

(e) with respect to any property, benefit or advantage identified in the agreement that was obtained or derived directly or indirectly from the act or omission, an obligation for the organization to

(i) forfeit it to Her Majesty in right of Canada, to be disposed of in

Contenu obligatoire de l'accord

715.34 (1) L'accord de réparation comporte les éléments suivants :

a) une déclaration des faits relatifs à l'infraction qui est imputée à l'organisation ainsi qu'un engagement de sa part de ne pas faire, ni tolérer, de déclarations publiques contradictoires à ces faits;

b) une déclaration de l'organisation portant qu'elle se reconnaît responsable de l'acte ou de l'omission à l'origine de l'infraction;

c) une mention de l'obligation pour l'organisation de communiquer tout autre renseignement qui est porté à sa connaissance ou qui peut être obtenu par des efforts raisonnables après la conclusion de l'accord et qui est utile pour identifier les personnes qui ont participé à l'acte ou à l'omission ou à tout acte répréhensible relatif à l'acte ou à l'omission;

d) une mention de l'obligation pour l'organisation de collaborer lors de toute enquête, poursuite ou procédure, au Canada ou à l'étranger lorsque le poursuivant l'estime indiqué, résultant de l'acte ou de l'omission, notamment en communiquant des renseignements ou en rendant des témoignages;

e) une mention de l'obligation pour l'organisation :

(i) soit de remettre à Sa Majesté du chef du Canada les biens,

accordance with paragraph 4(1)(b.2) of the *Seized Property Management Act*,

bénéfices ou avantages précisés dans l'accord qui ont été obtenus ou qui proviennent, directement ou indirectement, de l'acte ou de l'omission, pour en disposer conformément à l'alinéa 4(1)b.2) de la *Loi sur l'administration des biens saisis*,

(ii) forfeit it to Her Majesty in right of a province, to be disposed of as the Attorney General directs, or

(ii) soit de les remettre à Sa Majesté du chef d'une province, pour qu'il en soit disposé selon les instructions du procureur général,

(iii) otherwise deal with it, as the prosecutor directs;

(iii) soit d'en disposer de toute autre façon selon les instructions du poursuivant;

(f) an indication of the obligation for the organization to pay a penalty to the Receiver General or to the treasurer of a province, as the case may be, for each offence to which the agreement applies, the amount to be paid and any other terms respecting payment;

f) une mention de l'obligation pour l'organisation de payer au receveur général ou au Trésor de la province, selon le cas, une pénalité pour toute infraction visée par l'accord, ainsi qu'une mention du montant à payer et des modalités de paiement;

(g) an indication of any reparations, including restitution consistent with paragraph 738(1)(a) or (b), that the organization is required to make to a victim or a statement by the prosecutor of the reasons why reparations to a victim are not appropriate in the circumstances and an indication of any measure required in lieu of reparations to a victim;

g) une mention de toute mesure de réparation du tort causé aux victimes que l'organisation est tenue de prendre à leur égard, notamment tout dédommagement visé aux alinéas 738(1)a) et b), ou une déclaration du poursuivant énonçant les motifs pour lesquels une telle mesure n'est pas indiquée dans les circonstances et, s'il y a lieu, une mention de toute autre mesure qui sera prise à la place;

(h) an indication of the obligation for the organization to pay a victim surcharge for each offence to which the agreement applies, other than an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the amount to be paid and any other terms respecting payment;

h) une mention de l'obligation pour l'organisation de payer une suramende compensatoire pour toute infraction visée par l'accord, autre que celles visées aux articles 3 ou 4 de la *Loi sur la corruption d'agents publics étrangers*, ainsi qu'une mention du montant à payer et des modalités de paiement;

(i) an indication of the obligation for the organization to report to the prosecutor on the implementation of the agreement and an indication of the manner in which the report is to be made and any other terms respecting reporting;

i) une mention de l'obligation pour l'organisation de faire rapport au poursuivant relativement à la mise en oeuvre de l'accord et des modalités qui sont liées à cette obligation;

(j) an indication of the legal effects of the agreement;

j) une mention des effets juridiques de l'accord;

