

# **The Business (and Regulation) of Cannabis**

## Compliance and Enforcement of the Cannabis Act

**Presented by:** Jonathan Nehmetallah  
April 4, 2019



# Introduction

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## Purpose of the Cannabis Act

The purpose of the Act is to protect public health and public safety, including reducing the risk of cannabis being diverted to an illegal market. The Act, in conjunction with its Regulations:

- Sets the general control framework for cannabis;
- Provides authorizations to permit persons to engage in activities related to cannabis;
- Sets the parameters for the operation of a legal cannabis industry through the granting of licences, permits or authorizations;
- Sets clear authorities intended to protect against the public health and public safety risks associated with cannabis;
- Seeks to restrict youth access to cannabis and deter criminal activity by imposing serious penalties for those who break the law;

# Roles and Responsibilities

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## Regulated Parties

Regulated parties are expected to:

- understand the law and their obligations with respect to all regulated activities, including those that do not require a licence or authorization;
- ensure their products, activities and processes comply with applicable laws;
- treat Health Canada staff in a courteous and respectful manner;
- understand the role of an inspector;
- comply with provisions of the Act and its Regulations that govern interactions with Health Canada, such as requirements to comply with orders and prohibitions on obstructing an inspector or providing false or misleading statements;
- be aware of the ethical obligations that govern the actions of Health Canada inspectors as set out in the Values and Ethics Code for the Public Sector.

# Compliance and Enforcement Activities

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## Compliance Promotion

Health Canada promotes compliance through educational activities and information sharing on legislative and regulatory matters. This includes:

- policies and guidance documents intended to help regulated parties better understand the requirements and their responsibilities.

# Compliance and Enforcement Activities

## Compliance Monitoring

Health Canada monitors the activities of regulated parties to verify they are complying with the Act and its Regulations and to prevent non-compliance. Compliance monitoring includes gathering and analyzing information, carrying out compliance verification activities and collaborating with other regulatory agencies as appropriate.

As part of monitoring and verifying compliance, Health Canada has the authority to conduct inspections. Inspections may involve actions such as:

- Visually examining a facility, inventories, equipment, packaging, labelling and websites;
- Collecting and reviewing documents and records;
- Taking samples for laboratory analysis.

# Compliance and Enforcement Activities

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## Compliance Monitoring *(cont'd)*

Health Canada uses information from internal and external sources to identify possible risks to public health and public safety. When Health Canada identifies a product or activity that may not be compliant with the Act or its Regulations, it applies the guiding principles in this policy, including using a targeted, outcomes-focused and evidence-based approach to assess whether there is non-compliance. External sources may include consumers, a company within a supply chain, and federal, provincial, territorial and international partners.

# Enforcement

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# Compliance and Enforcement Activities

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Voluntary compliance measures initiated by the regulated party

It is always the regulated party's responsibility to take appropriate and timely action to meet all requirements of the legislation and regulations. In cases of non-compliance, the regulated party may voluntarily undertake one or more interventions based on the level of risk. These could include consent to forfeiture, product detention, product disposal, product stop-sale and product recall.

Voluntary actions by a regulated party may not preclude Health Canada from initiating other measures if they are appropriate in the circumstances.

# Compliance and Enforcement Activities

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## Measures Initiated by Health Canada

Health Canada may take a number of enforcement actions to address non-compliance or to address an issue of public health, depending on the circumstances. These include:

- Issuing warning letters to non-compliant regulated parties;
- Issuing public advisories or other forms of risk communication;
- Seizure and detention;
- Refusing, suspending or revoking an authorization, including a licence or permit;
- Issuing administrative monetary penalties up to \$1 million;
- Issuing a ministerial order to recall products from the market, conduct tests or studies, produce information or documents, or take other measures.

# Compliance and Enforcement Activities

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## Appeals

- Under the Act, regulated parties have the right to request a review of decisions relating to certain compliance and enforcement measures undertaken by Health Canada, including administrative monetary penalties and ministerial orders. There are also opportunities to be heard on licensing decisions, including licence amendment, suspension and revocation.
- These review processes involve individual(s) other than the decision maker that imposed the compliance and enforcement measure. They will also occur in a manner that prioritizes on-going compliance and enforcement actions and does not compromise Health Canada's efforts to address risks to public health and public safety.



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**Questions?**

# Contact Us

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Jonathan Nehmetallah



T **416.865.6732**



E **jnehmetallah@grllp.com**



W **grllp.com**



**@jnehmetallah**



# The SNC-Lavalin Affair: Protecting the Innocent or Playing Politics?

**Presented by:** Kenneth Jull  
April 4, 2019

The views are of the author and are not intended to reflect the views of Gardiner Roberts LLP



Respecting the legal framework: Lessons from the testimony of former Justice Minister and Attorney General of Canada, Ms. Jody Wilson-Raybould, and the unfolding SNC-Lavalin story



## Legal issues can put you on the front page



# Legal issues can put you on the front page

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- STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS EVIDENCE, WEDNESDAY, FEBRUARY 27, 2019
- Hon. Jody Wilson-Raybould
- On December 18, 2018, my chief of staff was urgently summoned to a meeting with Gerry Butts and Katie Telford to discuss SNC.
- Katie was like 'we don't want to debate legalities anymore....' They keep being like 'we aren't lawyers, but there has to be some solution here.'
- She was like 'If Jody is nervous, we would of course line up all kinds of people to write OpEds saying that what she is doing is proper.'

## March 31, 2019 response from Gerald Butts

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- Second, The Honourable Jody Wilson-Raybould reported that Ms. Prince implied we could engineer a desired outcome by influencing third party advice. As I said in my testimony, that was not what I meant at all. I said that I didn't see how getting advice from someone like retired Chief Justice Beverley McLachlin constituted political interference. I would add that the suggestion that political staff could influence the opinion of a retired Supreme Court justice on a matter of law is far-fetched. I did not and would not make such a suggestion.

