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## Providing for Victim Redress within the Legislative Scheme for Tackling Foreign Corruption

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*This article examines the prospects for victim redress for the corporate commission of foreign corruption, using Canada as a case study. Such cases are typically addressed by negotiated settlements, with Canada's new "remediation agreement" regime embracing an intention to provide "reparations for harm done to victims or to the community." Further work, however, needs to be done on defining who is a victim, with the SNC-Lavalin affair having focussed much attention on employees, pensioners and shareholders, with barely a mention of the overseas victims of the alleged crimes. To this end, the article examines comparable efforts undertaken in England to ensure the interests of the overseas victims of economic crime are taken into account. The creation of a fund to which the financial penalties for foreign corruption could be directed to support the provision of development assistance to affected foreign countries is also considered.*

*Dans le présent article, nous examinons les perspectives de réparation pour les victimes de corruption commise par les entreprises à l'étranger, en utilisant le Canada comme étude de cas. De tels cas sont généralement réglés par des accords négociés, le nouveau régime canadien d'« accord de réparation » prévoyant de fournir « des réparations pour les dommages causés aux victimes ou à la communauté ». D'autres travaux sont cependant nécessaires pour définir qui est une victime, l'affaire SNC-Lavalin ayant beaucoup attiré l'attention sur les employés, les retraités et les actionnaires, avec à peine une mention des victimes étrangères des crimes présumés. À cette fin, l'article examine les efforts comparables entrepris en Angleterre pour garantir la prise en compte des intérêts des victimes étrangères de la criminalité économique. La création d'un fonds dans lequel les sanctions financières pour corruption étrangère pourraient être versées dans le but de soutenir la fourniture d'une aide au développement aux pays étrangers touchés est également envisagée.*

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*Prologue*

In early 2019, an alleged case of corporate fraud and foreign corruption underpinned a widely-reported political scandal in Canada that led to the resignations of a former minister of justice and attorney general of Canada (then serving as veterans minister), the president of the treasury board, the prime minister's principal secretary, and Canada's top civil servant, the clerk of the privy council and secretary to the Cabinet.<sup>1</sup> That same criminal case also featured prominently in an inquiry conducted by the federal conflict of interest and ethics commissioner, who found that the prime minister had used his position of authority to seek to influence the attorney general to further the interests of the corporation involved.<sup>2</sup> The scandal

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1. For the media article that first broke the story of the scandal, see Robert Fife, Steven Chase & Sean Fine, "PMO Pressed Wilson-Raybould to Abandon Prosecution of SNC-Lavalin; Trudeau Denies His Office 'Directed' Her," *The Globe and Mail* (7 February 2019), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)> [perma.cc/N7Q6-ABQU]. Among subsequent coverage, see Globe Staff and the Canadian Press, "Timeline: A Chronicle of SNC-Lavalin, Trudeau, the PMO and Jody Wilson-Raybould," *The Globe and Mail* (12 February 2019), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)> [perma.cc/3DPC-8V9J]. On the resignations, see The Canadian Press, "Jody Wilson-Raybould Resigns from Cabinet," *Maclean's* (12 February 2019), online: <[www.macleans.ca](http://www.macleans.ca)> [perma.cc/A9KZ-RH98]; John Paul Tasker, "Gerald Butts Resigns as Prime Minister Justin Trudeau's Principal Secretary," *CBC News* (18 February 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/QRL8-48Z4]; Kathleen Harris, "Jane Philpott Resigns from Cabinet, Citing Loss of 'Confidence' over Government's Handling of SNC-Lavalin," *CBC News* (4 March 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/J6FD-FQW9]; Campbell Clark, "Wernick's Sudden Resignation is a Reminder of SNC Affair, Not a Quick Fix," *The Globe and Mail* (19 March 2019) A8.

2. Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, by Mario

continued to resonate during the national election of October 2019, with the former attorney general who had complained of political interference by the prime minister winning re-election to serve as the sole independent member of parliament.<sup>3</sup>

At the heart of the scandal was the Quebec-based multinational engineering and construction giant, the SNC-Lavalin Group Inc., with a global workforce of thousands. Widely admired as a crown jewel of the Quebec corporate world, SNC-Lavalin faced criminal charges throughout most of 2019 arising from activities undertaken in Libya from 2001 until its civil war in 2011.<sup>4</sup> Specifically, on 19 February 2015, the company and two of its affiliates were charged with one count of foreign bribery and one count of fraud arising from the alleged payment of CAD \$47.7 million in bribes to one or more public officials in Libya and the defrauding of several Libyan organizations of almost CAD \$130-million.<sup>5</sup> It later became known that the alleged bribes were paid to Saadi Gaddafi, the third son of the notorious Libyan ruler Muammar Gaddafi, using funds arising from the construction contracts he helped to secure for SNC-Lavalin in Libya.<sup>6</sup> The SNC-Lavalin Group, however, professed its innocence, taking the position that the charges concerned the “reprehensible deeds by former employees who left the company long ago.”<sup>7</sup> Indeed, three years earlier, in February 2012, several SNC-Lavalin executives had left their positions amidst controversy,<sup>8</sup> with one of these individuals later pleading guilty to Swiss charges of bribery, money laundering and corruption arising

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Dion (Ottawa: OCIEC, 2019) [*Trudeau II Report*].

3. Nancy MacDonald & Andrea Woo, “Federal Election 2019: Jody Wilson-Raybould Wins Seat in Vancouver Granville, Will Serve as Lone Independent in Parliament,” *The Globe and Mail* (22 October 2019), online: <[www.https://theglobeandmail.com](https://theglobeandmail.com)> [perma.cc/NR9D-Z68D].

4. There were also allegations that SNC-Lavalin had been engaged in corrupt activities elsewhere, including in Canada with regards to the securing of a construction contract for a large hospital complex in Montreal. See, e.g., “Former SNC-Lavalin CEO Pleads Guilty in Superhospital Fraud Case,” *CBC News* (1 February 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/P5RP-396Y].

5. Royal Canadian Mounted Police, News Release, “RCMP Charges SNC-Lavalin” (19 February 2015) (no longer available online; on file with the author).

6. SNC-Lavalin would later unsuccessfully challenge the prosecution’s position that Saadi Gaddafi was a foreign public official at a preliminary inquiry: *R c SNC-Lavalin International Inc*, 2019 QCCQ 7778.

7. SNC-Lavalin, Press Release, “SNC-Lavalin Contests the Federal Charges by the Public Prosecution Service of Canada and Will Enter a Non-Guilty Plea,” (19 February 2015), online: *SNC-Lavalin* <[www.snclavalin.com](http://www.snclavalin.com)> [perma.cc/68XQ-T9CB]. SNC-Lavalin’s position was also reflected in media reports. See, e.g., Graeme Hamilton, “SNC-Lavalin Charged with Fraud, Bribery: Charges Stem from Libya Deals,” *National Post* (20 February 2015) FP1.

8. See, e.g., The Canadian Press, “SNC-Lavalin Gaddafi Controversy: Riadh Ben Aïssa, Stéphane Roy Dismissed Amid Mexico Smuggling Allegations,” *Huffington Post* (10 February 2012), online: <[www.huffingtonpost.ca](http://www.huffingtonpost.ca)> [perma.cc/9FKY-69RE].

from activities in Libya.<sup>9</sup> (A Swiss connection arose from the location of where the transfers of funds were made to execute the Libyan scheme.) The Swiss plea bargain also resulted in some of the monies being returned to SNC-Lavalin in recognition of its status as an injured party and victim of the individual's crimes.<sup>10</sup> Some, however, have proffered a competing narrative, suggesting that the executives fired in 2012 served as cover or "scapegoats" for a company so then mired in corruption that it had encouraged its employees to do everything necessary to obtain a lucrative contract.<sup>11</sup>

Notwithstanding its protestations of innocence, it was also no secret that SNC-Lavalin had long been keen to secure some form of negotiated solution, with the charges having come about after settlement talks had failed.<sup>12</sup> The company made known it was open to discussing alternative forms of resolution, noting in its press release of 25 February 2015 "that companies in other jurisdictions, such as the United States and the United Kingdom, benefit from a different approach that has been effectively used in the public interest to resolve similar matters."<sup>13</sup> At that time, Canadian law did not permit this "different approach," but with a change in government in October 2015, an opportunity arose for SNC-Lavalin to lobby a new administration in Ottawa for changes to be made to the sentencing options provided by Canada's *Criminal Code*.<sup>14</sup> The saving

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9. Dave Seglins, "Riadh Ben Aïssa, ex-SNC-Lavalin Executive, Agrees to Settlement Plan," *CBC News* (18 August 2014), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/HM2Q-4794]; Nicolas Van Praet & Graeme Hamilton, "Ex-SNC Executive Guilty: Libyan Fixer Faces Justice," *National Post* (2 October 2014) A1-A2. Upon his release from a Swiss jail, Aïssa was extradited to Canada on corruption and fraud charges concerning the construction of a Montreal hospital complex and later pleaded guilty to a lesser charge: Jesse Feith, "Ex-SNC-Lavalin Vice-President Pleads Guilty to Charge in MUHC Superhospital Scandal," *Montreal Gazette* (11 July 2018) A6. See also *Ben Aïssa c Groupe SNC-Lavalin Inc*, 2019 QCCA 964. Later, Ben Aïssa's predecessor in charge of SNC-Lavalin's international construction division, Sami Bebawi, was found guilty of corruption offences relating to Libya: Jonathan Montpetit, "Former SNC-Lavalin Executive Found Guilty on Libya Corruption Charges," *CBC News* (15 December 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/SW4Q-V9K2]. The charges against the division's former comptroller, Stéphane Roy, were stayed on grounds of unreasonable delay: Giuseppe Valiante, "Case Thrown Out against Former SNC-Lavalin Exec," *CBC News* (19 February 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/2XG7-HJ8K]. See also *Roy c SNC-Lavalin Inc*, 2016 QCCS 836.

10. Van Praet & Hamilton, *supra* note 9.

11. See, e.g., Sophie Cousineau & Greg McArthur, "Fired Executive Sues SNC-Lavalin, Says He Always Acted on 'Orders,'" *The Globe and Mail* (13 February 2013), online <[www.https://theglobeandmail.com](https://theglobeandmail.com)> [perma.cc/PFT6-2HRS].

12. See, e.g., Les Perreux, Jeff Gray & Bertrand Marotte, "SNC-Lavalin charged with Fraud, Bribery after Settlement Talks Fail," *The Globe and Mail* (Toronto) (20 February 2015) A1.

13. SNC-Lavalin Press Release of 19 February 2015, *supra* note 7.

14. *Trudeau II Report*, *supra* note 2 at paras 24-27. See also David Cochrane, "Inside SNC-Lavalin's Long Lobbying Campaign to Change the Sentencing Rules," *CBC News* (14 February 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/Z58U-PRZB]; Nick Taylor-Vaisey, "Where SNC-Lavalin's Push for Deferred Prosecution Came Up Short," *Maclean's* (22 February 2019), online: <[www.macleans.ca](http://www.macleans.ca)>

of jobs was pitched as the key public interest at stake, with the criminal prosecution of a corporate giant such as SNC-Lavalin being portrayed as having serious negative collateral consequences for employees, pensioners and shareholders, given that a conviction for foreign bribery would debar the company from bidding on future work both in Canada and elsewhere.<sup>15</sup>

By September 2018, Canadian law had indeed been amended so as to permit what are known elsewhere as “deferred prosecution agreements” (DPAs), but under Canadian law are to be called remediation agreements, or *accords de réparation* in French.<sup>16</sup> Court records indicate that SNC-Lavalin made overtures to the director of public prosecutions for such an agreement, both before the new law had entered into force and after,<sup>17</sup> and to this end, the company provided an extensive amount of information on its efforts since 2012 to undertake significant internal change, including the implementation of an internal ethics and compliance program, with anti-corruption training for all employees.<sup>18</sup> The director, however, declined to issue SNC-Lavalin the required invitation to negotiate a remediation agreement on the grounds that it was “not appropriate in this case,”<sup>19</sup> leading to pressure from the prime minister on the attorney general to intervene. The prime minister was later found by Canada’s ethics commissioner in August 2019 to have acted contrary to the constitutional principles of prosecutorial independence and the rule of law.<sup>20</sup>

Four months later, a deal was reached. On 18 December 2019, the Court of Quebec accepted a plea of guilty to a single charge of fraud from

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[perma.cc/LK96-GHQD].