(k) an acknowledgement by the organization that the agreement has been made in good faith and that the information it has provided during the negotiation is accurate and complete and a commitment that it will continue to provide accurate and complete information while the agreement is in force;

k) une déclaration de l'organisation portant qu'elle reconnaît que l'accord a été conclu de bonne foi, que les renseignements qu'elle a communiqués lors des négociations sont exacts et complets et qu'elle continuera à fournir de tels renseignements durant la période de validité de l'accord;

(l) an indication of the use that can be made of information obtained as a result of the agreement, subject to subsection (2);

l) une mention de l'utilisation qui peut être faite des renseignements obtenus en vertu de l'accord, sous réserve du paragraphe (2);

(m) 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;

m) une mise en garde portant que le non-respect des conditions de l'accord peut mener à une demande du poursuivant pour résilier l'accord et à une reprise des poursuites;

(n) an indication of the obligation for the organization not to deduct, for income tax purposes, the costs of any reparations or other measures referred to in paragraph (g) or any other costs incurred to fulfil the terms of the agreement;

n) une mention de l'obligation pour l'organisation de ne faire aucune déduction d'impôt pour les frais entraînés par la prise de toute mesure visée à l'alinéa g) ni pour les autres frais engagés pour se conformer aux conditions de l'accord;

(o) a notice of the prosecutor's right to vary or terminate the agreement with the approval of the court; and

o) une mention du droit du poursuivant de modifier l'accord et d'y mettre fin, avec l'approbation du tribunal;

(p) an indication of the deadline by which the organization must meet the terms of the agreement.

p) une mention du délai dans lequel l'organisation doit remplir les conditions de l'accord.

Admissions not admissible in evidence

(2) No admission, confession or statement accepting responsibility for a given act or omission made by the organization as a result of the agreement 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 and admission of responsibility referred to in paragraphs (1)(a) and (b), if the agreement is approved by the court.

Non-admissibilité des aveux

(2) Les aveux de culpabilité ou les déclarations par lesquels l'organisation se reconnaît responsable d'un acte ou d'une omission déterminés ne sont pas, lorsqu'ils ont été obtenus en vertu de l'accord, admissibles en preuve dans les actions civiles ou les poursuites pénales dirigées contre elle et relatives à cet acte ou à cette omission, sauf dans le cas où l'accord est approuvé par le tribunal et que ces aveux ou déclarations font partie d'une déclaration visée par les alinéas (1)a) ou b).

Optional content of agreement

(3) A remediation agreement may include, among other things,

Contenu discrétionnaire de l'accord

(3) L'accord de réparation peut comporter notamment les éléments suivants :

(a) an indication of the obligation for the organization to establish, implement or enhance compliance measures to address any deficiencies in the organization's policies, standards or procedures — including those related to internal control procedures and employee training — that may have allowed the act or omission;

a) une mention de l'obligation pour l'organisation de mettre en place et d'appliquer des mesures de conformité ou d'améliorer celles déjà en place, afin de corriger les lacunes dans ses politiques, normes ou procédures — notamment celles visant les mécanismes de contrôle interne et la formation de ses employés — qui ont pu contribuer à l'acte ou à l'omission à l'origine de l'infraction;

(b) an indication of the obligation for the organization to reimburse the prosecutor for any costs identified in the agreement that are related to its administration and that have or will be incurred by the prosecutor; and

b) une mention de l'obligation pour l'organisation de rembourser au poursuivant les frais mentionnés dans l'accord se rapportant à son administration et encourus ou à encourir par lui;

(c) an indication of the fact that an independent monitor has been appointed, as selected with the prosecutor's approval, to verify and report to the prosecutor on the

c) une mention du fait qu'un surveillant indépendant a été nommé, avec l'approbation du poursuivant, afin de vérifier que l'organisation se conforme à l'obligation prévue à l'alinéa a) ou à

organization's compliance with the obligation referred to in paragraph (a), or any other obligation in the agreement identified by the prosecutor, as well as an indication of the organization's obligations with respect to that monitor, including the obligations to cooperate with the monitor and pay the monitor's costs.

toute autre obligation de l'accord indiquée par le poursuivant et d'en faire rapport à ce dernier, ainsi qu'une mention des obligations de l'organisation envers le surveillant, notamment l'obligation de coopérer avec lui et de payer ses frais.

Independent monitor — conflict of interest

715.35 A candidate for appointment as an independent monitor must notify the prosecutor in writing of any previous or ongoing relationship, in particular with the organization or any of its representatives, that may have a real or perceived impact on the candidate's ability to provide an independent verification.