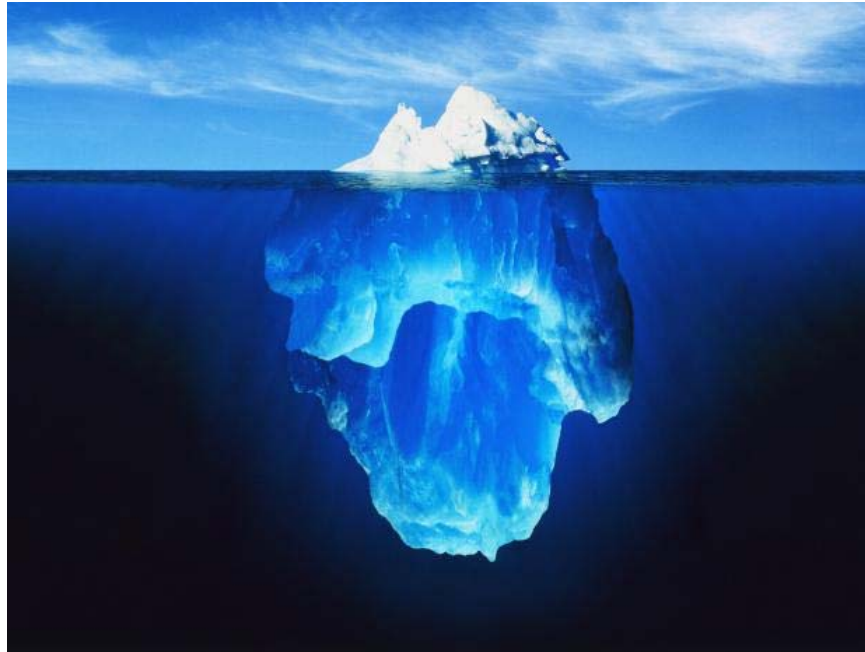
# Transcription of Note: 7 Jan. 19

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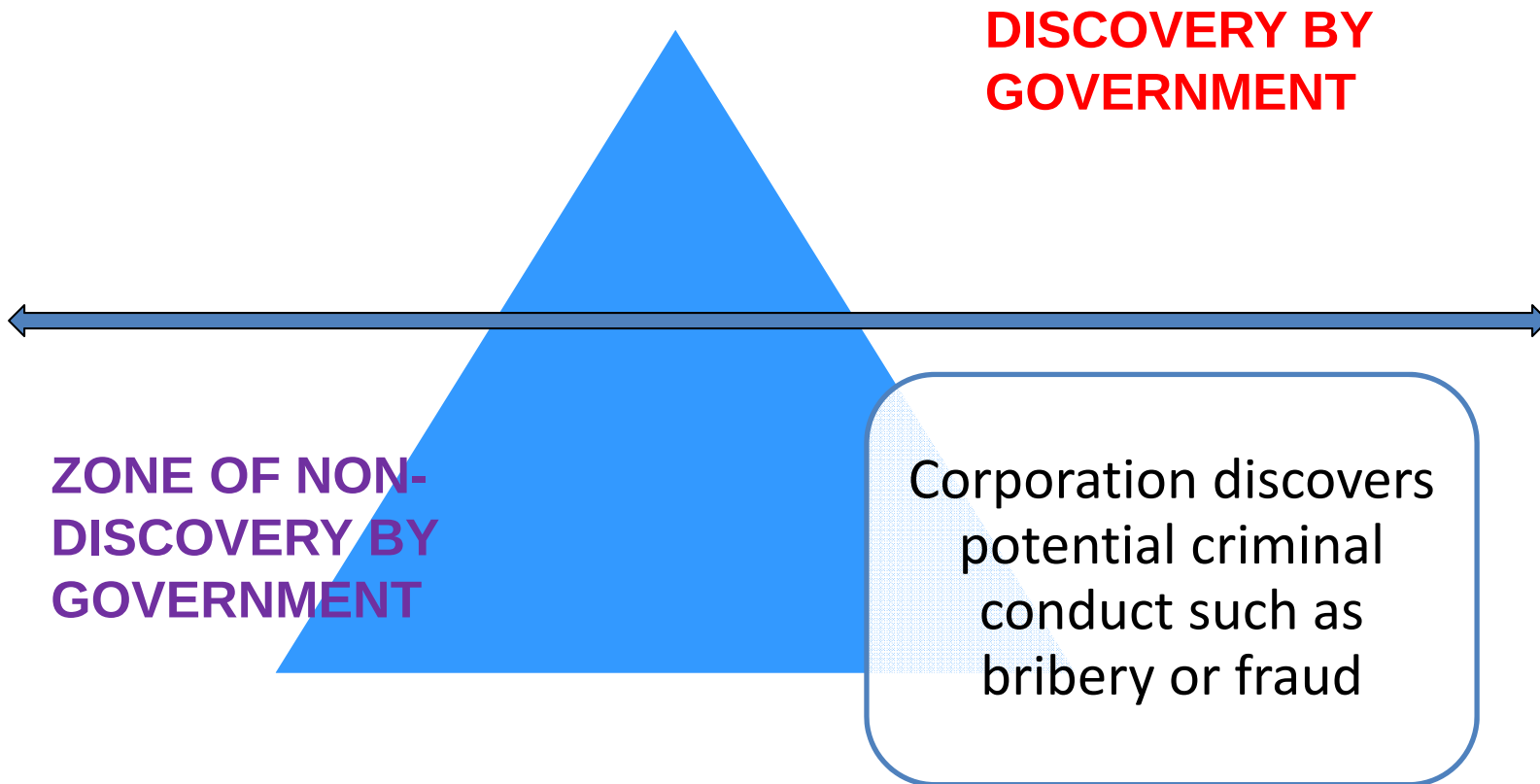
- Convo with Jody
- Scott put us in a difficult situation
- Jane IS to TB
- IS to execution mode. Need our best players to move to pitch in.
- Need Canadians to buy in
- Justice in defence mode until the election
- You are one of top players and this will show Canadians how seriously we take this
- JWR “I’m a little bit shocked.”
- PM: “Dream job” for Jane in Health. Had to switch her from that.
- “There is no way this”
- “I love being MOJAG. I’m not going to lie. IS is not my dream job. I’m not going to lie about that.”
- PM: “I know it is not your dream job but it is core to this government to maintain a legacy and to be crass about it to our political legacy.
- JWR: “I feel I’m being shifted out of Justice for other reasons.”
- PM: “We would not be doing this if it weren’t for Scott’s decision.
- JWR: I don’t agree. That’s not how we change people’s lives.
- PM: “After an election, everything is fresh again.”

# Why is the SNC-Lavalin Affair Relevant to Business Law and Practice?

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Archibald and Jull, Profiting from Risk Management  
and Compliance Student Edition 2018 INT: 90:10  
Zone of Non-Discovery by the Government



“We have to live without sympathy, don't we? We can't do that forever. One can't stay out of doors all the time. One needs to come in from the cold”

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- The Spy Who Came in from the Cold (1965), Quotes, <https://www.imdb.com/title/tt0059749/quotes>



## SCHEDULE TO PART XXII.1

(Section 715.3 and subsections 715.32(2) and 715.43(2) and (3))

Offences in respect of which a remediation agreement may be entered into

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- (a) section 119 or 120 (bribery of officers);
- (b) section 121 (frauds on the government);
- (c) section 123 (municipal corruption);
- (d) section 124 (selling or purchasing office);
- (e) section 125 (influencing or negotiating appointments or dealing in offices);
- (f) subsection 139(3) (obstructing justice);
- (g) section 322 (theft);
- (h) section 330 (theft by person required to account);
- (i) section 332 (misappropriation of money held under direction);
- (j) section 340 (destroying documents of title);

## SCHEDULE TO PART XXII.1

(Section 715.3 and subsections 715.32(2) and 715.43(2) and (3))

Offences in respect of which a remediation agreement may be entered into

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- (k) section 341 (fraudulent concealment);
- (l) section 354 (property obtained by crime);
- (m) section 362 (false pretence or false statement);
- (n) section 363 (obtaining execution of valuable security by fraud);
- (o) section 366 (forgery);
- (p) section 368 (use, trafficking or possession of forged document);
- (q) section 375 (obtaining by instrument based on forged document);
- (r) section 378 (offences in relation to registers);
- (s) section 380 (fraud);

## SCHEDULE TO PART XXII.1

(Section 715.3 and subsections 715.32(2) and 715.43(2) and (3))

Offences in respect of which a remediation agreement may be entered into

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- (t) section 382 (fraudulent manipulation of stock exchange transactions);
- (u) section 382.1 (prohibited insider trading);
- (v) section 383 (gaming in stocks or merchandise);
- (w) section 389 (fraudulent disposal of goods on which money advanced);
- (x) section 390 (fraudulent receipts under [Bank Act](#));
- (y) section 392 (disposal of property to defraud creditors);
- (z) section 397 (books and documents);
- (z.1) section 400 (false prospectus);
- (z.2) section 418 (selling defective stores to Her Majesty); and
- (z.3) section 426 (secret commissions).
- (z.4) section 462.31 (laundering proceeds of crime).