15. Within Quebec, the *Integrity in Public Contracts Act*, SQ 2012, c 25, subjects commercial enterprises to a screening and authorization process to determine eligibility for contracts with public bodies. Federally, the Government of Canada uses a policy, rather than statutory, approach to provide for a ten-year debarment period upon conviction for foreign bribery: Government of Canada, Public Services and Procurement Canada, *Ineligibility and Suspension Policy*, last modified 14 July 2017, online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>> [perma.cc/B2GA-7MMU]. In addition, as confirmed before a recent inquiry into the effectiveness of the UK’s anti-bribery law, “many countries have laws which debar a convicted company from public procurement contracts, and still more countries have laws allowing discretionary debarment”: UK, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny* (HL Paper 303) (March 2019), at para 248, online: <[www.publications.parliament.uk](http://www.publications.parliament.uk)> [perma.cc/562Z-L6SE].

16. See *Criminal Code*, RSC 1985, c C-46, Part XXII.1 (“Remediation Agreements”) [*Criminal Code*]. Enacted as *Budget Implementation Act, 2018*, No 1, SC 2018, c 12, s 404, the amendments were included within Bill C-74, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and Other Measures* (assented to on 21 June 2018, the new provisions entered into force on 19 September 2018) [Bill C-74].

17. *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282 at para 12 [*SNC-Lavalin v Canada* 2019].

18. *Ibid* at para 13.

19. *Ibid* at paras 21, 24.

20. *Trudeau II Report*, *supra* note 2 at para 351.

the subsidiary SNC–Lavalin Construction Inc., with a fine in the amount of CAD \$280-million to be paid in equal instalments over the next five years. In return, the Public Prosecution Service of Canada withdrew all charges against the parent company, the SNC-Lavalin Group Inc., as well as its international marketing arm, SNC-Lavalin International Inc., with SNC-Lavalin agreeing to a term of probation and the engagement of an independent monitor for its compliance with international standards. In essence, SNC-Lavalin had secured what it had wanted all along.<sup>21</sup> A subsidiary that had not been active since 2015 was found to have defrauded the government of Libya, and thus its people, of millions, but the parent company, as it stated in its press release concerning the plea deal, did “not anticipate that the guilty plea by a construction subsidiary...will affect the eligibility of SNC-Lavalin Group companies to bid on future projects....”<sup>22</sup> The withdrawal of the corruption of a foreign public official charge had removed the risk of debarment from future government contracts.

### *Introduction*

Clearly, the SNC-Lavalin affair raises many issues of both law and politics. These include the openness of a prime minister and the minister of finance to the lobbying efforts of a corporation then facing criminal charges and the reality of some collateral economic impact to flow with any criminal prosecution of a large corporation, alongside important questions of corporate ethics and international business standards. Questions were also asked about whether to split the roles of the attorney general and the minister of justice to further protect prosecutorial independence,<sup>23</sup> and the appropriateness of former Supreme Court of Canada justices acting as counsel in contentious cases.<sup>24</sup> But lost amidst all these discussions have been the corruption’s overseas victims, with the word “Libya” not mentioned even once in the ethics commissioner’s report. This article

21. A point not missed by media commentators: Peter Zimonjic, “After Year of Political Turmoil, SNC-Lavalin Gets Most of What It Wanted in Plea Deal,” *CBC News* (18 December 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/DCM9-AJPF].

22. SNC-Lavalin, Press Release, “SNC–Lavalin Group Settles Federal Charges” (18 December 2019), online: *SNC-Lavalin* <<https://www.snc-lavalin.com/en/media/press-releases/2019/18-12-2019>> [perma.cc/3YJM-WU74]. See also Kamila Hinkson, “SNC-Lavalin pleads guilty to fraud for past work in Libya, will pay \$280M fine,” *CBC News* (18 December 2019), online: <[www.cbc.ca](http://www.cbc.ca)> [perma.cc/L984-DWQ2].

23. See further A Anne McLellan, *Review of the Roles of the Minister of Justice and the Attorney General of Canada* (Ottawa: Office of the Prime Minister of Canada, 28 June 2019), online: <[www.pm.gc.ca](http://www.pm.gc.ca)> [perma.cc/GGP8-J3LB] (made public after the release of the *Trudeau II Report*, *supra* note 2, on 14 August 2019).

24. See further Shannon Proudfoot, “Talk to my Former Supreme Court Judge,” *Macleans*’s (3 April 2019), online: <[www.macleans.ca](http://www.macleans.ca)> [perma.cc/RB5S-FA3B].

addresses this failing by using the SNC-Lavalin affair as a springboard for discussing the means for securing a fuller measure of accountability for the corporate commission of serious economic crimes, while also highlighting a need for greater clarity in the law as to who is to be considered a victim. While recognizing the taint now associated with negotiated deals as a result of SNC-Lavalin's lobbying in its own self-interest, I nevertheless argue that the flexibility afforded by negotiated settlements with corporate defendants provides the best prospects for securing some form of financial consideration for the victims of complex economic crime.

Victimhood has received much coverage throughout the SNC-Lavalin affair. The term victim was used to describe the employees, pensioners, shareholders and suppliers of SNC-Lavalin, although it is not so clear that they were directly victimized by the fraud and bribery. Many also made use of the phrase "innocent third parties" as a way of recognizing the collateral impact of a corporate prosecution,<sup>25</sup> with none other than the deputy minister of justice and deputy attorney general of Canada using a combination of the terms by referring to the pensioners of SNC-Lavalin as "innocent victims."<sup>26</sup> It can be argued, however, that pensioners are victims because of the failings of successive governments to require corporations to set aside funds to meet their pension commitments and to ensure a super-priority to pensioners in the event of a corporate bankruptcy, rather than being the victims of the fraud or bribery, or the victims of a criminal prosecution to enforce the law concerning fraud or bribery. On the other hand, many pension funds are shareholders, with the deputy minister of justice having oddly referred to "small shareholders," alongside employees and pensioners, as "innocent victims and third parties."<sup>27</sup> There were, however, other victims of the fraud and bribery that went unmentioned, including the competitor companies and their employees, whether in Canada or abroad, who lost out on work because of another's use of bribery, and the organizations in Libya that were defrauded of millions.

Society as a whole is also a victim. Indeed, the use of a criminal law approach, as distinct from a corporate ethics approach, to address the problem of corruption in international business transactions embraces an underlying assumption that corruption is neither victimless nor harmless. The harm arises when corruption siphons funds from government accounts that could have been used for the provision of public services, with Canadian

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25. See, e.g., House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 132 (21 February 2019) at 1125 (Hon David Lametti).

26. As recorded in *Trudeau II Report*, *supra* note 2 at para 114.

27. House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 132 (21 February 2019) at 1125 (Nathalie Drouin).

courts having taken the view that “a fraud against a government agency is not a victimless crime in that it results in a reduction in resources available to people who rely on government services.”<sup>28</sup> Our courts have also said that “[a]ll Canadians, and our society as a whole, are victims when public officials breach the trust placed in them.”<sup>29</sup> Similar sentiments have also been expressed with respect to foreign corruption by the Supreme Court of Canada. In a 2016 case, coincidentally arising from allegations that SNC-Lavalin had engaged in bribery to secure a contract in Bangladesh, the court wrote: “Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity.”<sup>30</sup> Yet questions remain as to how to provide for some form of victim redress in the foreign corruption context, even though the prospect for “reparations for harm done to victims or to the community” has long been recognized as a Canadian sentencing principle.<sup>31</sup>

To this end, this article is organized into four parts. In Part I, I provide an overview of the Canadian legislative scheme for addressing foreign corruption, making note of both its international impetus in 1998 and its substantive amendment in 2013. I also discuss the 2018 addition of the provisions on remediation agreements, and I discuss the definition of a victim in Canadian criminal law. In Part II, I recognize the inevitability of a financial penalty causing some economic impact in corporate cases of foreign corruption, but I question the idea of shareholders as victims. I use the Canadian case of *Griffiths Energy International* as an illustrative example, with the United Kingdom’s Serious Fraud Office later seizing and redirecting the benefits from bribery that went to a shareholder so as to provide assistance to the crime’s overseas victims. In Part III, I review the potential influence of comparable developments elsewhere, and in Part IV, I mention the use of creative sentencing arrangements in environmental law in a way that provides funding for projects of assistance to victims in the broadest sense of the word, using Canada’s Environmental Damages Fund as a model. I conclude that the best prospects for victim redress for corporate criminality in foreign corruption cases lie with the diversion of some portion of the financial penalty incurred so as to support the funding of development assistance projects.

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28. *R v Karigar*, 2014 ONSC 3093 at para 24 (citing *R v Bogart*, [2002] 61 OR (3d) 75 at para 33, leave to appeal to SCC refused, [2002] SCCA 398).

29. *R v Karigar*, *supra* note 28 at para 34 (citing *R v Serré*, 2013 ONSC 1732 at para 29).

30. *World Bank Group v Wallace*, 2016 SCC 15 at para 1.

31. *Criminal Code*, *supra* note 16, s 718(e), repeated specifically for remediation agreements in s 715.31(e).

## I. *The Canadian Legislative Scheme to Address Foreign Corruption*

### 1. *The Corruption of Foreign Public Officials Act*

Motivated by the desire to establish a global set of rules applicable to all, there are now several international treaties requiring parties to have in place domestic anti-bribery and corruption laws. These treaties, and the domestic laws they have encouraged, make use of a criminal law approach to address what may once have been seen as a problem of business ethics, with bribery having become the standard offence for addressing acts of foreign corruption committed to obtain an undue advantage in international business.<sup>32</sup> For Canada, the lead treaty is the 1997 *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*,<sup>33</sup> developed by states under the auspices of the Organization for Economic Co-operation and Development (OECD), but inspired by the 1977 US *Foreign Corrupt Practices Act* (FCPA).<sup>34</sup> Canada is also bound by the 1996 *Inter-American Convention Against Corruption*<sup>35</sup> and the 2003 *United Nations Convention Against Corruption*.<sup>36</sup> Canada's treaty obligations are then transformed into domestic law through domestic legislation, most notably the 1998 *Corruption of Foreign Public Officials Act* (or CFPOA),<sup>37</sup> but also the *Criminal Code*.<sup>38</sup>

As discussed in detail elsewhere,<sup>39</sup> the enactment in Canada of the CFPOA took an unusual path, with its speedy passage meaning that there is little on record to address current questions of concern, such as the definition of victim. Although there was clearly no emergency, the proposed legislation came forth as a fast-tracked initiative with all-party support, and sailed through the required phases of consideration in both houses of parliament within a week. The explanation for the law's speedy passage rests with its international impetus and a domestic desire to matter. At a summit meeting in May 1998, states within the Group of

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32. See, e.g., T Markus Funk & Andrew S Boutros, eds, *From Baksheesh to Bribery: Understanding the Global Fight Against Corruption and Graft* (New York: Oxford University Press, 2019).

33. 17 December 1997, OECD Doc DAF/FE/IME/BR(97)20, 37 ILM 1 (1998) (entered into force 15 February 1999) [*OECD Anti-Bribery Convention*].

34. Pub L No 95-213, 91 Stat 1496 (1977), codified and amended at 15 U.S.C. §§ 78dd-1 *et seq.*

35. 29 March 1996, OASTS No B-58 (entered into force 6 March 1997, ratification by Canada on 1 June 2000).

36. 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005, ratification by Canada on 2 October 2007).

37. *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [CFPOA].

38. See, e.g., *An Act to Amend the Criminal Code in order to implement the United Nations Convention against Corruption*, SC 2007, c 13.

39. See generally Joanna Harrington, "Addressing the Corruption of Foreign Public Officials: Developments and Challenges within the Canadian Legal Landscape" (2018) 56 Can YB Intl L 98.