Surveillant indépendant — conflit d'intérêts

715.35 Toute personne dont la candidature est proposée à titre de surveillant indépendant est tenue d'aviser par écrit le poursuivant de toute relation antérieure ou actuelle, notamment avec l'organisation ou tel de ses agents, qui pourrait avoir une incidence réelle ou perçue sur sa capacité de faire une vérification indépendante.

Duty to inform victims

715.36 (1) After an organization has accepted the offer to negotiate according to the terms of the notice referred to in section 715.33, the prosecutor must take reasonable steps to inform any victim, or any third party that is acting on the victim's behalf, that a remediation agreement may be entered into.

Devoir d'informer les victimes

715.36 (1) Après que l'organisation a accepté l'invitation à négocier selon les conditions de l'avis visé à l'article 715.33, le poursuivant prend les mesures raisonnables pour informer les victimes ou une tierce partie qui agit pour leur compte qu'un accord de réparation pourrait être conclu.

Interpretation

(2) The duty to inform any victim is to be construed and applied in a manner that is reasonable in the circumstances and not likely to interfere with the proper administration of justice, including by causing interference with prosecutorial discretion or compromising, hindering or causing excessive delay to the negotiation of an

Interprétation

(2) Le paragraphe (1) doit être interprété et appliqué de manière raisonnable dans les circonstances et d'une manière qui n'est pas susceptible de nuire à la bonne administration de la justice, notamment de porter atteinte au pouvoir discrétionnaire du poursuivant, de nuire aux négociations portant sur l'accord ou à sa conclusion, de les compromettre ou

agreement or its conclusion.

Reasons

(3) If the prosecutor elects not to inform a victim or third party under subsection (1), they must provide the court, when applying for approval of the agreement, with a statement of the reasons why it was not appropriate to do so in the circumstances.

Application for court approval

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.

Coming into force

(2) The coming into force of the agreement is subject to the approval of the court.

Consideration of victims

(3) To determine whether to approve the agreement, the court hearing an application must consider

(a) any reparations, statement and other measure referred to in paragraph 715.34(1)(g);

(b) any statement made by the prosecutor under subsection 715.36(3);

(c) any victim or community impact statement presented to the court; and

(d) any victim surcharge referred to in paragraph 715.34(1)(h).

encore de causer des délais excessifs à leur égard.

Motifs

(3) Le poursuivant qui ne remplit pas l'obligation prévue au paragraphe (1) est tenu d'en donner les motifs au tribunal lors de la demande pour approbation de l'accord.

Demande d'approbation

715.37 (1) Lorsque le poursuivant et l'organisation se sont entendus sur les conditions d'un accord de réparation, le poursuivant demande, par écrit, au tribunal de rendre une ordonnance pour approuver l'accord.

Prise d'effet subordonnée à l'approbation

(2) La prise d'effet de l'accord est subordonnée à l'approbation de celui-ci par le tribunal.

Prise en compte des victimes

(3) Dans le cadre de l'audience pour approbation de l'accord, le tribunal est tenu de prendre en considération :

a) toute mesure de réparation, déclaration ou autre mesure visée à l'alinéa 715.34(1)g);

b) tout motif donné par le poursuivant aux termes du paragraphe 715.36(3);

c) toute déclaration de la victime ou déclaration au nom d'une collectivité qui lui est présentée;

d) toute suramende compensatoire visée à l'alinéa 715.34(1)h).

Victim or community impact statement

(4) For the purpose of paragraph (3)(c), the rules provided for in sections 722 to 722.2 apply, other than subsection 722(6), with any necessary modifications and, in particular,

(a) a victim or community impact statement, or any other evidence concerning any victim, must be considered when determining whether to approve the agreement under subsection (6);

(b) the inquiry referred to in subsection 722(2) must be made at the hearing of the application; and

(c) the duty of the clerk under section 722.1 or subsection 722.2(5) is deemed to be the duty of the prosecutor to make reasonable efforts to provide a copy of the statement to the organization or counsel for the organization as soon as feasible after the prosecutor obtains it.