## SCHEDULE TO PART XXII.1

(Section 715.3 and subsections 715.32(2) and 715.43(2) and (3))

Offences in respect of which a remediation agreement may be entered into

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2. An offence under any of the following provisions of the Corruption of Foreign Public Officials Act:

a) section 3 (bribing a foreign public official); and

b) section 4 (maintenance or destruction of books and records to facilitate or hide the bribing of a foreign public official).

3. A conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in section 1 or 2.

## Part XXII.1 Remediation Agreements



715.3(1) The following definitions apply in this Part.

- **organization** has the same meaning as in section 2 (organization means (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons; (organisation) **but does not include** a public body, trade union or municipality.

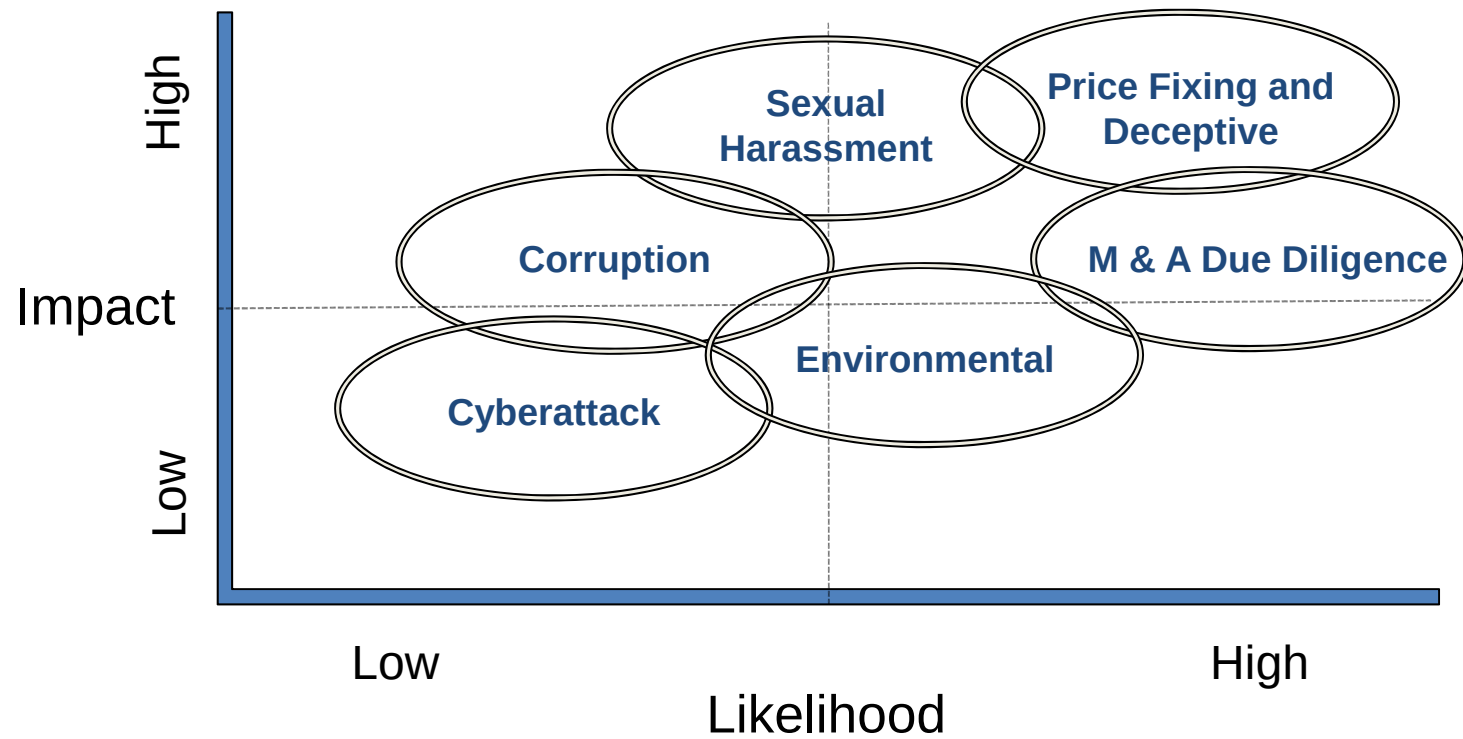
# CRA Voluntary Disclosure Programme

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- The Voluntary Disclosures Program (VDP) gives you a second chance to correct a tax return you previously filed or to file a return that you should have filed. If you file a VDP application and it is accepted by the Canada Revenue Agency (CRA) you will have to pay the taxes owing, plus interest in part or in full. However, you would be eligible for relief from prosecution and, in some cases, from penalties that you would otherwise be required to pay.
- <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/voluntary-disclosures-program-overview.html>

# Compliance Systems: Competing Priorities





# Risk Matrix and Compliance Systems

| <b>Impact</b> |                              |                                        |                                                          |
|---------------|------------------------------|----------------------------------------|----------------------------------------------------------|
| Significant   | Management effort worthwhile | Significant Management effort required | <u>Act now:</u><br><u>Extensive management essential</u> |
| Moderate      | Accept risks with monitoring | <u>Management effort required</u>      | Significant Management effort required                   |
| Minor         | <u>Accept risks</u>          | Accept risks with monitoring           | Management effort worthwhile                             |
|               | Low                          | Medium                                 | High                                                     |
|               |                              |                                        | <b>Likelihood</b>                                        |

# Basic Requirements for a Credible and Effective Corporate Compliance Program

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- Management Commitment and Support
- Risk-based Corporate Compliance Assessment
- Corporate Compliance Policies and Procedures
- Compliance Training and Communication
- Monitoring, Verification and Reporting Mechanisms
- Consistent Disciplinary Procedures and Incentives for Compliance
- Compliance Program Evaluation
- See [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf) ("Competition Bulletin")