8 (G8)<sup>40</sup> made a public commitment to ratify the *OECD Anti-Bribery Convention* before the end of 1998.<sup>41</sup> As time passed, Canada recognized that its ratification would be the one that would bring the convention into force, with the then minister of foreign affairs, Lloyd Axworthy, describing Canadian ratification as “the key which will unlock the door.”<sup>42</sup> This led to a rushed approach. Parliament finalized its enactment of the CFPOA on 10 December 1998, enabling the executive branch to ratify the *OECD Anti-Bribery Convention* on 17 December 1998, and the CFPOA was later brought into force by cabinet on 14 February 1999,<sup>43</sup> a day before the convention entered into force internationally.

As the implementation vehicle for Canada’s international obligations, the CFPOA makes the bribery of a foreign public official to obtain or retain an advantage in the course of business an indictable offence under Canadian law. Offering a bribe, however, is not the only offence of relevance, with the possession of property, or the proceeds of property, obtained through foreign bribery, and the laundering of such property or proceeds, also constituting offences under Canadian law.<sup>44</sup> Canadian law also enables the prosecution of a conspiracy or an attempt to commit these offences, and also applies to situations of aiding and abetting.

In keeping with the imperatives of article 2 of the *OECD Anti-Bribery Convention*, both individuals and corporations, without regard to nationality, may be charged in Canada with foreign corruption. The word “person” is used in the CFPOA so as to include corporations, using the same principles of corporate criminal liability as apply to *Criminal Code* offences.<sup>45</sup> Enforcement of the law for corporations is by fine, with the department of justice having explained in 1999 that: “Corporations,

40. First formed in 1975 to discuss matters of mutual concern, the G8 is now, once again, the Group of Seven (G7), with Russia having been ejected following the annexation of Crimea in 2014. Canada joined the G7 in 1976.

41. G8 Birmingham Summit, *Final Communiqué* (17 May 1998) at para 7, online: *G7 Information Centre* <<https://www.g8.utoronto.ca/summit/1998birmingham/finalcom.htm>> [perma.cc/ZX85-XBWJ].

42. *Debates of the Senate*, 36-1, vol 137, No 100 (3 December 1998) at 1530 (Hon Lloyd Axworthy). The convention’s entry into force was dependent on securing ratification from at least five of the top ten trading countries in the OECD.

43. *Order Fixing February 14, 1999 as the Date of the Coming into Force of the Act*, SI/99-13.

44. CFPOA, *supra* note 37, ss 4-7. These CFPOA provisions were later repealed, along with similar provisions in other federal statutes, so as to require the use of the *Criminal Code*’s provisions on possession and laundering, rather than having individualized provisions in various federal statutes: *An Act to Amend the Criminal Code (Organized Crime and Law Enforcement) and to Make Consequential Amendments to Other Acts*, SC 2001, c 32, s 58.

45. Section 2 of the CFPOA, *supra* note 37, defines “person” to mean a person as defined in section 2 of the *Criminal Code*, *supra* note 16, which makes clear that references to “person” include an organization and that “organization means (a) a...body corporate.”

of course, cannot be subject to imprisonment, but they can be fined. The amount of any fine would be at the discretion of the judge, and there is no maximum.”<sup>46</sup>

During the Act’s passage, Canadian parliamentarians focussed their discussions on the often stated goal of securing a level playing field for Canadian businesses operating abroad. Only passing reference was made to corruption’s corrosive effects on democracy, human rights and the rule of law, and there was no discussion of the place for victims within the new legislative scheme. It was assumed that there would be victims if the prohibited conduct took place, but no-one asked about how to identify or define these victims, nor was there any discussion on how to ensure that any recovered property or proceeds of crime would be used to assist the victims, assuming that an adequate means of identification could be worked out. Victim redress was simply not discussed.

When the Act underwent amendment in 2013,<sup>47</sup> the then minister of foreign affairs, John Baird, expressly recognized that: “Every dollar that goes to a bribe is a dollar that does not benefit the people who desperately need a new school, or a new hospital, or what have you.”<sup>48</sup> But there was little else said about how to remedy this situation by way of a successful prosecution. Instead, the 2013 amendments aimed to “answer the call for enhanced vigilance”<sup>49</sup> by making certain improvements to the existing scheme, rather than instigating any radical change. The maximum sentence for individual offenders was increased from five to fourteen years, a new “books-and-records” offence specific to foreign bribery was created, and the reach of the Act was extended to assert Canadian jurisdiction on the basis of both nationality and territory.<sup>50</sup> The Royal Canadian Mounted Police (RCMP) was granted the exclusive authority to lay charges, thereby eliminating any potential for overlap with provincial police forces. The 2013 changes also removed the defence to a foreign bribery charge for what are known as “grease payments” or small “facilitation payments,”<sup>51</sup>

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46. *The Corruption of Foreign Public Officials Act: A Guide* (Ottawa: Department of Justice, 1999) at 7.

47. *Fighting Foreign Corruption Act*, SC 2013, c 26 [FFCA].

48. “Bill S-14, An Act to amend the Corruption of Foreign Public Officials Act,” Senate, Standing Senate Committee on Foreign Affairs and International Trade, *Evidence*, 41-1, No 22 (28 February 2013) at 22:27 (Hon John Baird).

49. “Bill S-14, An Act to amend the Corruption of Foreign Public Officials Act,” *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 1000 (Bob Dechert).

50. *FFCA*, *supra* note 47, ss 3, 4. See further Harrington, *supra* note 39 at 112-120.

51. *FFCA*, *supra* note 47, s 5.

although this particular amendment did not come into force until 31 October 2017.<sup>52</sup>

## 2. *Canada's record of enforcement under the CFPOA*

Yet, despite the stated desire for “enhanced vigilance,” it remains the case that in twenty years, there were only six convictions under Canada’s CFPOA. This record is a point of sensitivity for Canada’s diplomatic relations with other states keen to secure the global deterrence of bribery and corruption. Three of the six convictions concern corporations, secured by way of a negotiated guilty plea,<sup>53</sup> while the three individuals convicted under the Act went to trial.<sup>54</sup> This tally now increases to seven with the recent conviction and sentencing of former SNC-Lavalin executive vice-president Sami Bebawi for corruption activities involving Libya.<sup>55</sup>

Crimes of corruption, by their covert nature, are hard to prove and little is said publicly by either the RCMP or the Canadian government as to why there have been only seven convictions in twenty plus years. It may be that other charges have been preferred, after a balancing of various factors, as illustrated by the guilty plea to a single charge of fraud for an SNC-Lavalin construction subsidiary in December 2019.<sup>56</sup> There may also be active investigations underway, with the government taking the view that “allegations of corruption...are...treated with the utmost confidence for reasons of privacy and ensuring the integrity of investigations.”<sup>57</sup> A simple

52. *Order Fixing October 31, 2017 as the Day on which Subsection 3(2) of the Act Comes into Force*, SI/2017-69, (2017) C Gaz II, 3233. See also Global Affairs Canada, News Release, “Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act” (30 October 2017), online: *Government of Canada* <[https://www.canada.ca/en/global-affairs/news/2017/10/canada\\_repeals\\_facilitationpaymentsexceptionincorruptionofforeig.html](https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html)> [perma.cc/29WF-MN55].

53. The leading case is *R v Griffiths Energy International Inc*, [2013] AJ No 412 (QB), while the other case of note is *R v Niko Resources Ltd*, [2011] AJ No 1586, 101 WCB (2d) 118 (Alta QB). The third case involved charges against both an individual and a corporation but was resolved by a negotiated guilty plea for the corporation: *R v Watts and Hydro-Kleen Systems Inc*, [2005] AJ No 568 (QB).

54. The leading case is *R v Karigar*, 2013 ONSC 5199, appeal from conviction dismissed 2017 ONCA 576, leave to appeal refused, [2017] SCCA 385 (concerning an attempt to bribe officials in India to secure a software contract with Air India). Two other individuals involved were also convicted: *R v Barra and Govindia*, 2019 ONSC 1786.

55. Jesse Feith, “SNC-Lavalin: Sami Bebawi Sentenced to 8½ Years for Fraud, Corruption,” *Montreal Gazette* (11 January 2020), online: <[www.https://montrealgazette.com/news/local-news/snc-lavalin-sami-bebawi-sentenced-to-8-5-years-in-prison-for-fraud-corruption/](https://montrealgazette.com/news/local-news/snc-lavalin-sami-bebawi-sentenced-to-8-5-years-in-prison-for-fraud-corruption/)> [perma.cc/85LA-X3PP].

56. SNC-Lavalin Press Release of 18 December 2019, *supra* note 22.

57. An archive of annual reports to parliament can be found at: Global Affairs Canada, *Bribery and Corruption*, online: <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>> [perma.cc/X2LL-SD7J]. The number of active or ongoing investigations used to be reported annually and publicly, as noted in Harrington, *supra* note 39 at 102.

conviction tally also overlooks the fact that some Canadian investigations may serve to support taking prosecutorial action elsewhere, with it possible that the RCMP's search of SNC-Lavalin's Montreal headquarters in April 2012<sup>58</sup> provided some assistance in the Swiss proceedings against an SNC-Lavalin former executive that secured a guilty plea in 2014.<sup>59</sup>

Similarly, little is said about Canada's record of acquittals and stayed proceedings under the Act, with this tally being twice that recorded by the OECD given the latter's focus on acquittals.<sup>60</sup> A fuller report of Canada's record of unsuccessful cases would have to include the charges against all five individuals alleged to have taken part in the foreign bribery scheme concerning the Padma bridge construction project in Bangladesh,<sup>61</sup> as well as a sixth individual who was charged in 2016 for offering a bribe to Thai officials,<sup>62</sup> but for whom the charges were withdrawn in 2017.<sup>63</sup> Of the five individuals charged in relation to the Bangladesh bridge project—with this being the same project that led to SNC-Lavalin's negotiated ten-year debarment from bidding on World Bank projects<sup>64</sup>—two had their charges withdrawn as the jurisdictional connection to Canada was unsound, while the remaining three were acquitted for lack of evidence after the trial judge excluded the wiretap evidence obtained by the RCMP on the basis of an authorization that it had secured using information that it had failed to verify.<sup>65</sup>

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58. Paul Waldie, Ingrid Peritz & Graeme Smith, "RCMP Makes Second Search of SNC-Lavalin," *The Globe and Mail* (13 April 2012), online: <<https://www.theglobeandmail.com/news/politics/rcmp-makes-second-search-of-snc-lavalin/article4100225/>> [perma.cc/ME6H-DWTX]; "SNC-Lavalin's Montreal offices Raided by RCMP," *CBC News* (13 April 2012), online: <<https://www.cbc.ca/news/canada/montreal/snc-lavalin-s-montreal-offices-raided-by-rcmp-1.1170982>> [perma.cc/7NAQ-PZS7].

59. Van Praet & Hamilton, *supra* note 9.

60. OECD Working Group on Bribery, *2018 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (December 2019) at 2, online (pdf): <<https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf>> [perma.cc/C6HR-7459].

61. *Chowdhury v The Queen*, 2014 ONSC 2635; *R v Wallace*, 2017 ONSC 0132.

62. "Canadian General Aircraft President Charged with Conspiring to Bribe Thai Officials in Plane Deal," *CBC News* (24 November 2016), online: <<https://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-1.3866073>> [perma.cc/292X-K49Q].

63. Meghan Grant, "Charges Dropped against Calgary Man Accused of Conspiring to Bribe Thai Officials in Jet Deal," *CBC News* (6 December 2017), online: <<https://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-charge-stayed-1.4436289>> [perma.cc/5TGZ-UXT7].

64. The World Bank, Press Release, "World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years" (17 April 2013), online: <<https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>> [perma.cc/7TSL-ZQ42].