Déclaration de la victime ou déclaration au nom d'une collectivité

(4) Pour l'application de l'alinéa (3)c), les règles prévues aux articles 722 à 722.2, exception faite du paragraphe 722(6), s'appliquent avec les adaptations nécessaires et, pour l'application de ces dispositions :

a) toute déclaration de la victime ou déclaration au nom de la collectivité ainsi que tout autre élément de preuve qui concerne les victimes sont pris en considération pour décider si l'accord devrait être approuvé au titre du paragraphe (6);

b) l'obligation de s'enquérir prévue au paragraphe 722(2) doit être remplie au moment de l'audition;

c) l'obligation du greffier prévue à l'article 722.1 ou au paragraphe 722.2(5) est réputée être celle du poursuivant de faire les efforts raisonnables pour faire parvenir une copie de la déclaration de la victime ou de la déclaration au nom de la collectivité à l'organisation ou à son avocat dans les meilleurs délais après l'avoir obtenue.

Victim surcharge

(5) For the purpose of paragraph 715.34(1)(h), the amount of the victim surcharge is 30% of any penalty referred to in paragraph 715.34(1)(f), or any other percentage that the prosecutor deems appropriate in the circumstances, and is payable to the treasurer of the province in which the application for approval referred to in section 715.37 is made.

Suramende compensatoire

(5) Pour l'application de l'alinéa 715.34(1)h), le montant de la suramende compensatoire est de trente pour cent de la pénalité visée à l'alinéa 715.34(1)f) ou tout autre pourcentage que le poursuivant estime indiqué dans les circonstances et est payable au Trésor de la province dans laquelle la demande d'approbation visée à l'article 715.37 est faite.

Approval order

Ordonnance d'approbation

(6) The court must, by order, approve the agreement if it is satisfied that

(6) Le tribunal approuve par ordonnance l'accord s'il est convaincu que les conditions suivantes sont réunies :

(a) the organization is charged with an offence to which the agreement applies;

a) l'organisation fait l'objet d'accusations relativement aux infractions visées par l'accord;

(b) the agreement is in the public interest; and

b) l'accord est dans l'intérêt public;

(c) the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

c) les conditions de l'accord sont équitables, raisonnables et proportionnelles à la gravité de l'infraction.

Stay of proceedings

Suspension des poursuites

(7) As soon as practicable after the court approves the agreement, the prosecutor must direct the clerk or other proper officer of the court to make an entry on the record that the proceedings against the organization in respect of any offence to which the agreement applies are stayed by that direction and that entry must be made immediately, after which time the proceedings shall be stayed accordingly.

(7) Dans les meilleurs délais suivant l'approbation de l'accord par le tribunal, le poursuivant ordonne au greffier ou à tout fonctionnaire compétent du tribunal de mentionner au dossier que les poursuites à l'égard de l'organisation relativement aux infractions qui sont visées par l'accord sont suspendues sur son ordre et cette mention doit être faite séance tenante; dès lors, les poursuites sont suspendues en conséquence.

Other proceedings

Autre poursuite

(8) No other proceedings may be initiated against the organization for the same offence while the agreement is in force.

(8) Aucune autre poursuite ne peut être engagée contre l'organisation à l'égard de ces infractions pendant la période de validité de l'accord.

Limitation period

Interruption de la prescription

(9) The running of a limitation period in respect of any offence to which the agreement applies is suspended while the agreement is in force.

(9) Le délai de prescription des infractions visées par l'accord est interrompu pendant la période de validité de celui-ci.

Variation order

Ordonnance de modifications

715.38 On application by the prosecutor, the court must, by order, approve any modification to a remediation agreement if the court is satisfied that the agreement continues to meet the conditions set out in subsection 715.37(6). On approval, the modification is deemed to form part of the agreement.

715.38 Sur demande du poursuivant, le tribunal approuve par ordonnance toute modification d'un accord de réparation s'il est convaincu que l'accord continue de satisfaire aux conditions prévues au paragraphe 715.37(6). Ces modifications sont, dès leur approbation, réputées faire partie de l'accord.

Termination order

715.39 (1) On application by the prosecutor, the court must, by order, terminate the agreement if it is satisfied that the organization has breached a term of the agreement.

Ordonnance de résiliation

715.39 (1) Sur demande du poursuivant, le tribunal ordonne la résiliation de l'accord de réparation s'il est convaincu que l'organisation a fait défaut de respecter les conditions de l'accord.