# The Right and Wrong Way to Seek Remediation Agreements

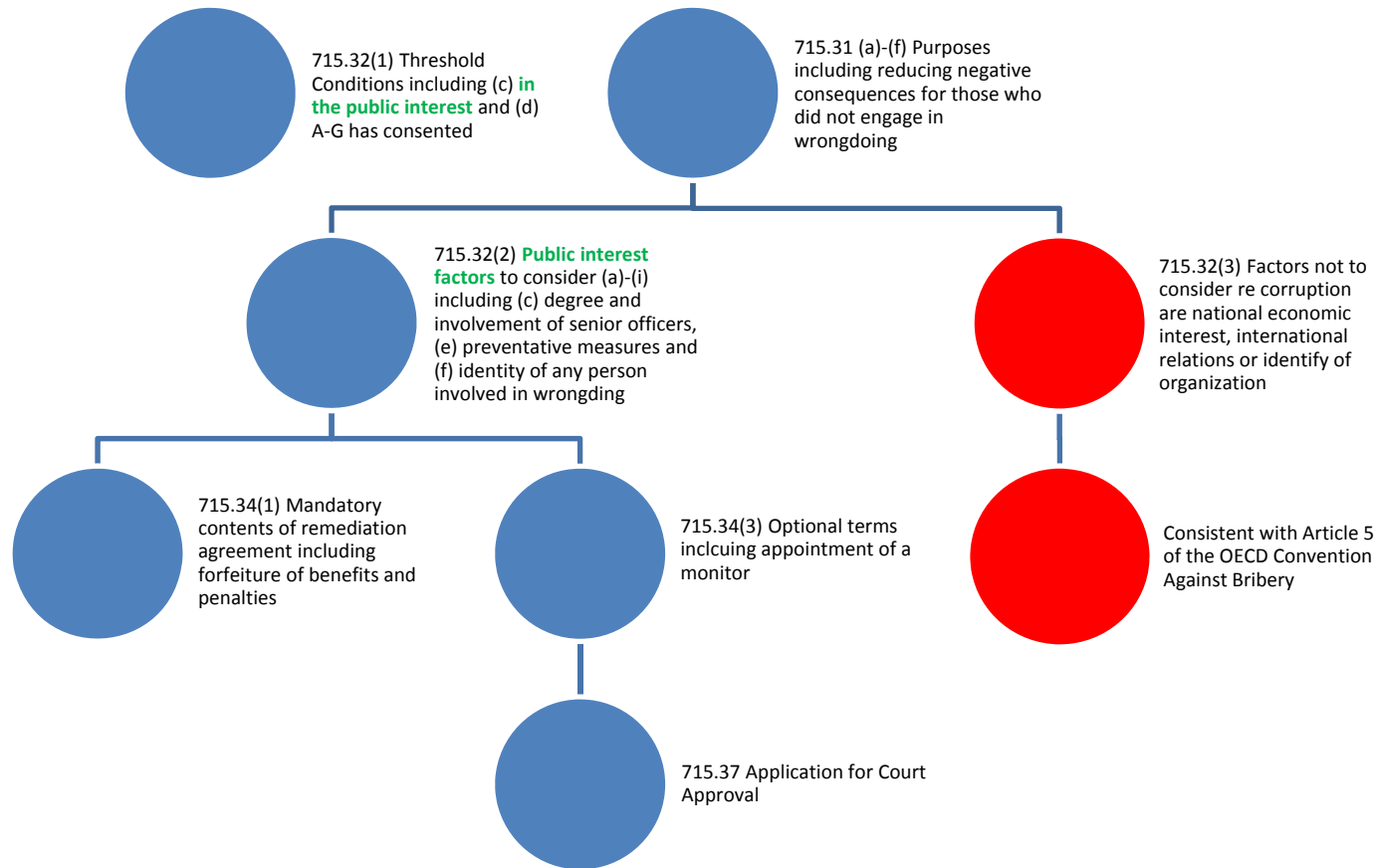


## The Right and Wrong Way to Seek Remediation Agreements

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

# The Right and the Wrong Roads to Get to Remediation Agreements



## Right Road: Innocent Third Parties Who Did Not Engage in Wrongdoing



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

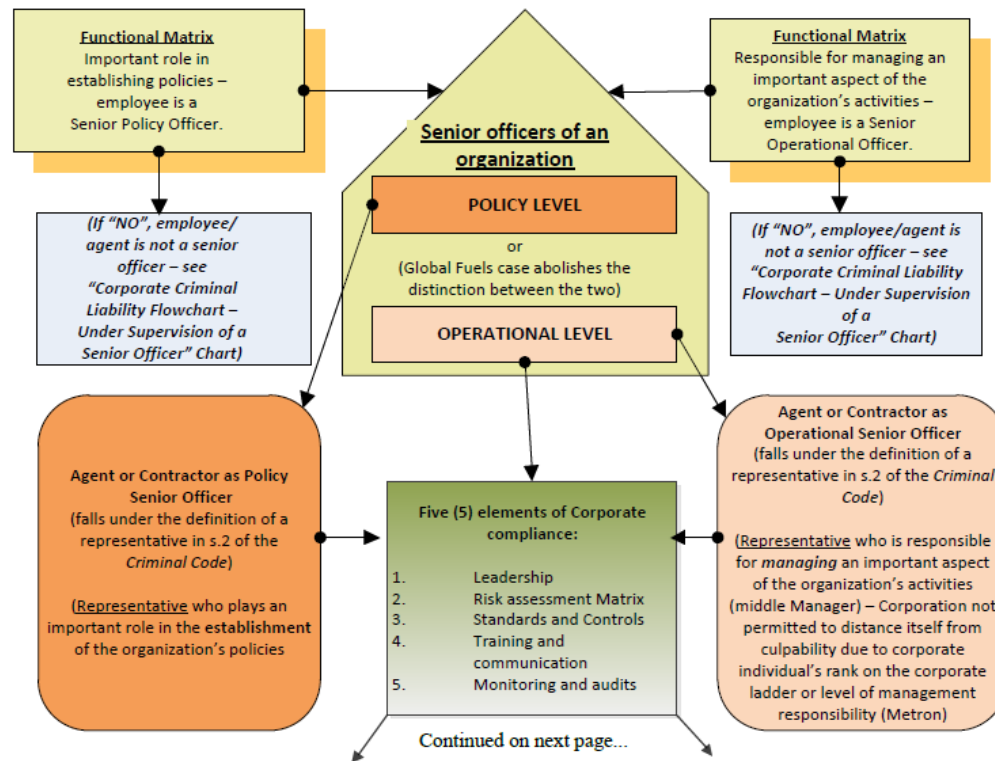
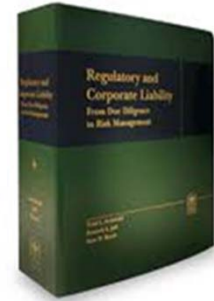
## Right Road: Innocent Third Parties Who Did Not Engage in Wrongdoing