65. *R v Wallace*, 2017 ONSC 0132; See also Jacques Gallant, "Judge Acquits SNC-Lavalin Execs, Says RCMP Relied on 'Gossip,'" *Toronto Star* (10 February 2017), online: <<https://www.thestar.com/news/gta/2017/02/10/judge-acquits-snc-lavalin-execs-says-rcmp-relied-on-gossip.html>> [perma.cc/

### 3. *The remediation agreement provisions in the Criminal Code*

As for the sentencing options available for the corporate commission of foreign corruption, Canada opted in 2018 to expand what was available by adopting what some have pitched as a made-in-Canada version of a deferred prosecution agreement regime. This regime was bolted on to both the CFPOA and the *Criminal Code*, again through the speedy passage of legislation by parliament. The new law enables prosecutors to negotiate deferred prosecution agreements for certain specified criminal offences of an economic character, including the bribing of a foreign public official and the maintenance or destruction of books and records to facilitate or hide such a bribe.<sup>66</sup> The new scheme aims to hold an organization accountable, oblige the imposition of corrective measures, and encourage the voluntary disclosure of wrongdoing.<sup>67</sup>

In considering this change to the law, Canada engaged in a public consultation process in the fall of 2017, resulting in feedback from businesses, industry associations, justice sector stakeholders, non-governmental organizations and academics.<sup>68</sup> According to the government's summary of the results, published in February 2018, a majority supported the change, viewing a deferred prosecution agreement regime as "a useful additional tool for prosecutors to use at their discretion in appropriate circumstances to address corporate wrongdoing."<sup>69</sup> Criticism later emerged that more time was needed to study the proposal.<sup>70</sup> Nevertheless, five days after the release of the consultation results, as noted in the ethics commissioner's report,<sup>71</sup> the government of Canada introduced legislation to amend the *Criminal Code* to provide for what would be termed in Canadian law a "remediation agreement." This terminology presumably was chosen to convey the idea that these are tools "focused

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WN7D-JTND].

66. *Criminal Code*, *supra* note 16, Schedule to Part XXII.1, s 2.

67. *Ibid*, ss 715.31(b)-(d).

68. See further *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion Paper for Public Consultation: Deferred Prosecution Agreement Stream* (Ottawa: Government of Canada, 2017) [2017 Discussion Paper]. See also *Trudeau II Report*, *supra* note 2 at paras 34-35.

69. See *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard* (Ottawa: Government of Canada, 2018) at 4 [*What We Heard*]. See also *Trudeau II Report*, *supra* note 2 at para 40.

70. See Andy Blatchford, "Federal Budget Bill Quietly Proposes Tool to Ease Penalties for Corporate Crime," *iPolitics* (15 May 2018), online: <<https://ipolitics.ca/2018/05/15/federal-budget-bill-quietly-proposes-tool-to-ease-penalties-for-corporate-crime/>> [perma.cc/A8NL-NZ8P]. See also John Geddes, "The Government's Case for 'Remediation Agreements' Made no Mention of SNC-Lavalin," *Maclean's* (13 February 2019), online: <<https://www.macleans.ca/politics/the-governments-case-for-remediation-agreements-makes-no-mention-of-snc-lavalin/>> [perma.cc/XVX8-QBYYY].

71. *Trudeau II Report*, *supra* note 2 at para 41.

on rehabilitation rather than on punishment.”<sup>72</sup> The amendments were included in a 582-page omnibus budget bill,<sup>73</sup> sponsored by the minister of finance, and as such, were not extensively debated by parliamentarians.<sup>74</sup> Now found as Part XXII.1 of the *Criminal Code*, the new provisions entered into force on 21 September 2018.<sup>75</sup>

As with the use of deferred prosecution agreements in the United States and the jurisdiction of England and Wales,<sup>76</sup> Canada’s regime for remediation agreements offers an alternative to prosecution for corporations willing to carry out certain specified obligations in return for a stay of criminal charges. There is no legal right to a remediation agreement, with their availability governed by the exercise of prosecutorial discretion.<sup>77</sup> An over-arching public interest test governs the exercise of that discretion,<sup>78</sup> taking into account such factors as the corporation’s self-reporting of wrongdoing, the actions taken in response, and the culpability of senior management, as well as any record of previous wrongdoing.<sup>79</sup>

For foreign corruption cases, the new provisions on remediation agreements also make clear that “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.”<sup>80</sup> This prohibition is a verbatim copy of the pre-existing obligations of article 5 of the *OECD Anti-Bribery Convention*, with the bar on considering the “national economic interest” prompting a debate in Canada throughout much of 2019 as to whether this phrase can be interpreted in some way so as to keep a large employer viable to save jobs and pensions.<sup>81</sup> Indeed,

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72. *What We Heard*, *supra* note 69 at 14.

73. See Bill C-74, *supra* note 16, which received First Reading in the House of Commons on 27 March 2018.

74. There are only four instances of discussion of the remediation agreements provisions in the House of Commons and the Senate during the budget bill debates, with the most notable occurring at a meeting of the former’s Standing Committee on Finance at which the lead civil servant with responsibility for the proposed legislation provided an overview and answered questions: House of Commons, Standing Committee on Finance, *Evidence*, 42-1, No 154 (8 May 2018) at 21:25 (Ann Sheppard, Senior Counsel, Criminal Law Policy Section, Department of Justice) [*Ann Sheppard Committee Evidence*].

75. *Budget Implementation Act, 2018, No 1*, *supra* note 16, s 409.

76. Deferred prosecution agreements are not available in Scotland and Northern Ireland.

77. As confirmed in *SNC-Lavalin v Canada* 2019, *supra* note 17. See also *Ann Sheppard Committee Evidence*, *supra* note 74.

78. *Criminal Code*, *supra* note 16, s 715.32(1)(c).

79. *Ibid*, s 715.32(2).

80. *Ibid*, s 715.32(3).

81. See, in particular, Donald Johnston, “Was SNC-Lavalin Denied a Deal All Because of Three Simple but Misunderstood Words,” *Financial Post* (22 March 2019), online: <<https://business.financialpost.com/opinion/was-snc-lavalin-denied-a-deal-all-because-of-three-simple-but-misunderstood-words>> [perma.cc/8FRU-EJGK] (the author having served two terms as the OECD

the former clerk to the privy council and secretary to the cabinet put forward the view that the convention's bar on "national economic interest" considerations had an inter-state meaning such that "you cannot favour or let a company off because it helps France versus Germany, or Germany versus Italy, or Canada versus the United States," but he maintained the view that "[t]he [economic] impact on suppliers, pensioners, customers, communities is a relevant public interest consideration."<sup>82</sup> It was later reported by the ethics commissioner that the prime minister's counsel had argued that "the exclusion under the *Criminal Code* for considerations of 'national economic interest' is not intended to apply to non-culpable stakeholders," but no supporting authority was referenced.<sup>83</sup>

And yet, the view of the OECD Working Group on Bribery is clear. While the phrase "national economic interest" is not defined in the *OECD Anti-Bribery Convention*, and the drafting history provides no assistance,<sup>84</sup> the Working Group has advised that there are no permissible degrees of economic interest which would justify influencing a prosecutorial decision.<sup>85</sup> Indeed, Canada was told as much in 2004 when a Canadian effort to distinguish "proper" from "improper" considerations of national economic interest led the Working Group to recommend that Canada "clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest...."<sup>86</sup> This recommendation was repeated again in a 2006 study by the Working Group,<sup>87</sup> wherein it was also accepted that "where large

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secretary-general from 1996 to 2006); See also Jonathan Montpetit, "Why Quebec Sees SNC-Lavalin as an Asset, not a Liability," *CBC News* (14 February 2019), online: <<https://www.cbc.ca/news/canada/montreal/snc-lavalin-quebec-prosecution-1.5018472>> [perma.cc/4TAA-HHKK]; but see Allan Lanthier, "The Inconvenient Reality: Economic Interest has Nothing to do with SNC-Lavalin Getting a DPA," *The Globe and Mail* (11 March 2019), online: <<https://www.theglobeandmail.com/opinion/article-the-inconvenient-reality-economic-interest-has-nothing-to-do-with-snc/>> [perma.cc/29WH-ZLYT]; See also the opinion of Kenneth Jull, counsel with Gardiner Roberts LLP: House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 133 (25 February 2019) at 17:10 (Kenneth Jull).

82. House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 138 (6 March 2019) at 14:10 (Michael Wernick).

83. *Trudeau II Report*, *supra* note 2 at para 241, and for the ethics commissioner's assessment, at paras 308-319.

84. There is no formal drafting history or official *travaux préparatoires* for the negotiations of the *OECD Anti-Bribery Convention*: Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015) at 41-42.

85. See generally Peter J Cullen & Mark Pieth, "Enforcement" in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 349-396, especially 370-380.

86. OECD Working Group on Bribery, *Canada: Phase 2* (25 March 2004) at para 80, online (pdf): <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf>> [perma.cc/ZQ8N-Q8Z6].

87. OECD Working Group on Bribery, *Mid-Term Study of Phase 2 Reports* (22 May 2006) at para

companies are involved, enforcement actions...could potentially affect the national economy of the relevant Parties.”<sup>88</sup> Canada was reminded again of the Working Group’s position in 2011,<sup>89</sup> and it should have come as no surprise that during the SNC-Lavalin affair, Canada was put on notice that the Working Group was following the situation closely.<sup>90</sup>

It must also be emphasized that Canadian law clearly states that to enter into negotiations for a remediation agreement, a prosecutor must be of the opinion that there is a reasonable prospect of conviction with respect to the offence.<sup>91</sup> The negotiation of a remediation agreement also requires the consent of the attorney general,<sup>92</sup> and where negotiations result in an agreement, judicial approval is then required,<sup>93</sup> with a judge required to consider if “the agreement is in the public interest” and whether its terms are “fair, reasonable and proportionate to the gravity of the offence.”<sup>94</sup> Remediation agreements are, therefore, not secret, behind-the-scenes, out-of-court settlements, with the above requirements for independent scrutiny serving to protect the public interest, although some worry that these safeguards may deter corporate self-disclosure given the absence of a guarantee in return.<sup>95</sup> However, the new regime also presumes that remediation agreements approved by a court will be made public,<sup>96</sup> with publication enabling “other companies to see the kinds of terms that might be negotiated, if they were in a similar situation.”<sup>97</sup> Publication and transparency are also key factors in maintaining public confidence in the justice system.

As to their content, section 715.34(1) of the *Criminal Code* requires a remediation agreement to include a statement of the relevant facts, an admission of responsibility, and an indication of the penalty to be paid and

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277, online (pdf): <[www.oecd.org](http://www.oecd.org)> [perma.cc/DN9Z-2SDP].

88. *Ibid* at para 284.

89. OECD Working Group on Bribery, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada (18 March 2011) at paras 110-112, online (pdf): <[www.oecd.org](http://www.oecd.org)> [perma.cc/5FKQ-7VMA].

90. OECD, “OECD will follow Canadian proceedings addressing allegations of political interference in foreign bribery prosecution” (11 March 2019), online: <[www.oecd.org](http://www.oecd.org)> [perma.cc/6KDA-6J9H].

91. *Criminal Code*, *supra* note 16, s 715.32(1)(a).

92. *Ibid* at s 715.32(1)(d).

93. *Ibid* at s 715.37(1).

94. *Ibid* at s 715.37(6).

95. Provisions on the non-admissibility of certain admissions have been included to offset this concern, but some may still worry that details once disclosed, cannot be taken back: *Criminal Code*, *supra* note 16, ss 715.33(2), 715.34(2). The potential use in court of “deferred prosecution agreement negotiation material” was expressly recognized as a “sensitive matter” in the government’s 2017 Discussion Paper, *supra* note 68 at 11.

96. *Criminal Code*, *supra* note 16, s 715.42.

97. *Ann Sheppard Committee Evidence*, *supra* note 74 at 21:29.

the forfeiture of any benefit that was improperly received. A remediation agreement also imposes ongoing reporting obligations, and it imposes corporate obligations of cooperation and assistance with the aim of supporting the investigation and prosecution of the individuals involved in the crimes.<sup>98</sup> A corporation may also be required to establish a compliance plan to improve such matters as internal control procedures and employee training, and in some cases, an independent monitor will be appointed to report to the prosecutor on progress.<sup>99</sup> If the corporation meets the terms of the remediation agreement, the prosecutor will apply to a judge for an order of successful completion.<sup>100</sup> The charges will be stayed, and no criminal conviction will result. But if the corporation breaches a term of the remediation agreement, the criminal proceedings could be recommenced, and a prosecution could take place,<sup>101</sup> although provision is also made for varying the terms of an approved remediation agreement.<sup>102</sup>

#### 4. *Providing for victims in Canadian criminal law*

According to a purpose clause included within the new law, the remediation agreements regime aims to “denounce” wrongdoing and “provide reparations for harm done to victims or to the community.”<sup>103</sup> This wording reflects the existing content and phrasing of the key objectives for sentencing those convicted of crimes already found in the *Criminal Code*.<sup>104</sup> However, while the purpose clause identifies victim reparations as an aim,<sup>105</sup> it also provides that the law aims “to reduce the negative consequences of the wrongdoing for persons—employees, customers, pensioners and others—who did not engage in the wrongdoing.”<sup>106</sup> This emphasis on addressing the negative consequences for various third parties was also highlighted by the government’s spokesperson in the Senate during the law’s enactment, who emphasized that “[r]emediation agreements can

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98. *Criminal Code*, *supra* note 16 at s 715.34(1)(d). Reflecting on the American experience with deferred prosecution agreements, the former US Attorney General Eric Holder has stated that “the greatest deterrent effect is not to prosecute a corporation...[i]t is to prosecute the individuals in that corporation that are responsible for those decisions,” as cited in Nicholas Ryder, “Too Scared to Prosecute and Too Scared to Jail?” A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK” (2018) 82:3 J Crim L 245 at 254. According to one expert witness, cooperation to obtain a deferred prosecution agreement in the US “entails providing human beings for the Government to prosecute”: UK Select Committee on the Bribery Act, *supra* note 15 at 87.