Recommencement of proceedings

(2) As soon as the order is made, proceedings stayed in accordance with subsection 715.37(7) may be recommenced, without a new information or a new indictment, as the case may be, by the prosecutor giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered.

Reprise des poursuites

(2) Dès le prononcé de l'ordonnance, les poursuites suspendues en application du paragraphe 715.37(7) peuvent être reprises par le poursuivant sans nouvelle dénonciation ou sans nouvel acte d'accusation, selon le cas, s'il donne avis de la reprise au greffier du tribunal où les poursuites ont été suspendues.

Stay of proceedings

(3) If no notice is given within one year after the order is made under subsection (1), or before the expiry of the time within which the proceedings could have been commenced, whichever is earlier, the proceedings are deemed never to have been commenced.

Arrêt des poursuites

(3) Si l'avis n'est pas donné dans l'année qui suit le prononcé de l'ordonnance rendue au titre du paragraphe (1) ou avant l'expiration du délai dans lequel les poursuites auraient pu être engagées si ce délai expire le premier, les poursuites sont réputées n'avoir jamais été engagées.

Order declaring successful completion

715.4 (1) On application by the prosecutor, the court must, by order, declare that the terms of the agreement

Ordonnance déclarant le respect des conditions de l'accord

715.4 (1) Sur demande du poursuivant, le tribunal, s'il est convaincu que les conditions de l'accord de réparation ont

were met if it is satisfied that the organization has complied with the agreement.

été respectées, rend une ordonnance les déclarant telles.

Stay of proceedings

(2) The order stays the proceedings against the organization for any offence to which the agreement applies, the proceedings are deemed never to have been commenced and no other proceedings may be initiated against the organization for the same offence.

Arrêt des poursuites

(2) L'ordonnance entraîne l'arrêt immédiat des poursuites à l'encontre de l'organisation relativement aux infractions visées à l'accord, auquel cas ces poursuites sont réputées n'avoir jamais été engagées et aucune autre poursuite ne peut être engagée contre elle relativement à ces infractions.

Deadline

715.41 (1) The prosecutor must, as soon as practicable after the deadline referred to in paragraph 715.34(1)(p), apply to the court in writing for a variation order under section 715.38, including to extend the deadline, an order terminating the agreement under section 715.39 or an order under section 715.4 declaring that its terms were met and the court may issue any of these orders as it deems appropriate.

Expiration du délai

715.41 (1) Dans les meilleurs délais, après l'expiration du délai visé à l'alinéa 715.34(1)p), le poursuivant doit demander par écrit au tribunal de rendre l'ordonnance visée à l'article 715.38 pour notamment prolonger le délai, l'ordonnance visée à l'article 715.39 pour résilier l'accord de réparation ou l'ordonnance visée à l'article 715.4 pour déclarer que ses conditions ont été respectées et le tribunal peut rendre l'une de ces ordonnances qu'il estime indiquée.

Deeming

(2) The agreement is deemed to remain in force until a court issues an order terminating it or declaring that its terms were met.

Présomption

(2) L'accord est réputé demeurer en vigueur jusqu'à la date où le tribunal ordonne sa résiliation ou déclare que ses conditions ont été respectées.

Publication

715.42 (1) Subject to subsection (2), the following must be published by the court as soon as practicable:

Publication

715.42 (1) Sous réserve du paragraphe (2), le tribunal est tenu de publier dans les meilleurs délais :

(a) the remediation agreement approved by the court;

a) l'accord de réparation approuvé par lui;

(b) an order made under any of

b) toute ordonnance rendue au titre de

sections 715.37 to 715.41 and the reasons for that order or the reasons for the decision not to make that order; and

l’un des articles 715.37 à 715.41 et les motifs justifiant de la rendre ou de ne pas la rendre;

(c) a decision made under subsection (2) and the reasons for that decision.

c) toute décision rendue au titre des paragraphes (2) ou (5), motifs à l’appui.

Decision not to publish

Non-publication

(2) The court may decide not to publish the agreement or any order, decision or reasons referred to in subsection (1), in whole or in part, if it is satisfied that the non-publication is necessary for the proper administration of justice.

(2) Le tribunal peut décider de ne pas publier tout ou partie de l’accord ou d’une ordonnance ou des motifs visés à l’alinéa (1)b), s’il est convaincu que la bonne administration de la justice l’exige.