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

# Corporate Criminal Liability Flowchart

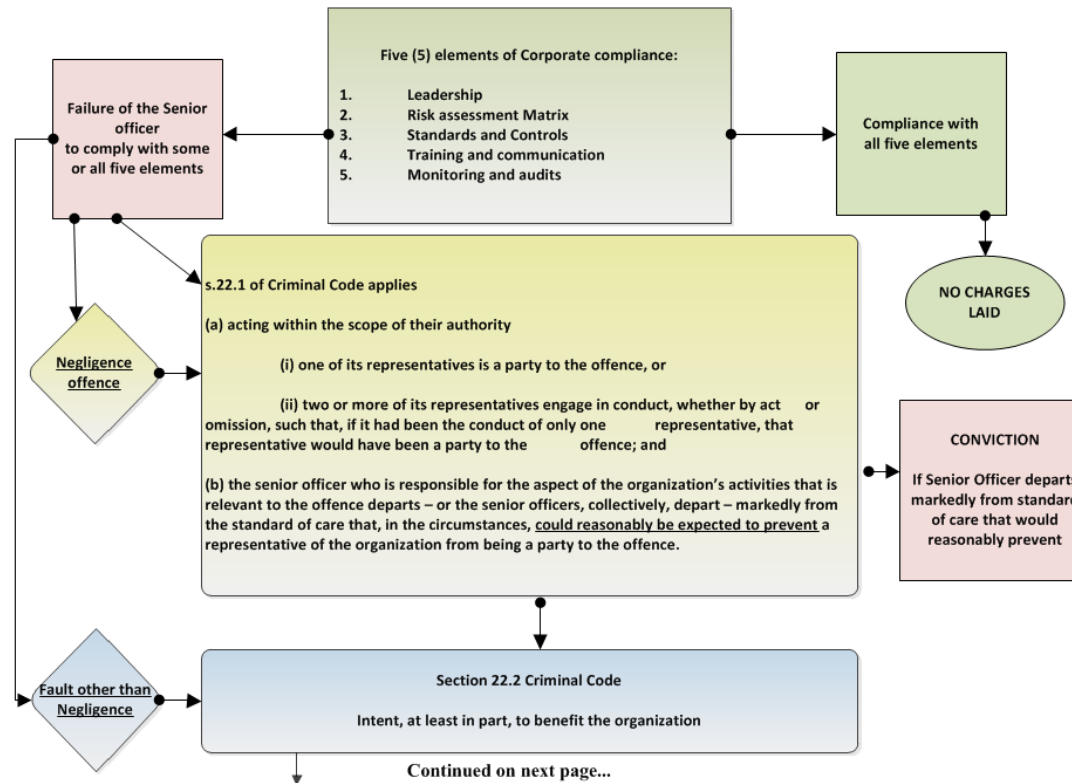
## Senior Officer Level



# Corporate Criminal Liability Flowchart

## Senior Officer Level

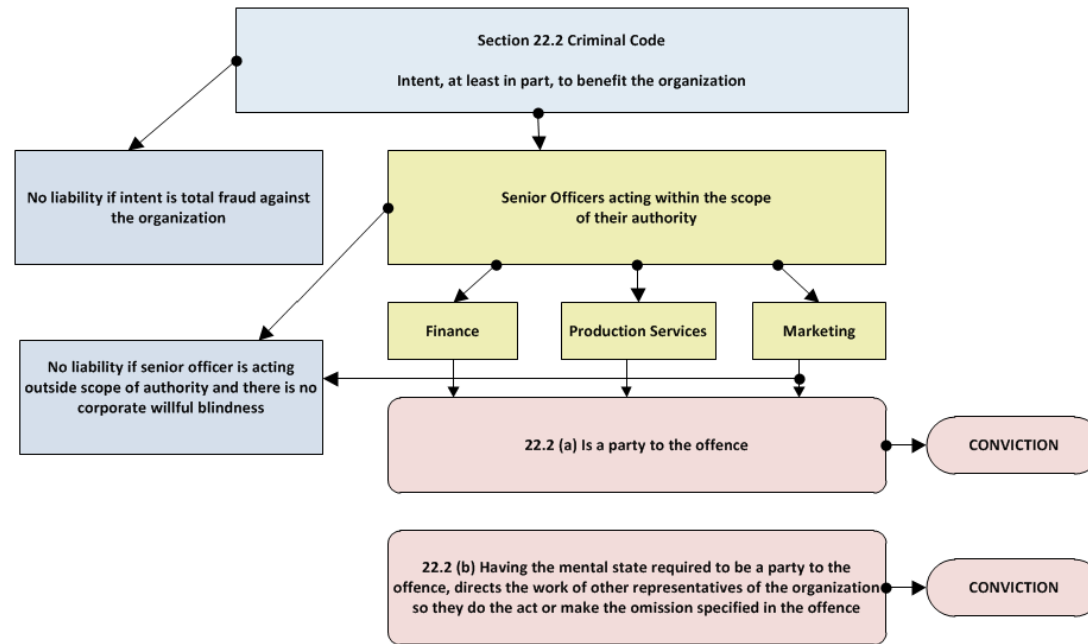
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# Corporate Criminal Liability Flowchart