99. *Criminal Code*, *supra* note 16 at s 715.34(3).

100. *Ibid* at s 715.4.

101. *Ibid* at s 715.39.

102. *Ibid* at s 715.38.

103. *Ibid* at s 715.31(a),(e).

104. *Ibid* at s 718(a), (e).

105. *Ibid* at s 715.31(e).

106. *Ibid* at s 715.31(f).

save jobs, investment and a company's contribution to our economy."<sup>107</sup> A backgrounder published by the federal department of justice when the new law came into effect also draws attention to the "serious impact" of economic crime "on the economy and on innocent third parties, such as employees,"<sup>108</sup> with the impact of a conviction on employees and others having been raised by SNC-Lavalin in its judicial review application.<sup>109</sup> However, not all would include investors or shareholders in the same category as employees and pensioners, particularly if one takes the view that those who benefit from the risks of investing, should also shoulder the burdens. Well-established legal scholars of corporate criminality have written that "[j]ustice as fairness requires, as a minimum, that the cost of corporate offences be internalised by the enterprise."<sup>110</sup> On the other hand, it must be generally recognized that many pension funds are major investors in publicly listed companies.

With respect to remedies, the new provisions expressly state that remediation agreements may "provide reparations for harm done to victims or the community,"<sup>111</sup> with "victim" in the foreign corruption context defined to include "any person outside Canada."<sup>112</sup> Indeed, victim compensation is often cited as a key feature of deferred prosecution agreement schemes, with those who comply being required to pay a form of "anticipated restitution" in the absence of a formal conviction.<sup>113</sup> This language of restitution is required for jurisdictional reasons in Canada, although it also leads to difficulties. Within the Canadian federation, criminal law is an area of jurisdiction for the Parliament of Canada,<sup>114</sup> with the courts having held that this jurisdiction extends to include the restitution of readily ascertainable losses following a conviction as part of the sentencing process.<sup>115</sup> The practical reality, however, of this situation

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107. "Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on 27 February 2018 and other measures," 2nd reading, *Debates of the Senate*, 42-1, No 218 (11 June 2018) at 1830 (Grant Mitchell).

108. Government of Canada, Department of Justice, Media Release, "Remediation Agreements and Orders to Address Corporate Crime: Backgrounder" (11 September 2018), online: <[www.canada.ca/perma.cc/9GTV-L69P](http://www.canada.ca/perma.cc/9GTV-L69P)> [Department of Justice, "Backgrounder"].

109. *SNC-Lavalin v Canada* 2019, *supra* note 17 at paras 13, 31, 109.

110. See Brent Fisse & John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11:3 *Sydney L Rev* 508, cited with approval in CMV Clarkson, "Kicking Corporate Bodies and Damning Their Souls" (1996) 59:4 *Modern L Rev* 557 at 563.

111. *Criminal Code*, *supra* note 16 at ss 715.31(e), 715.32(2)(e), 715.34(1)(g).

112. *Ibid* at s 715.3(1).

113. 2017 Discussion Paper, *supra* note 68 at 12.

114. *Constitution Act*, 1867 (UK), 30 & 31 *Vict*, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

115. *R v Zelensky*, [1978] 2 SCR 940, 86 DLR (3d) 179; see also *Criminal Code*, *supra* note 16 at ss

is unsatisfactory as it seems illogical for victim compensation to be available in the simple case of foreign bribery, but not in highly complex cases involving carefully structured multijurisdictional layers of payments and kickbacks. As for provincial (and territorial) efforts, there are various forms of victims assistance schemes available, but none aim to provide support or assistance for foreign victims of crime.

Canada's statutory scheme for remediation agreements also makes provision for victims' rights to information and participation, with the prosecutor under a duty to inform victims and their representatives soon after an offer to negotiate a remediation agreement has been accepted by the corporation.<sup>116</sup> At the judicial approval stage, the court is also required to consider any reparations made to victims and the content of any victim or community impact statements,<sup>117</sup> and if necessary, a judicially-approved remediation agreement need not be published to protect the identity of victims, among others.<sup>118</sup> Provision is also made for the imposition of a victim surcharge on top of the financial penalty incurred,<sup>119</sup> although to whom these funds will benefit in practice remains unclear. In the past, sizeable victim surcharges have been paid by corporations in Canadian foreign corruption cases ostensibly in support of victims' assistance programs,<sup>120</sup> but without any mention of the foreign victims of the crimes. In the *Griffiths Energy International* case, involving a negotiated plea deal to settle a charge of paying bribes to influence the award of resource development rights in Chad, the corporation involved paid a fine of CAD \$9 million and a victim surcharge of CAD \$1.35 million.<sup>121</sup> In the *Niko Resources* case, involving a negotiated plea deal to settle a charge of paying bribes to secure concessions in Bangladesh, the corporation paid a fine

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738-741.2.

116. *Criminal Code*, *supra* note 16, s 715.36. For confirmation of the policy intent, see House of Commons, Standing Committee on Finance, *Evidence*, 42-1, No 157 (23 May 2018) at 1615 (Ann Sheppard).

117. *Criminal Code*, *supra* note 16 at s 715.37(3)(a), (c).

118. *Ibid* at s 715.42(3)(b).

119. *Ibid* at s 715.37(5). The amount of the victim surcharge is 30% "or any other percentage that the prosecutor deems appropriate in the circumstances."

120. Assessed at 15%, then later 30%, of any fine, the federal victim surcharge was introduced in 1989, and made mandatory in 2013, as a way to make offenders more accountable and to offset some of the costs of funding victims' programs and services. However, in removing scope for judicial discretion to alleviate the surcharge's impact on offenders with no ability to pay, the government opened the door to a constitutional challenge, with the victim surcharge law declared invalid in December 2018: *R v Boudreault*, 2018 SCC 58.

121. *Griffiths Energy International*, *supra* note 53 at paras 10, 28. See also Jen Gerson, "Guilty Plea for Calgary Firm—Energy Company—Griffiths Energy Paid Officials in Chad \$2-million," *National Post* (Toronto edition) (23 January 2013) A4; Brian Hutchinson, "Law Firms Consulted Before \$2M Briber—Griffiths Energy—Fined \$10.3M After Admitting Illicit Payment," *National Post* (Toronto edition) (28 January 2013) A1-A2.

of CAD \$8.26 million and a victim surcharge of CAD \$1.239 million.<sup>122</sup> In both cases, the victim surcharge was payable to the Alberta treasury without any mention of using these funds for victim assistance activities of relevance to either Chad or Bangladesh. One is guessing, but perhaps the reality of this situation is why the new provisions on remediation agreements expressly state that the victim surcharge is not available for offences under the CFPOA.<sup>123</sup>

There remains, however, further work to be done on defining a victim, with clarity needed as to whether this categorization may also include a company's employees, pensioners and/or shareholders, or indeed, whether the terminology of "victims" and "innocent third parties" that is found within the law on remediation agreements might be interchangeable. Within its consultation documents, the government acknowledged that "in the case of economic crime, the 'victim' may not be an identifiable individual, but rather the employees, stakeholders of the company or one of its competitors, or, in the case of foreign bribery, for example, the citizens of another country."<sup>124</sup> However, the interests of the stakeholders were clearly accorded greater weight, with the purpose of a remediation agreement identified as being to "help to mitigate unintended consequences associated with a criminal conviction for blameless employees, customers, pensioners, suppliers and investors."<sup>125</sup> Indeed, it was expressly stated within the response to the consultation that "[w]hile victim remediation was considered to be a laudable goal, it was acknowledged that it is only viable where the victims may be identified and the harm quantified."<sup>126</sup> A few participants in the consultation also "indicated that victim compensation is best left to the civil courts."<sup>127</sup>

Nevertheless, as enacted, the new law contains a purpose clause, wherein victims are addressed in a separate objective from that concerning employees, customers, pensioners and shareholders.<sup>128</sup> In its background, the department of justice does not comment further, noting only that the new law "could help result in faster compensation to victims and protect

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122. *Niko Resources*, *supra* note 53 at para 21. See also Greg McArthur, "Canadian Firm to Admit to Overseas Bribery: Lengthy RCMP Probe Ends with Niko Resources' Guilty Plea Over Attempts to Influence Bangladeshi minister," *The Globe and Mail* (24 June 2011) A1, online: *The Globe and Mail* <[www.theglobeandmail.com](http://www.theglobeandmail.com)> [perma.cc/7MDR-7K34].

123. *Criminal Code*, *supra* note 16 at s 715.34(1)(h).

124. 2017 Discussion Paper, *supra* note 68 at 12.

125. *What We Heard*, *supra* note 69 at 6; see also *ibid* at 13.

126. *Ibid* at 14, 19.

127. *Ibid* at 20.

128. *Criminal Code*, *supra* note 16 at ss 715.31(e), (f).

jobs of innocent employees and investments of innocent shareholders.”<sup>129</sup> The word “victim” is, however, a defined term in Canadian criminal law. Section 2 of the *Criminal Code* provides that a “victim means a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence.” The *Code* also defines “complainant” as “the victim of an alleged offence.”<sup>130</sup> When first introduced in 1999,<sup>131</sup> the definition of victim simply read that a “victim includes the victim of an alleged offence,” with this definition, according to the then justice minister, Anne McLellan, purposely left open to let common sense and the judgments of the courts decide who is a victim.<sup>132</sup> It was also introduced so as to avoid the argument that there cannot be a victim without, or until there is, a conviction.<sup>133</sup> The *Criminal Code* definition of “victim” was later expanded in 2015, with the end result connecting victimhood with the suffering of harm, while also expanding harm to include property damage and economic loss.<sup>134</sup> This wording may well suggest that shareholders might be considered victims in a case of corporate economic crime, with the 2015 definition clearly intended by parliamentarians to serve as a broad definition, capable of covering all persons directly affected by an offence, even when an offence has not been committed against them personally.<sup>135</sup> The current definition also appears to be exhaustive, with Part XXII.1 of the Code on “Remediation Agreements” expressly incorporating the section 2 definition of victim within its definitional section in section 715.3(1), while also adding the extra proviso that the term also “includes any person outside Canada” when dealing with corruption of foreign public officials offences.<sup>136</sup>

129. Department of Justice, “Backgrounder,” *supra* note 108. But see Fisse & Braithwaite, *supra* note 110.

130. *Criminal Code*, *supra* note 16, s 2.

131. *An Act to Amend the Criminal Code (Victims of Crime) and Another Act in Consequence*, SC 1999, c 25, s 1. A more expansive definition of victim could be found in the *Criminal Code*, *supra* note 16 at s 722(4), but its application was tied to the provision of victim impact statements at the sentencing or discharge phase.

132. House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 36-1, No 134 (22 April 1999) at 1200 (Hon Anne McLellan).

133. *Ibid*; see also Senate, Standing Committee on Legal and Constitutional Affairs, 36-1, No 72 (9 June 1999) (Catherine Kane, Counsel, Criminal Law Policy, Department of Justice).

134. *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

135. “Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts,” 2nd reading, *House of Commons Debates*, 41-2, No 72 (9 April 2014) at 1610 (Hon Peter MacKay); “Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts,” 3rd reading, *House of Commons Debates*, 41-2, No 176 (20 February 2015) at 1005 (Hon Peter MacKay).