Factors to be considered

Facteurs à considérer

(3) To decide whether the proper administration of justice requires making the decision referred to in subsection (2), the court must consider

(3) Pour décider si la bonne administration de la justice exige de prendre la décision visée au paragraphe (2), le tribunal prend en considération les facteurs suivants :

(a) society’s interest in encouraging the reporting of offences and the participation of victims in the criminal justice process;

a) l’intérêt de la société à encourager la dénonciation des infractions et la participation des victimes au processus de justice pénale;

(b) whether it is necessary to protect the identity of any victims, any person not engaged in the wrongdoing and any person who brought the wrongdoing to the attention of investigative authorities;

b) la nécessité ou non de protéger l’identité de victimes, de personnes qui ne se sont pas livrées à l’acte répréhensible ou de celles qui l’ont dénoncé aux autorités chargées des enquêtes;

(c) the prevention of any adverse effect to any ongoing investigation or prosecution;

c) la prévention de tout effet préjudiciable sur les enquêtes et les poursuites en cours;

(d) whether effective alternatives to the decision referred to in subsection (2) are available in the circumstances;

d) l’existence dans les circonstances d’autres moyens efficaces que celui de prendre la décision visée au paragraphe (2);

(e) the salutary and deleterious effects

e) les effets bénéfiques et préjudiciables

of making the decision referred to in subsection (2); and

(f) any other factor that the court considers relevant.

Conditions

(4) The court may make its decision subject to any conditions that it considers appropriate.

Review of decision

(5) On application by any person, the court must review the decision made under subsection (2) to determine whether the non-publication continues to be necessary for the proper administration of justice. If the court is satisfied that the non-publication is no longer necessary, it must publish the agreement, order or reasons, as the case may be, in whole or in part, as soon as practicable.

Regulations

715.43 (1) On the recommendation of the Minister of Justice, the Governor in Council may make regulations generally for the purposes of carrying out this Part, including regulations respecting

(a) the form of the remediation agreement; and

(b) the verification of compliance by an independent monitor, including

(i) the qualifications for monitors,

(ii) the process to select a monitor,

de prendre la décision visée au paragraphe (2);

f) tout autre facteur qu'il estime pertinent.

Conditions

(4) Le tribunal peut assortir sa décision de toute condition qu'il estime indiquée, notamment quant à la durée de la non-publication.

Révision de la décision

(5) Sur demande de toute personne, le tribunal révise la décision rendue en vertu du paragraphe (2) pour décider si la bonne administration de la justice exige toujours la non-publication. S'il est convaincu que ce n'est pas le cas, l'accord, l'ordonnance ou les motifs, selon le cas, sont publiés, en tout ou en partie, dans les meilleurs délais.

Règlements

715.43 (1) Le gouverneur en conseil peut, sur recommandation du ministre de la Justice, prendre tout règlement d'application de la présente partie, notamment concernant :

a) la forme des accords de réparation;

b) la vérification de la conformité par des surveillants indépendants, notamment :

(i) les compétences requises pour agir à ce titre,

(ii) le processus de sélection des

surveillants,

(iii) the form and content of a conflict of interest notification, and

(iii) la forme et le contenu des avis relatifs aux conflits d'intérêts,

(iv) reporting requirements.

(iv) les exigences en matière de rapport.

Amendment of schedule

(2) On the recommendation of the Minister of Justice, the Governor in Council may, by order, amend the schedule by adding or deleting any offence to which a remediation agreement may apply.

Décret

(2) Sur recommandation du ministre de la Justice, le gouverneur en conseil peut, par décret, modifier l'annexe par adjonction ou suppression de toute infraction qui peut être visée par un accord de réparation.

Deleting offence

(3) If the Governor in Council orders the deletion of an offence from the schedule to this Part, this Part continues to apply to an organization alleged to have committed that offence if a notice referred to in section 715.33 respecting that offence was sent to the organization before the day on which the order comes into force.

Suppression d'une infraction

(3) Dans le cas où il y a suppression d'une infraction à l'annexe de la présente partie par décret du gouverneur en conseil, la présente partie continue de s'appliquer à l'organisation à qui est imputée l'infraction à condition que l'avis prévu à l'article 715.33 au sujet de cette infraction lui ait été donné avant la date de prise d'effet du décret.

FEDERAL COURT

SOLICITORS OF RECORD

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