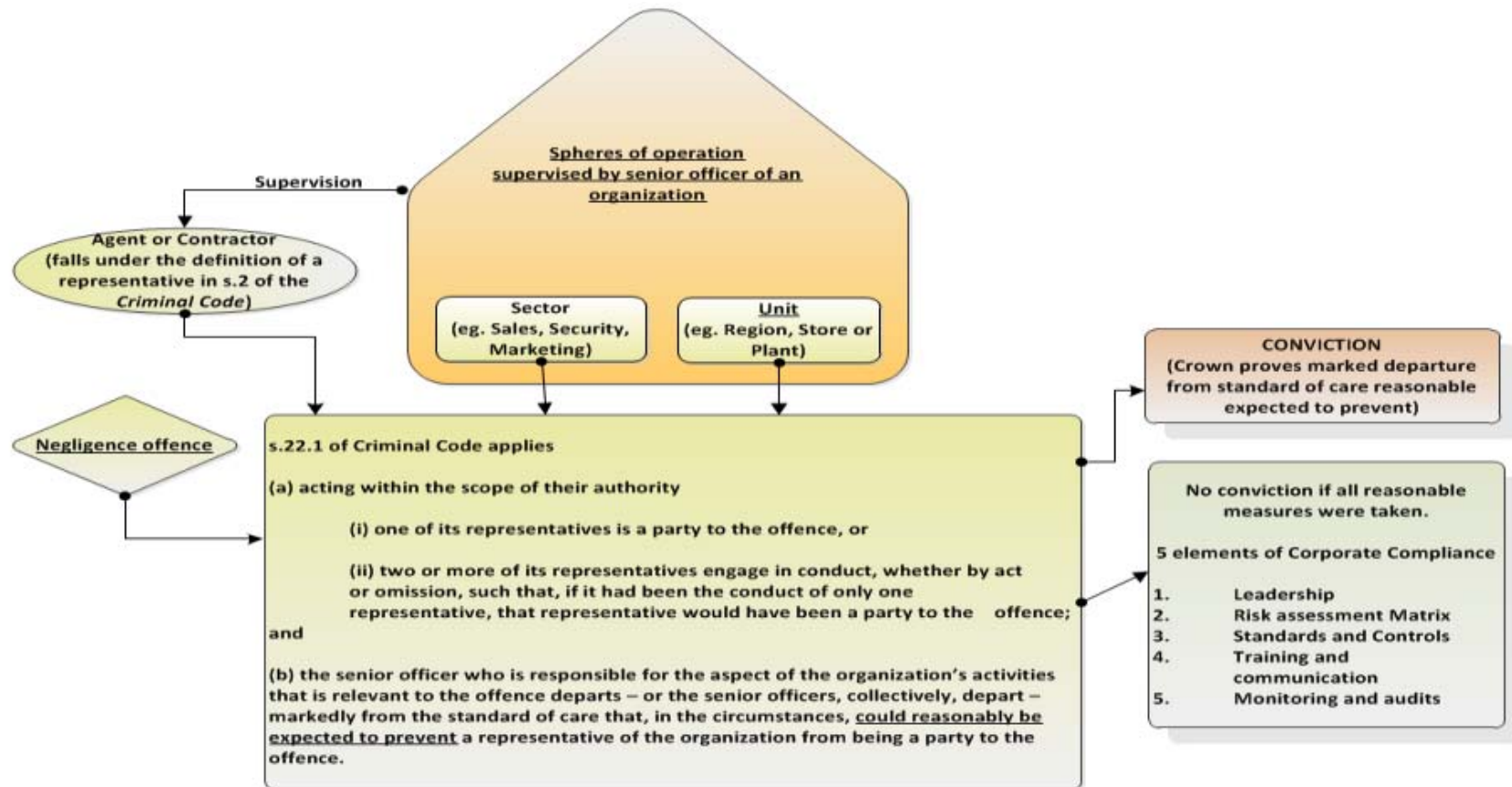
## Senior Officer Level

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# Corporate Criminal Liability Flowchart

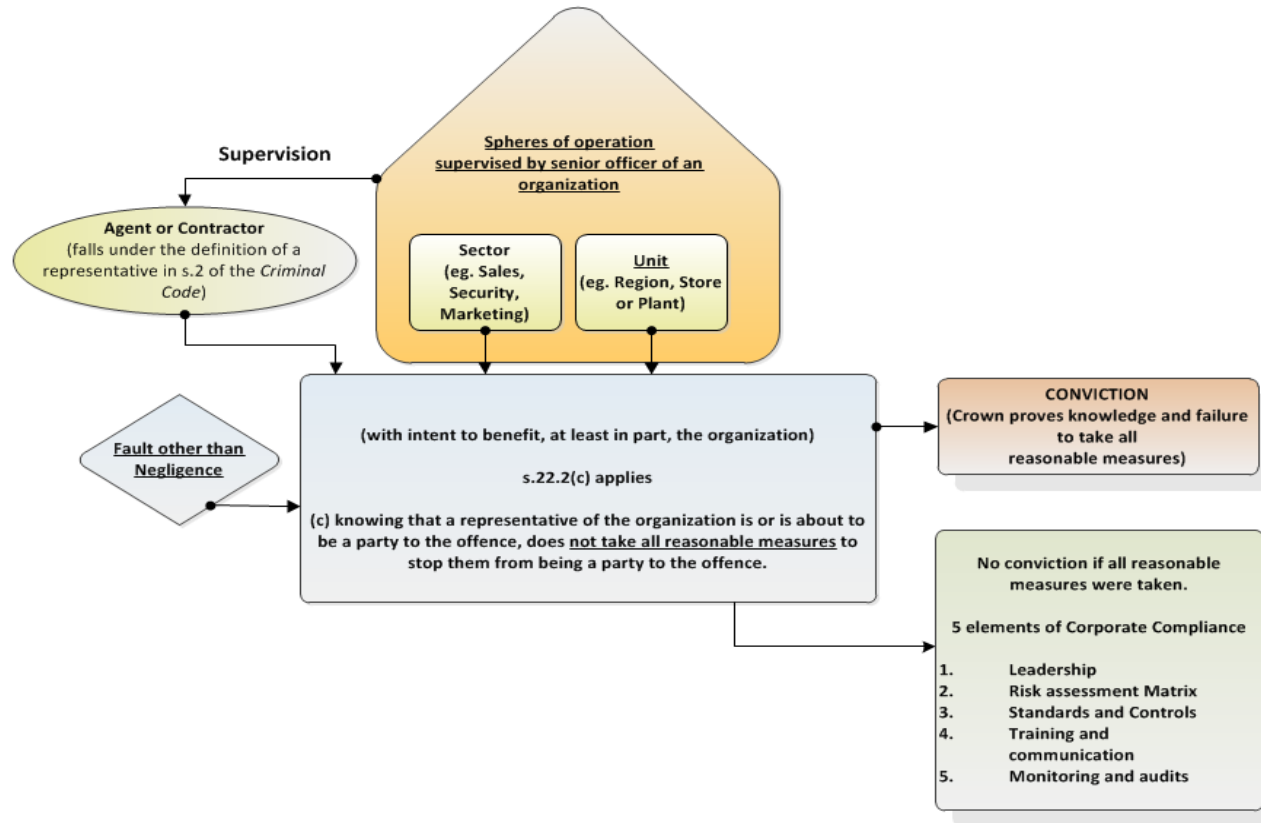
## Under Supervision of a Senior Officer



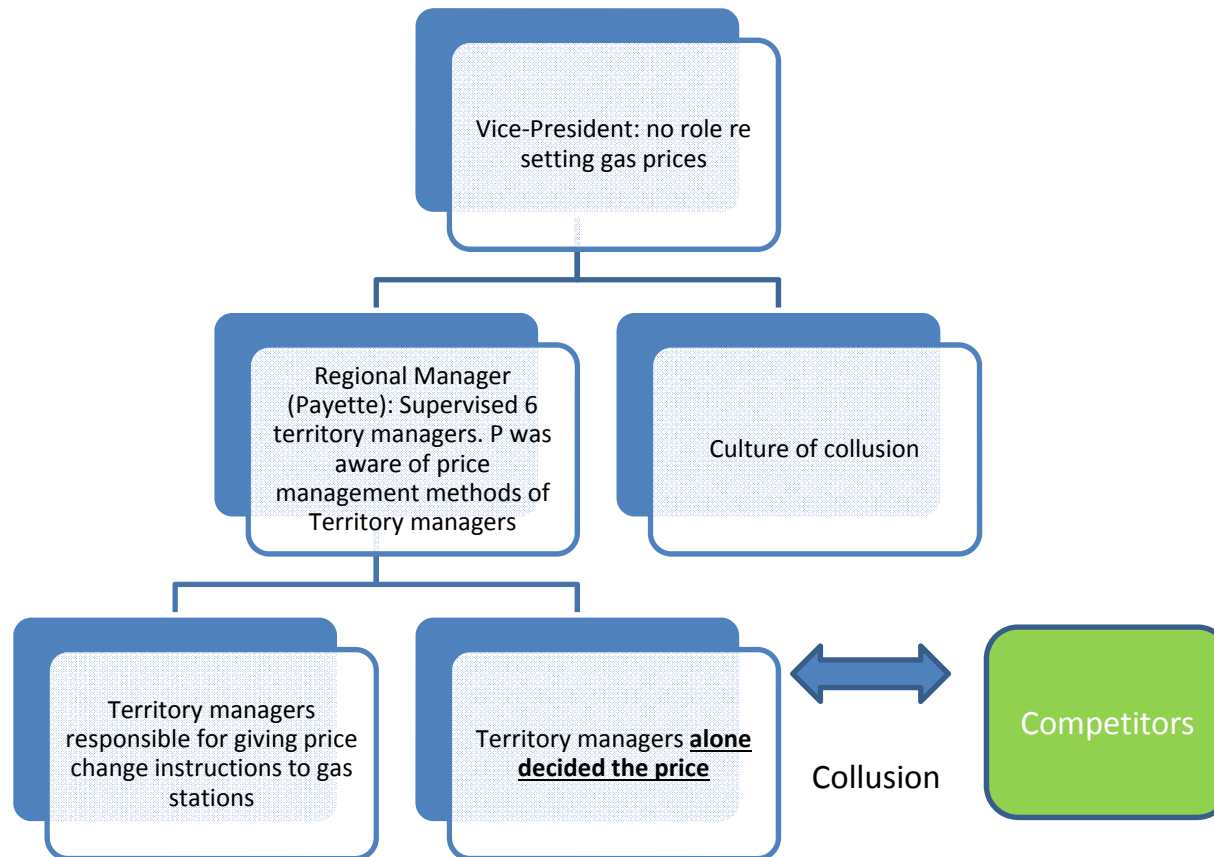
# Corporate Criminal Liability Flowchart