136. *Criminal Code*, *supra* note 16 at s 715.3(1).

II. *The inevitability of economic consequences and shareholders as victims*

Corporations cannot go to jail. The accountability option available upon conviction is a financial penalty, which inevitably must have some economic consequences for the corporation involved in order for the penalty to serve as a deterrent. In the foreign corruption context, these fines can be extensive, often ranging in the millions of dollars for the corporate offender. Rolls-Royce Plc, for example, incurred a financial penalty of GBP £239-million for foreign bribery in 2017, with that fine to have been higher, but for what was described by the English Crown Court as the company's "extraordinary" cooperation with prosecuting authorities.<sup>137</sup> An order was also made for the disgorgement of profits in the amount of GBP £258-million, and like SNC-Lavalin, Rolls-Royce employed some 50,000 people worldwide, with its reputation in the field of engineering motivating the court to conclude that it was "properly considered a company of central importance to the United Kingdom."<sup>138</sup>

These huge sums are then paid to the public accounts of the governments of the prosecuting authority, with no obligation to pay forward any of the funds to the government or people of the foreign country affected. In some cases, compensation might also be available, as might asset recovery and the forfeiture of the proceeds of crime, although it is often not easy to trace with sufficient precision the losses that result, or the profits that were gained, from a complex scheme of foreign bribery. Indeed, it is the very complexity of corporate crime that favours the use of negotiated settlements, given the difficulties in proving matters at trial, with the obvious topics for negotiation being the amount of the fine to be incurred and any credit or discount to be applied in recognition of corporate cooperation and/or voluntary self-disclosure.<sup>139</sup> It is also inevitable that consideration will be given to the consequences of a conviction, with a guilty plea, as distinct from a stayed prosecution, for foreign corruption charges raising the prospect of debarment from consideration for future

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137. *Serious Fraud Office v Rolls Royce Plc*, [2017] Lloyd's Rep FC 249 (Crown Court) at paras 21-22.

138. *Ibid* at para 2; see also United Kingdom, Serious Fraud Office, News Release, "SFO Completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC" (17 January 2017), online: <[www.sfo.gov.uk](http://www.sfo.gov.uk)> [[perma.cc/KB3K-U369](https://perma.cc/KB3K-U369)].

139. In England and Wales, the Sentencing Council's recommended maximum discount of 30% for a guilty plea has increased to 50% in corporate bribery cases settled through deferred prosecution agreements. For a full discussion, see UK Select Committee on the Bribery Act, *supra* note 15 at paras 284-310.

lucrative work. The impact of debarment has also been considered at the judicial approval phase for a deferred prosecution agreement.<sup>140</sup>

There remains, however, the question of whether the shareholders in a company should be considered victims or innocent third parties particularly in the foreign corruption context where the benefits of a bribery arrangement may well have secured the profitable work and an increase in share value. The *Griffiths Energy International* case provides an illustrative example. In that case,<sup>141</sup> Griffiths Energy International (GEI) had engaged in the bribery of the wife of the ambassador of Chad to the United States and Canada, and the wife of the deputy chief of Chad's diplomatic mission, in return for assistance in securing a contract with the Republic of Chad. The bribes, (a description contested by the individuals involved),<sup>142</sup> consisted of the payment of a USD \$2 million consultancy fee and the grant of four million shares in GEI at a price of \$0.001 per share. In January 2011, GEI secured the desired production-sharing contract with Chad, and in February 2011, the company founded by the ambassador's wife received its payment of the USD \$2 million fee. Six months later, GEI underwent a change of management. During preparations to become a publicly-traded company, the bribery arrangements were discovered, leading to the company's voluntary self-disclosure of wrongdoing to law enforcement authorities in both Canada and the United States. In January 2013, a plea deal on foreign corruption charges was reached between GEI and the Public Prosecution Service of Canada, resulting in the payment of a CAD \$10.35 million fine. That deal saved the company, which later changed its name to Caracal Energy, and by July 2013, had begun trading shares on the London Stock Exchange.<sup>143</sup> By mid-2014, Caracal Energy, and its valuable prospects in Chad, had been acquired by the Anglo-Swiss commodities and resources giant Glencore Xstrata Plc for GBP £807 million,<sup>144</sup> leading to a surge in value for the company's shareholders.<sup>145</sup>

140. *Serious Fraud Office v Rolls Royce Plc*, *supra* note 137 at paras 52-55.

141. *R v Griffiths Energy International Inc*, *supra* note 53. The facts are also set out in detail in *Serious Fraud Office v Saleh*, [2015] EWHC 2119 (QB) at paras 11-23 [*Saleh* (2015)]; *Saleh v Director of the Serious Fraud Office*, [2017] EWCA Civ 18 at paras 6-21 [*Saleh* (2017)]; *Serious Fraud Office v Saleh*, [2018] EWHC 1012 (QB) (BAILII) at paras 14-51 [*Saleh* (2018)].

142. See *Bechir v Gowling Lafleur Henderson LLP*, 2017 ABQB 667 at paras 15-18.

143. The factual background can be found in Harrington, *supra* note 39 at 127-128.

144. Ashley Armstrong, "Glencore Gatecrashes Caracal Energy Deal with Rival £807m Cash Offer," *The Telegraph* (14 April 2014), online: <[www.telegraph.co.uk](http://www.telegraph.co.uk)> [perma.cc/7BSS-S593]; Alexis Flynn, "Glencore Xstrata Buys Caracal Energy," *The Wall Street Journal* (14 April 2014), online: <[www.wsj.com](http://www.wsj.com)> [perma.cc/G3R3-JCA2]. Announced in April, the acquisition took place in July 2014. Glencore had merged with Xstrata in 2013 and is now known simply as Glencore.

145. Neil Hume & Xan Rice, "Glencore Xstrata Buys Chad-Focussed Oil and Gas Group Caracal," *Financial Times* (14 April 2014), online: <[www.ft.com/content/68960974-c3da-11e3-a8e0-](http://www.ft.com/content/68960974-c3da-11e3-a8e0-)

Acquisition by the world's largest mining company, with revenues in the billions, also meant that at GBP £5.50 per share, the four million shares provided as an bribe to the two wives were now worth an estimated GBP £22 million.

Securing the forfeiture of these benefits was not an easy task. A forfeiture application was initiated in Canada, but later withdrawn, with the chief federal prosecutor providing no reasons.<sup>146</sup> In July 2014, the shares were surrendered to the stock transfer agent handling the acquisition of Caracel Energy by Glencore, and the proceeds of their sale were deposited in an account with the Royal Bank of Scotland, leading to the involvement of the leading British prosecutorial authority for matters of economic crime, the Serious Fraud Office (SFO). Acting on its own initiative, and in response to a US Department of Justice request, the SFO then took the necessary steps to secure a property freezing order for the proceeds of the sale.<sup>147</sup> The wife of the deputy chief of mission, Ikram Mahamet Saleh, then went to court in England to seek the release of a sum of GBP £4.4 million, being the proceeds from the sale of the 800,000 shares she had acquired in 2009 for CAD \$800.<sup>148</sup> She was unsuccessful, leading to the alleged proceeds of crime from the Griffiths Energy bribery scheme being seized—not by the actions of the Canadian authorities, but by British authorities,<sup>149</sup> with the SFO having advertised its success in what it calls the “Chad Oil case.”<sup>150</sup> As for the shares held by the ambassador's wife, those became the subject of US forfeiture proceedings, with the US authorities viewing the proceeds as traceable to conduct carried out when the ambassador and his wife were stationed in the US.<sup>151</sup>

The SFO also deserves credit for its recognition of the overseas victims of the crime and the general societal damage that arises in cases of foreign bribery. There is, however, a risk in any foreign corruption case that the foreign officials taking bribes are emblematic of a wider culture of corruption and cronyism within the foreign state. For this reason, there may be concerns in remitting funds to the government, with Chad, as a

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00144feabdc0> [perma.cc/3M6J-X498].

146. As recorded in *Saleh* (2015), *supra* note 141 at paras 112-113.

147. *Ibid* at para 53.

148. *Saleh* (2017), *supra* note 141 at paras 2, 6.

149. *Saleh* (2018), *supra* note 141.

150. United Kingdom, Serious Fraud Office, News Release, “SFO Recovers £4.4m from Corrupt Diplomats in ‘Chad Oil’ Deal” (22 March 2018), online: <www.sfo.gov.uk> [perma.cc/RA3N-NM2D].

151. United States, Department of Justice, Press Release, 14-1240, “Department of Justice Seeks Recovery of Approximately \$100,000 in Bribes Paid to Former Chad Ambassador” (7 November 2014), online: <www.justice.gov> [perma.cc/95EJ-7VTX].

pertinent example, having faced criticism for using its oil revenues to buy weapons rather than relieve poverty in the face of an agreement with the World Bank that oil royalties be used for development purposes.<sup>152</sup> Balancing these considerations, the SFO directed the funds seized in the Chad Oil case to be transferred to the UK government's Department for International Development (DFID) for investment in projects that "will benefit the poorest in Chad."<sup>153</sup>

This example of creative sentencing parallels two other efforts where the SFO has facilitated the transfer back of confiscated funds for the benefit of foreign victims of foreign bribery. Using the monies arising from the conviction of the security printing firm, Smith and Ouzman Ltd., the SFO procured several new ambulances to service hospitals in Kenya, and it used its very first deferred prosecution agreement with Standard Bank Plc (now known as ICBC Standard Bank Plc) to direct GBP £4.9 million to the government of Tanzania.<sup>154</sup> In a 2018 speech at an international symposium on economic crime delivered by the head of the SFO's Proceeds of Crime and International Assistance Division, Elizabeth Baker made clear the SFO's position that "[a]ll economic crime has victims," even if "[t]heir identification may be more elusive."<sup>155</sup> She went on to state that "the ideal outcome, where-ever it is possible, is for the money secured through asset recovery to be returned to victims, using that term in its widest sense."<sup>156</sup> In supporting her argument with examples, she drew upon the cases of Chad Oil and Smith and Ouzman Ltd.

### III. *Comparative experience from the United Kingdom and Australia*

Law enforcement authorities in the UK have also entered into an agreement to establish "a common framework to identify cases where compensation is appropriate" for victims of economic crime overseas and to "act swiftly in those cases to return funds to the affected countries, companies or

152. See further Annalisa M Leibold, "Aligning Incentives for Development: The World Bank and the Chad-Cameron Oil Pipeline" (2011) 36:1 Yale J Intl L 167-206.

153. United Kingdom, Serious Fraud Office, News Release, *supra* note 150. See also Harrington, *supra* note 39 at 134, for the suggestion that "a seizing state may consider using the funds to support development projects and charities in the foreign state that have been vetted by its own development agency."

154. These developments are highlighted by the SFO, *supra* note 150. Case information concerning Smith and Ouzman Ltd is available from the Serious Fraud Office at <[www.sfo.gov.uk/cases/smith-ouzman-ltd/](http://www.sfo.gov.uk/cases/smith-ouzman-ltd/)> [perma.cc/57PN-J9CW]. Case information concerning Standard Bank Plc is available from the Serious Fraud Office at <[www.sfo.gov.uk/cases/standard-bank-plc/](http://www.sfo.gov.uk/cases/standard-bank-plc/)> [perma.cc/MU2T-NGL9].

155. Elizabeth Baker, "All Economic Crime has Victims" (Paper delivered at the Cambridge International Symposium on Economic Crime, Cambridge, 6 September 2018), online: *Serious Fraud Office* <[www.sfo.gov.uk](http://www.sfo.gov.uk)> [perma.cc/W3AK-2F3G].

156. *Ibid.*

people.”<sup>157</sup> The agreement concerns the Crown Prosecution Service, the National Crime Agency and the Serious Fraud Office. Launched as part of the UK’s Anti-Corruption Strategy for 2017–2022, the three departments have adopted a set of “General Principles” that make clear their “aim to ensure that overseas victims of bribery, corruption and economic crime, are able to benefit from asset recovery proceedings and compensation orders made in England and Wales,” with these victims to include “affected states, organizations and individuals.”<sup>158</sup> The over-arching strategy document also calls upon the UK to support other countries “to deliver their commitment to develop their own principles and continue to raise awareness internationally with the aim of achieving a consensus that overseas victims should benefit from the positive outcomes of bribery and corruption cases.”<sup>159</sup>

It is worth drawing attention to this development since Canada has opted for the English model of deferred prosecution agreements. There are two kinds of legal regimes that provide for deferred prosecution agreements. The United States has a policy-based regime, driven by the discretion of a prosecutor or a Securities and Exchange Commission official,<sup>160</sup> and with a fairly limited role for the courts,<sup>161</sup> although legislation has been proposed since 2009 to provide for the issuance of public written guidelines.<sup>162</sup> The impetus for the US policy favouring the use of deferred prosecution agreements to address the corporate commission of economic crime has been widely attributed to the 2002 criminal conviction of the now-defunct

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157. United Kingdom, Serious Fraud Office, News Release, “New Joint Principles Published to Compensate Victims of Economic Crime Overseas” (1 June 2018), online: <<https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>> [perma.cc/Y2T5-S6JK].

158. United Kingdom, Crown Prosecution Service, “General Principles to Compensate Overseas Victims (Including Affected States) in Bribery, Corruption and Economic Crimes Cases” (December 2017), online: *Crown Prosecution Service* <<https://www.cps.gov.uk/sites/default/files/documents/publications/general-Principles-to-compensate-overseas-victims-December-2017.pdf>> [perma.cc/B4FE-QLNR].

159. *United Kingdom Anti-Corruption Strategy 2017–2020* (2017), art 6.10, online (pdf): *Government of the United Kingdom* <[assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk)> [perma.cc/ADP2-BPKC].

160. On the evolution of US policy towards the use of deferred prosecution agreements to address the corporate commission of foreign corruption, see Mike Koehler, “Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement” (2015) 49:2 UC Davis L Rev 497.

161. For appellate affirmation of a limited judicial role in reviewing the terms of a US deferred prosecution agreement, see *United States v Fokker Services BV*, 818 F (3d) 733 at 744-745 (DC Cir 2016). See also *United States of America v HSBC Bank USA, NA*, 863 F (3d) 125 (2d Cir 2017).

162. Entitled the *Accountability in Deferred Prosecution Act*, the legislation has not been enacted into law. A recent effort was introduced in 2018 by US Senator Elizabeth Warren that would also mandate judicial oversight. See further Peter R Reilly, “Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: US Corporate DPAs Rejected on Many Fronts” (2018) 50 Ariz St LJ 113 at 1160-1163.

financial services firm of Arthur Andersen LLP in the aftermath of the Enron financial scandal.<sup>163</sup> In that case, the criminal charges and conviction led to the loss of the firm's certified public accounting licence, a resulting inability to conduct audits, and then lay-offs for thousands of employees, with the conviction's 2005 reversal by a unanimous US Supreme Court coming too late to save the company from the collateral consequences of the criminal charges.<sup>164</sup> No doubt, SNC-Lavalin was aware of what is known as the "Arthur Andersen effect," although empirically-based research has been conducted to challenge the belief that the laying of criminal charges against a corporation leads to ruin.<sup>165</sup>

By contrast, the jurisdiction of England and Wales, but not Scotland nor Northern Ireland,<sup>166</sup> has opted for a statutory-based regime with judicial oversight and publication requirements, thus addressing the transparency and public interest accountability criticisms that arise in relation to the US model. While there was interest in England in developing a deferred prosecution agreement regime so as to avoid the expense and effort of a complex and confusing trial,<sup>167</sup> the type of scheme introduced was also influenced by judicial criticism of prosecution-led plea agreements, casting these agreements as contrary to the constitutional principle of transparency and open justice, and as challenging the sentencing role of the courts.<sup>168</sup> During the Canadian consultation process discussed above, transparency was mentioned as a common reason for favouring the English model, as was the desire for "clear prosecution guidelines," publication requirements, and "strong judicial oversight,"<sup>169</sup> with the English model having also attracted support in Australia and Ireland for many of the same reasons.<sup>170</sup>

For England and Wales, the relevant law is found in a Schedule to the *Crimes and Courts Act 2013*, known as Schedule 17, which was brought into force in February 2014.<sup>171</sup> Until this enactment, a deferred prosecution

163. See Koehler, *supra* note 160 at 501-502. See also Ryder, *supra* note 98 at 248, 251-252.

164. *Arthur Andersen LLP v United States*, 544 US 696 (2005).

165. See generally Gabriel Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-first Century" (2013) 15 U Pa J Bus L 797.

166. See *Crimes and Courts Act 2013* (UK), c 22, s 61(13)(g).

167. Ryder, *supra* note 98 at 259.

168. *R v Inmospec Ltd*, [2010] Crim L R 665 (EWCC); *R v Dougall*, [2010] EWCA Crim 1048.

169. *What We Heard*, *supra* note 69 at 5, 14, 16.

170. The situation in Australia is discussed below. The Law Reform Commission in Ireland compared the US and UK models and recommended the latter's approach because it is statutory-based, imposes limits on prosecutorial discretion, and provides for judicial oversight: Ireland, Law Reform Commission, *Report: Regulatory Powers and Corporate Offences: Volume 1: Regulatory Powers* (Dublin: Law Reform Commission, 2018), ch 5, 219-280.

171. *Crimes and Courts Act 2013*, *supra* note 166 at Schedule 17; *Crime and Courts Act 2013*

agreement was “a creature unknown to English law,” as explained in a recent parliamentary review of the scheme.<sup>172</sup> English deferred prosecution agreements are also clearly intended to be discretionary tools, with only the director of public prosecutions and the director of the Serious Fraud Office having the power to authorize their negotiation with corporations, partnerships and unincorporated associations, but never individuals, in relation to fraud, bribery and other economic crimes.<sup>173</sup> The courts have a role in approving and overseeing such agreements, and their terms are made public. The process and application criteria has also been made public, as is the Code of Practice describing how prosecutors will use this new tool.<sup>174</sup> Criminal prosecution, however, continues to serve as a preferred course of action, with the entire scheme made subject to an overarching principle that deferred prosecution agreements are only offered in specific circumstances, and in the interests of justice, based on an assessment of the evidence and the public interest.<sup>175</sup> To date, four agreements have been concluded, with these agreements concerning Standard Bank (2015), Rolls Royce (2017), Tesco (2017), and a fourth company known as XYZ because it cannot be named until related criminal proceedings are concluded.<sup>176</sup> The cases of Standard Bank, Rolls Royce, and XYZ are concerned with bribery offences, while the Tesco case involved charges of false accounting practices.

As for victims, the British legislation indicates that a deferred prosecution agreement can include an obligation “to compensate victims” or “to donate money to a charity or other third party.”<sup>177</sup> Indeed, in the first agreement concluded under the new scheme, involving an indictment against Standard Bank Plc for failing to prevent associated persons from committing bribery, a term was included for the payment of compensation with interest to the government of Tanzania in the amount of USD \$7 million, in addition to the payment of a USD \$16.8 million penalty, the disgorgement of profits in the amount of USD \$8.6 million, and the payment of GBP £330,000 for the costs of the investigation.<sup>178</sup> The

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(Commencement No 8) Order 2014 (UK), SI 2014/258.

172. See UK Select Committee on the Bribery Act, *supra* note 15 at 69.

173. *Crimes and Courts Act 2013*, *supra* note 166, Schedule 17, para 3.

174. United Kingdom, Serious Fraud Office and Crown Prosecution Service, “Deferred Prosecution Agreements: Code of Practice” (11 February 2014), online: *Crown Prosecution Service* <[https://www.cps.gov.uk/sites/default/files/documents/publications/dpa\\_cop.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf)> [perma.cc/LQL5-VDBS].

175. *Crimes and Courts Act 2013*, *supra* note 166, Schedule 17 at ss 7(1)(a), 8(1)(a), 10(2)(a).

176. United Kingdom, Serious Fraud Office, “Deferred Prosecution Agreements” (undated), online: <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>> [perma.cc/LBU8-QD8S].

177. *Crimes and Courts Act 2013*, *supra* note 166, Schedule 17 at ss 5(3)(b)-(c).

178. United Kingdom, Serious Fraud Office, News Release, “UK’s First Deferred Prosecution

agreement lasted for three years and when it expired on 30 November 2018, the SFO issued a statement expressly confirming that the terms were met, with the payment of compensation to Tanzania made in May 2016. The SFO has also announced that it has been working with the Foreign and Commonwealth Office, the Department of International Development and HM Treasury, as well as other UK organizations, “to develop a process for making similar compensation payments and other financial settlements to affected states in foreign bribery and international corruption cases safely and transparently.”<sup>179</sup>

The process of judicial approval for deferred prosecution agreements has also led to judicial guidance from the English courts with respect to providing compensation for victims. In his preliminary judgment concerning Standard Bank Plc, the President of the Queen’s Bench Division, Sir Brian Leveson, made clear that in relation to corporate offenders, priority should be given to the payment of compensation to victims over fines.<sup>180</sup> However, the payment of compensation relies on an ability to positively identify an entity or person as a victim, as the English court has made clear in relation to the deferred prosecution agreements for XYZ and Rolls Royce.<sup>181</sup> Sentencing guidelines and their associated jurisprudence have also made clear that compensation is for “clear and simple cases” and “there is no jurisdiction to make an order where there are real issues as to whether those to benefit have suffered any, and if so, what loss.”<sup>182</sup> As a result, those who perpetrate the most complex foreign bribery schemes, perhaps involving multiple intermediaries, make it impossible to identify a quantifiable loss arising from the criminal conduct, and can avoid having to pay compensation precisely because of that complexity.

Australia, meanwhile, introduced the possibility of deferred prosecution agreements in December 2017,<sup>183</sup> following a more extensive consultation process than that used in Canada. In March 2016, the attorney-general’s department released a discussion paper on the possible

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Agreement, between the SFO and Standard Bank, Successfully Ends” (30 November 2018), online: <[www.sfo.gov.uk](http://www.sfo.gov.uk)> [perma.cc/LBU8-QD8S].

179. United Kingdom, Serious Fraud Office, “Case Information: Standard Bank Plc” (last updated 3 September 2019), online: <<https://www.sfo.gov.uk/cases/standard-bank-plc/>> [perma.cc/KBJ6-JNND].

180. *Serious Fraud Office v Standard Bank Plc*, [2015] 11 WLUK 804 (Crown Court) at para 39.

181. *Serious Fraud Office v XYZ Ltd*, [2016] 7 WLUK 220 (Crown Court) at para 20; *Serious Fraud Office v Rolls Royce Plc*, *supra* note 137 at paras 81-84.

182. *Serious Fraud Office v Rolls Royce Plc*, *supra* note 181 at para 81.

183. Australia, Commonwealth Parliament, Parliamentary Library Bills Digest, *Crimes Legislation Amendment (Combatting Corporate Crimes) Bill 2017* (Cth), by Cat Barker and Monica Biddington (2017) (introduced and read a first time).

introduction of a scheme for deferred prosecution agreements,<sup>184</sup> and then in March 2017, the department initiated a second consultation for views on the law to be proposed.<sup>185</sup> Then, after the relevant bill was introduced in parliament, a further consultation was undertaken with respect to a Code of Practice, with a draft being published in May 2018.<sup>186</sup> However, contrary to the suggestion made in the ethics commissioner's report,<sup>187</sup> Australia's scheme is not yet in place. The bill lapsed with the dissolution of the Commonwealth Parliament for a general election in mid-2019.

Assuming the law will be enacted in the near future, the Australian scheme intends to offer a corporation the deferment of a prosecution on foreign bribery and corruption charges, among other serious corporate crimes, in return for an obligation of cooperation with other investigations, the payment of a financial penalty, and the implementation of a program to improve compliance through ongoing monitoring. The terms of the agreement must be approved by a retired judge, due to Australian constitutional concerns having posed an obstacle to the use of a sitting judge. If the agreement is approved, no criminal proceedings are to be commenced, making the Australian scheme more akin to a non-prosecution agreement, with criminal proceedings commenced if the agreement is breached.<sup>188</sup> During the consultation process, it was also suggested that the introduction of a deferred prosecution agreement scheme will "help to compensate victims of corporate crime,"<sup>189</sup> with the attorney-general's department having come to the view that "victim restitution is a key feature of the US and UK schemes."<sup>190</sup> The proposed Australian scheme also follows the lead of the English scheme by providing for the payment of a donation to a charity or third party as an obligation within an approved agreement.