Under Supervision of a Senior Officer

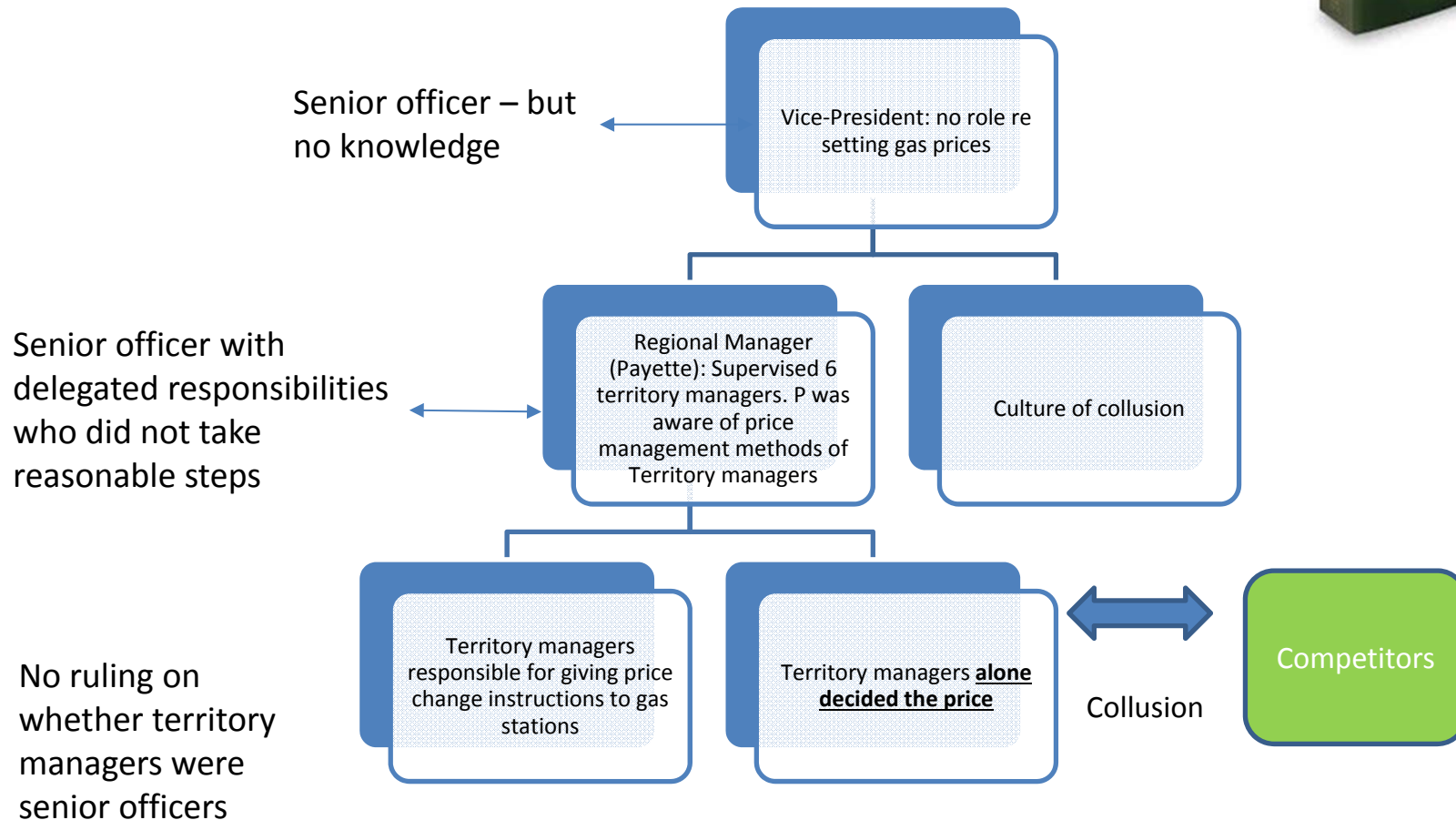
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# Global Fuels Example



# Archibald, Jull, 5:40 – The New Law of Expanded Organizational Criminal Liability



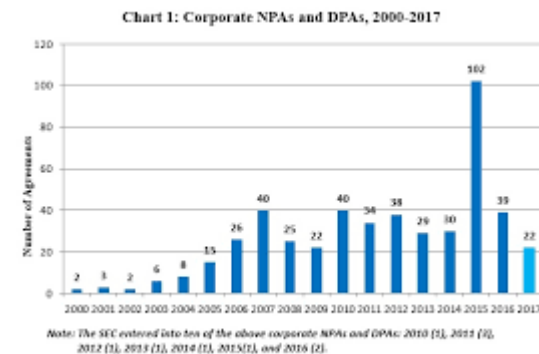
## Right Road: Innocent Third Parties Who Did Not Engage in Wrongdoing