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184. Australia, Commonwealth Government, Attorney-General's Department, *Deferred Prosecution Agreements: Public Consultation* (March 2016) [Australia 2016 Discussion Paper].

185. Australia, Commonwealth Government, Attorney-General's Department, *Public Consultation: Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (March 2017), online: *Government of Australia* <[www.ag.gov.au](http://www.ag.gov.au)> [perma.cc/YC8U-SGRS].

186. Australia, Commonwealth Government, Attorney-General's Department, *Deferred Prosecution Agreement Scheme Code of Practice: Consultation Draft* (May 2018), online (pdf): *Government of Australia* <[www.ag.gov.au](http://www.ag.gov.au)> [perma.cc/DMH8-UZ6T].

187. *Trudeau II Report*, *supra* note 2 at para 25.

188. This point is made in a critique of the proposed Australian scheme in Liz Campbell, "Trying Corporate Actors—Why Not Prosecute?" (8 February 2019) at 17, online: *Social Sciences Research Network* <<https://ssrn.com/abstract=3332134>> [perma.cc/X64E-V4UE].

189. Australia 2016 Discussion Paper, *supra* note 184 at 3.

190. *Ibid* at 20.

#### IV. *Creating a remediation fund similar to the Environmental Damages Fund*

One last option for future consideration is the creation of a designated fund to which some portion of the penalties for foreign corruption could be directed to provide financial support for development assistance projects aimed at the remediation of the general societal impact of foreign bribery. Such a fund could use the federally-created Environmental Damages Fund (EDF) as a model and precedent.<sup>191</sup> Established in 1995, not by statute or regulation, but by a Treasury Board decision,<sup>192</sup> and administered by the federal department of the environment (known colloquially as Environment and Climate Change Canada),<sup>193</sup> the EDF serves as a concrete expression of the polluter-pays principle in international environmental law, whereby those who pollute are required to pay for the economic, environmental and social consequences of their activities.<sup>194</sup> The EDF is a “specified purpose account” within the accounts of Canada,<sup>195</sup> into which are deposited monies obtained from court orders, negotiated settlements and voluntary payments relating to the commission of environmental offences under federal statutes such as the *Canadian Environmental Protection Act, 1999*.<sup>196</sup> Monies can also be directed to the EDF from what are called Environmental Protection Alternative Measures (EPAMs), which stand as an environmental law equivalent to the above-discussed remediation agreements for economic crimes.<sup>197</sup> Payments have also been directed to the EDF in cases where direct damage has been difficult to identify, as with the illegal importation of an ozone-depleting substance, and where

191. See generally “Environmental Damages Fund” (15 November 2018), online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/environmental-damages-fund.html>> [perma.cc/9S5N-6E9J].

192. Harry J Wruck, “The Federal Environmental Damages Fund” (2004) 62:2 *Advocate* 217 at 221. For the legal authority, see the *Financial Administration Act*, RSC 1985, c F-11.

193. *Department of the Environment Act*, RSC 1985, c E-10.

194. See Principle 16 of the *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol I) at Annex I (1992); see also Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (Oxford: Oxford University Press, 2009) at 322-326. The Supreme Court of Canada has confirmed that “the principle has become firmly entrenched in environmental law in Canada”: *Imperial Oil v Quebec (Minister of the Environment)*, 2003 SCC 58 at paras 23-24.

195. Government of Canada, Treasury Board Secretariat, “Directive on Accounting Standards: GC 4100 Specified Purpose Accounts” (1 April 2017), online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32524>> [perma.cc/S5LL-VGUK].

196. *Canadian Environmental Protection Act, 1999*, SC 1999, c 33.

197. See further Government of Canada, Environment Canada, “Environmental Protection: Alternatives to Legal Prosecution” (28 November 2019), online: <<https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/enforcement-compliance/alternatives-legal-prosecution.html>> [perma.cc/AYV7-6A2E].

harm is assumed to flow from an illegality committed in a foreign state, as with the importation of elephant ivory into Canada.<sup>198</sup>

The EDF assists with remediation through the provision of awards in support of projects aimed at environmental rehabilitation and wildlife conservation, with applications made by non-governmental organizations, universities and academic institutions, Indigenous organizations, and provincial, territorial and municipal governments. According to a 2014 evaluation, the EDF had allocated or committed over CAD \$4.8 million since 1998, and funded 201 projects across Canada.<sup>199</sup> To receive funding, a proposed project must focus on one or more of the Fund's designated priority areas, being environmental restoration, environmental quality improvement, research and development, and education and awareness. Projects which focus on the geographic region where the offence occurred are also given priority, with the EDF also obliged to respect any restrictions imposed by the courts concerning the monies. Sub-accounts are established within the EDF to meet any conditions specified by a court and to allocate monies to address particular incidents. The terms of the EDF also spell out what is ineligible for support, and they require that funded projects make use of performance indicators to evaluate outcomes. Projects are selected for funding by department experts through an evaluation process that is similar to that used for the allocation of research grants and scholarships from public funds.

By its terms, the EDF cannot be used to fund projects outside of Canada. This restriction is the choice of the fund's creators, and does not bar the creation of a similar fund to support development assistance projects overseas, using a portion of the financial penalties paid by Canadian companies (and possibly, individuals) for the commission of foreign bribery. Instead of requirements to demonstrate scientific feasibility, the terms of this proposed development assistance fund could require applicants to work with Canada's international development ministry,<sup>200</sup> so as to minimize the risk of monies being injected back into corrupt government schemes, and in partnership with a local community in the foreign country, so as to ensure that the latter has a role in designing

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198. See Wruck, *supra* note 192 at 229.

199. Government of Canada, Environment Canada, Audit and Evaluation Branch, *Evaluation of the Environmental Damages Fund: Final Report* (October 2014) at i, online (pdf): <[https://www.ec.gc.ca/ae-ve/23D3C410-CDE9-46F9-AD2E-055551B883FE/Evaluation%20of%20the%20Environmental%20Damages%20Fund%20\(EDF\).pdf](https://www.ec.gc.ca/ae-ve/23D3C410-CDE9-46F9-AD2E-055551B883FE/Evaluation%20of%20the%20Environmental%20Damages%20Fund%20(EDF).pdf)> [perma.cc/F6VM-SU3Y].

200. With statutory responsibilities for international development, poverty reduction and humanitarian assistance, Canada's Minister for International Development operates within the Department of Foreign Affairs, International Trade and Development (known colloquially as Global Affairs Canada). See *Department of Foreign Affairs, Trade and Development Act*, SC 2013, c 33, s 174 at s 4.

and implementing the remediation project. Indeed, in light of Canada's experience with the EDF, the larger obstacle to overcome may be the need for publicity about this sentencing option, with greater awareness needed among both lawyers and judges so to ensure that some portion of the penalties are diverted to such a fund.<sup>201</sup>

### *Conclusion*

There needs to be greater clarity as to the place for victims within the criminal law scheme for addressing the corruption of foreign public officials, whether the crime is committed by corporations or individuals. Given the crime's inherent transnational nature, there may well be victims in both Canada and overseas, with Canada's justice system having long accepted that corruption is neither harmless nor victimless. Since the mid-1980s, greater attention has also been paid to the impact of crime on victims, leading to the adoption of an international declaration of basic principles in 1985.<sup>202</sup> According to this declaration, victims of crime are entitled "to prompt redress, as provided for by national legislation, for the harm that they have suffered," and "offenders...should, where appropriate, make fair restitution to victims."<sup>203</sup> To give effect to the 1985 declaration, states are encouraged to cooperate with each other in such matters as "the pursuit of offenders" and "the seizure of their assets, to be used for restitution to the victim."<sup>204</sup> The UK's Serious Fraud Office appears to be heeding this call in the corruption context, having developed public statements of principle that recognize the need to use the millions paid in fines to assist overseas victims, even if its initial efforts to put these principles into practice through the provision of ambulances for Kenya may seem so random as to provide little precedential guidance.<sup>205</sup>

There remains, however, the difficult issue of defining a victim in the foreign corruption context, with the SNC-Lavalin affair having repeatedly raised issues of victimhood in public discussions.<sup>206</sup> The victims most often

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201. See further Government of Canada, Environment Canada, Audit and Evaluation Branch, *Evaluation of the Environmental Damages Fund* (July 2009), online: <<https://www.ec.gc.ca/ae-ve/default.asp?lang=En&n=4DBC464A-1>> [perma.cc/BP8V-XHTL]; *Evaluation of the Environmental Damages Fund: Final Report*, *supra* note 199.

202. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GA Res 40/34, UN Doc A/RES/40/34 (1985) at para 1 [*Victims of Crime Declaration*].

203. *Ibid*, Annex at paras 4, 8.

204. *Ibid* at para 4(h).

205. I remain grateful to Professor Cecily Rose of Leiden University for this insight.

206. There has been no mention in the media coverage concerning the SNC-Lavalin plea deal reached in December 2019 as to whether the fine of CAD \$280-million includes some form of payment for victims. SNC-Lavalin had earlier indicated a "willingness to provide further information" concerning the negotiation of reparations to victims: *SNC-Lavalin v Canada* 2019, *supra* note 17 at para 13.

mentioned were the company's employees, pensioners and suppliers, as well as its shareholders and investors. Under the 1985 UN Declaration, victims are defined as "persons who, individually or collectively, have suffered harm," with the Declaration also making clear that "a person may be considered a victim...regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted."<sup>207</sup> However, for victim redress to be secured through compensation or restitution, specificity is needed as to a victim's identity and the quantification of their loss, with a causal link to be established between the victim and the criminal conduct. Given the difficulty in establishing this degree of specificity, another option may be to abandon any definitional effort, and instead provide for victim redress in foreign corruption cases through efforts of a collective nature, aimed at addressing general societal needs, with the flexibility of negotiated agreements, whether plea deals or remediation agreements, offering the best prospects for securing some diversion of the fines to be paid by corporate wrongdoers.

For many, society as a whole, or society as a whole within the foreign state, is seen as the victim in a foreign corruption case, with the development imperative for tackling foreign bribery and corruption having been embraced by the Supreme Court of Canada in the opening words of its judgment in *World Bank Group v Wallace*.<sup>208</sup> Many may also recognize grand corruption's wider connection to the breakdown of the rule of law and the sense of impunity that can contribute to the commission of international crimes, with Libya being a cogent example. For this reason, victim redress in the form of redirecting some of the millions paid in corporate fines to an appropriate charity or an international development agency for the provision of public services in the affected foreign country is the best route forward, with the general principles on compensating the overseas victims of economic crime adopted by the law enforcement authorities in England and Wales offering a model for Canada to consider further.<sup>209</sup> The time is also ripe for a parliamentary review of the CFPOA, with Canada's peer jurisdictions having already engaged in a parliamentary review of their Act's record of success and failings.<sup>210</sup> In addition, Canada's implementation of its obligations under the *OECD Anti-Bribery Convention*, including article 5, is scheduled for a peer review before the

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207. *Victims of Crime Declaration*, *supra* note 202, Annex at paras 1 & 2.

208. *World Bank Group v Wallace*, *supra* note 30 at para 1.

209. See United Kingdom, Crown Prosecution Service, *supra* note 158.

210. Australia, Commonwealth Parliament, Senate, Economics References Committee, *Foreign Bribery* (March 2018) (Chair: Chris Ketter); UK Select Committee on the Bribery Act, *supra* note 15.

OECD Working Group on Bribery in 2020.<sup>211</sup> A review of the CFPOA, as now amended by the remediation agreement scheme, could also consider further the idea of creating a corruption remediation and development assistance fund, akin to Canada's Environmental Damages Fund, for the collection and distribution of a portion of the financial penalties paid in settlement of foreign corruption charges to provide support for worthy projects.

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211. OECD Working Group on Bribery, *Monitoring Schedule: December 2016–June 2024*, (undated), online (pdf): <[www.oecd.org](http://www.oecd.org)> [perma.cc/55RD-QHDH]. Launched at the OECD Anti-Bribery Ministerial Meeting held in Paris on 18 March 2016, the fourth phase of the Convention's peer review monitoring process aims to focus on enforcement efforts and results.