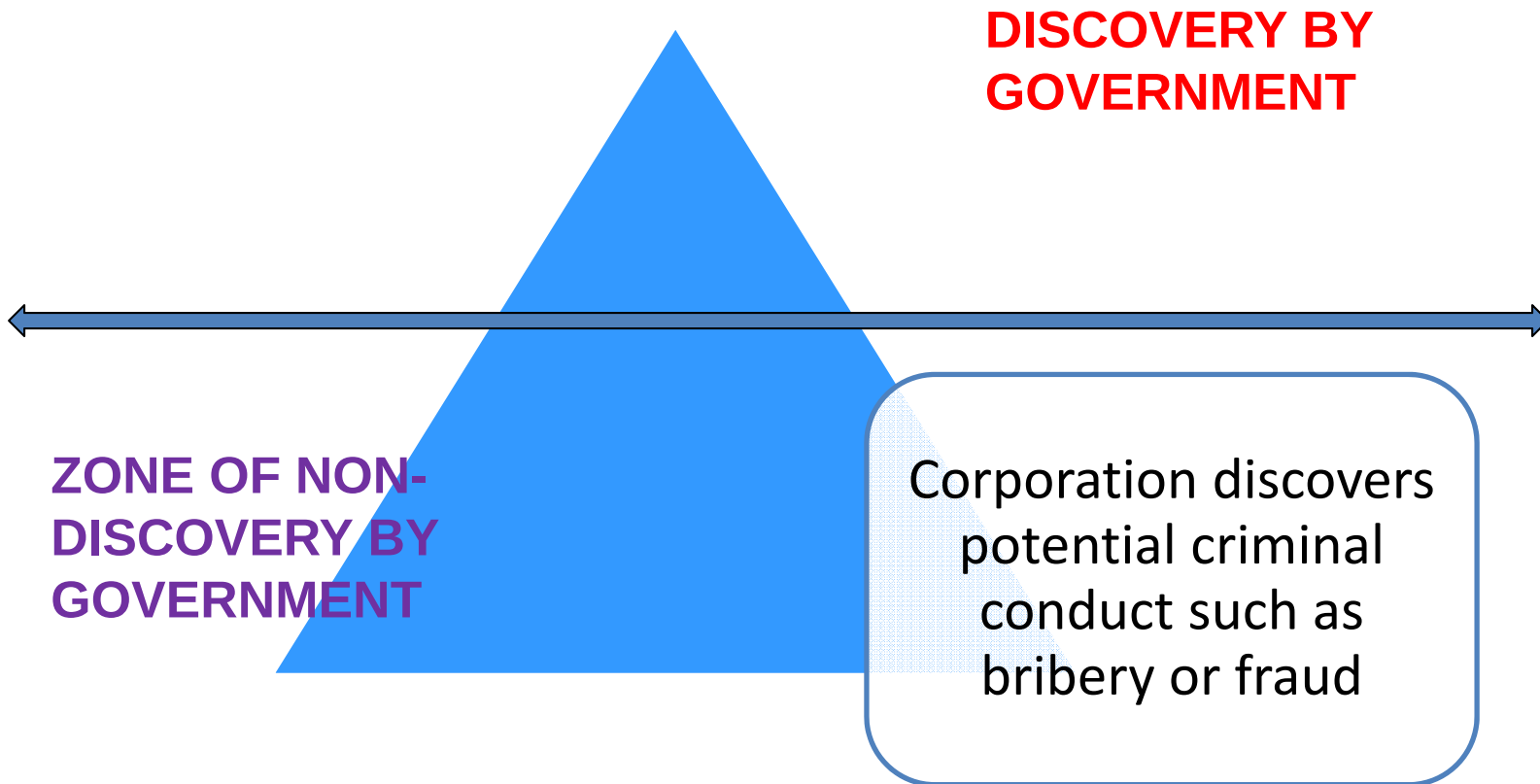
It is possible for senior officers or certain middle managers acting with intent, at least in part, to benefit a corporation and acting within the scope of their authority to have committed bribery offences on behalf of the corporation. At the same time, there may be many employees who are not involved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

## Right Road: Innocent Third Parties Who did not Engage in Wrongdoing

We could also learn from the United States experience. The DOJ will carefully consider whether a deferred prosecution agreement might lessen the potential harm to ***innocent*** third parties. It is this concept of innocence that distinguishes this route from the prohibited factor of national economic interest. (See Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States, October 2010, paragraph 60).



# The Purposes of Accountability and Encouraging Voluntary Disclosure of Wrongdoing



## The Purposes of Accountability and Encouraging Voluntary Disclosure of Wrongdoing

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

## The Purposes of Accountability and Encouraging Voluntary Disclosure of Wrongdoing

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

## From Purposes to Threshold Conditions

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- (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



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

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

(e) whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;

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

## Factors to Consider



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

## Factors to Consider



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

## Wrong Road: National Economic Interest



- Subsection 715.32(3) of the Canadian *Criminal Code* creates an effective “Do Not Enter” sign which is consistent with the OECD Convention on Combating Bribery of Foreign Public Officials. Section 715.32(3) states:
- Factors not to consider
- (3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

## Wrong Road: National Economic Interest



- In March 2017, the OECD Working Group on Bribery completed its fourth evaluation of the United Kingdom's implementation of the OECD Convention. The Working Group made some observations that might have a parallel with Canada: "NGOs believe that Brexit could increase the risk of UK companies threatening to relocate and potential loss of UK jobs as a bargaining chip in negotiations with prosecutors over charges."
- The OECD has reiterated the view that consultation with government ministers about individual criminal cases is generally not appropriate in foreign bribery cases, in which the national economic interest will frequently be involved.

## Wrong Road: National Economic Interest



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

## Wrong Road: Identity of the Organization



- Another factor that should not be considered is the identity of the organization or individual. An analogy could be made to a Hollywood star who says “Do you know who I am?” when pulled over by the police. Celebrity is not an appropriate factor to consider for individuals or corporations.

The Remediation Scheme requires Attorney General Consent on the way up the ladder but not on the way down

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Assuming that the prosecutor agrees to a remediation agreement, the Criminal Code explicitly requires that the Attorney General consent to the negotiation of the agreement. This might be described as the “ladder up” scenario, with the rung above being judicial approval, which is also required.

In the reverse “ladder down” scenario, where the prosecutor does not think that a remediation agreement is appropriate (which was the case in the SNC-Lavalin matter) the legislation for remediation agreements does not explicitly give power to the Attorney General or Cabinet to override the prosecutor.

## Cabinet power to override in legislation



- Comparison with other legislation shows that the drafters could have put in such a power. For example, section 12 of the Telecommunications Act gives the Cabinet power to vary or rescind a decision of the CRTC. In my view, in the absence of an explicit power in the remediation regime for Cabinet to override a decision to not negotiate a remediation agreement, the Attorney General's power to override the prosecutor should be read restrictively and not permit a wide policy override.

## Director of Public Prosecutions Act



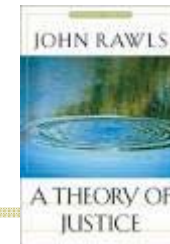
- In order to overrule the prosecutor, the Attorney-General must rely on a different piece of legislation, the *Director of Public Prosecutions Act*.
- Under section 10 of this Act, the Attorney General can issue a directive respecting specific prosecutions and that directive would be published in the Canada Gazette to ensure transparency. The Attorney General can also take over the prosecution under section 15.

## Director of Public Prosecutions Act



- In my view, if the Attorney General must resort to the Director of Public Prosecutions Act, the reasons for such an intervention should relate to the legislative criteria in the remediation scheme and a purported failure of the prosecutor to properly consider or apply that criteria. For example, if a prosecutor did not properly consider the reduction of the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, or consider the relevant factors, that might be a valid reason to intervene.

## Director of Public Prosecutions Act



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

## The Black Box



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

## The Black Box



- As this affair appears to be the centre stage of public attention it might be appropriate for the government to waive the privilege concerning the decision by the DPP. SNC-Lavalin would not likely complain, as they sought the reasons for the decision in their unsuccessful judicial review. Given that both the Attorney General and the Prime Minister's office both had access to this decision by the DPP, a waiver would allow a more precise analysis of the reasoning that was applied.
- Professor Kent Roach has argued that "Prosecutorial independence should not be an excuse for prosecutors not providing reasons for important decisions." In short, the public disclosure of the section 13 notice might provide insight into the central question as to whether the right or wrong roads were pursued in the past and what the proper road forward should be.

# Contact Us

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Kenneth Jull



T 416.865.2964



E [kjull@grllp.com](mailto:kjull@grllp.com)



W [grllp.com](http://grllp.com)



@KennethJull

