



Canadian Foundation *for*  
Advancement *of* Investor Rights  
Fondation canadienne *pour* l'avancement  
*des* droits *des* investisseurs

**FAIR Canada Statement on SNC**  
**Why Penalize Millions of Canadians?**

Toronto, April 15, 2019 - FAIR Canada supports the use of deferred prosecution agreements to resolve allegations of criminal offences brought against Canadian public companies in order to mitigate the victimization of innocent shareholders. As a general rule, a deferred prosecution agreement is in the best interests of innocent stakeholders including current shareholders, employees, communities in which a company carries on business and Canada as a whole.

The decision by the Director of Public Prosecutions Service of Canada (DPP) not to enter into discussions involving a deferred prosecution agreement with SNC-Lavalin (SNC) cost Canadians approximately \$1 billion. On October 10, 2018 the day SNC announced the DPP decision, SNC shares fell 13.5% from \$51.85 to \$44.86. Canadians own 82% of SNC's outstanding shares. The drop in the value of SNC shares amounts to approximately \$1.234 billion with Canadians owning 82%. So the decision essentially fined Canadian pensioners and other investors \$1 billion.

FAIR Canada is a non-partisan, nonprofit organization advocating for the interests of Canadian retail investors and consumers of financial products and services. Our focus is on the interests of shareholders generally and in the case of SNC it's innocent public shareholders. We are not in anyway commenting on the political aspects of this case that have been making headlines for the last couple of months. From our perspective this is not about special deals for major corporations. It is about (1) what makes the most sense in terms of the innocent stakeholders of SNC, including shareholders, and for Canada and (2) fair and proportionate punishment for foreign bribery and corruption offences and how best to achieve deterrence of future misconduct by SNC and other corporations.

**Background**

SNC was charged in 2015 with criminal offences of bribery of foreign officials and fraud in relation to business dealings in Libya during the period 2001 to 2011. If convicted, in addition to any criminal penalties the company would be barred from bidding on federal projects for 10 years, and current federal projects would be subject to review and possible cancellation. A conviction against the corporation would also hamper their ability to partner and obtain contracts for projects in Canada and around the world. A conviction could result in other significant impacts including further financial losses for shareholders, job loses for employees, sale or takeover of the company or parts thereof, and relocation of its head office away from Canada.

Since the events that led to the criminal charges all of the former employees responsible for the alleged conduct have left the company, SNC has made wholesale changes to executive management and to the board of directors. It has also put in place rigorous compliance policies and procedures to prevent a repetition of the offences.

Millions of Canadians are indirectly invested in SNC through pension plans (such as the Canada Pension Plan Investment Board, Caisse de Depot, OMERS, Teachers, BC Investment Management, Alberta Investment Management) and Canadian equity mutual funds (from RBC, Manulife and many others), and ETFs (Exchange Trade Funds issued by iShares, Vanguard and others), many of which are shareholders of SNC. As well, thousands of Canadians are likely direct shareholders of SNC. So by punishing SNC by proceeding with a criminal trial, Canada is indirectly penalizing millions of Canadians.<sup>1</sup>

The US, UK, and other countries regularly enter into similar deferred prosecution settlements with corporations for similar offences. The US has been using deferred prosecution agreements (called remediation agreements under the Criminal Code of Canada) in corporate corruption cases involving major corporations for decades. In fact, trials under the U.S. Foreign Corrupt Practices Act are virtually non-existent in the US. According to a study recently released by the Organization for Economic Co-operation and Development (OECD)<sup>2</sup> ninety-six per cent of all foreign bribery prosecutions in the US since 1999 have involved non-trial resolutions. Some of the world's biggest corporations outside Canada (Siemens, Walmart, Alcoa, Daimler, Alcatel-Lucent) have negotiated or are negotiating deferred prosecution agreements with government prosecutors. Billions of dollars in fines have been collected and corporate remediation and reorganizations have taken place. Why should Canada be naïve and inflict severe damage on one of Canada's few global companies and punish innocent shareholders who had no involvement in any wrongdoing?

### **DPA Can Be Best Option for Investor Rights**

A deferred prosecution agreement would include a substantial fine and set out an agreed statement of the material facts so that the public is informed of and can understand whether the terms of the agreement are fair and reasonable. The agreement would require SNC to put in place or keep in place compliance measures that would avoid such wrongdoings in the future. Charges could be brought in future if SNC failed to live up to the terms of the agreement. "To the extent that non-trial resolutions save time and free up resources, law enforcement authorities can use fewer resources to resolve more cases" the OECD study states. This leads to faster resolutions of enforcement proceedings resulting in the ability to prosecute more anti-bribery cases with fewer resources. Shorter prosecution times also removes uncertainty from the marketplace for shareholders as opposed to the damage caused by the uncertainty of the result of the prosecution which often takes many years to reach a conclusion.

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<sup>1</sup> <https://www.morningstar.com/stocks/xtse/snc/quote.html>

<sup>2</sup> OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, published March 20, 2019

In addition, by refusing to enter into negotiations of a deferred prosecution agreement with SNC, Canada effectively discourages corporate responsibility and remediation. There is less incentive for a corporation to proactively take remedial action if the government is going to drag the corporation into court regardless.

FAIR Canada does not in any way support the conduct of which SNC is accused. We support the concept of effective, proportionate and dissuasive sanctions. We support ensuring that the sanctions serve as a deterrent to others.

### **Charges Against Individuals**

Since 2012 the RCMP has charged eight people tied to the allegations of foreign bribery. Seven of those have had their cases dismissed due to unreasonable delays by the prosecution, or problems with the evidence. The Swiss authorities secured a guilty plea from Ben Aïssa, a former SNC executive vice-president of construction. He was sentenced to three years in prison. The Sûreté du Québec and provincial prosecutors convicted former SNC CEO Pierre Duhaime and Ben Aïssa with offences related to bribes to win the contract to build the McGill University Health Centre. Duhaime received a sentence of twenty months consisting of six months house arrest plus 14 months of conditions for his release. Aïssa was sentenced to fifty-one months in prison.

### **Law Amended in 2018 to Expressly Permit the Deferred Prosecution Agreement**

The Criminal Code of Canada was amended in 2018 to introduce the deferred prosecution agreement as an alternative non-trial process for the resolution of certain criminal offences. The reason(s) why the DPP has declined to enter into negotiations with SNC of a possible deferred prosecution agreement have not been made public.

### **Debarment is Problematic Penalty**

If we assume for a moment the DPP is successful in prosecuting these charges and the court imposes a guilty verdict, what purpose will be achieved that wouldn't be achieved by allowing the corporation to enter into a deferred prosecution agreement? The only additional penalty to be achieved by a criminal conviction against SNC is debarment, which is not a penalty imposed by a court under the criminal law. Rather, debarment is an administrative penalty introduced into Canadian law in 2015 and is imposed on corporations as the result of convictions for a variety of offences, such as bribery of Canadian or foreign government officials, bid rigging, price fixing, and lobbying offences. It automatically imposes ineligibility, or debarment, from Public Works and Government Services Canada contracts for 10 years (potentially reducible to 5 years by entering into an administrative agreement with the government).

It is a problematic penalty that indiscriminately hurts innocent third parties such as shareholders, rather than being directed at the persons who are responsible for the

wrongdoing. It is automatically imposed by civil servants using policies that do not afford either procedural fairness or transparency.

Unless a deferred prosecution agreement can be entered into, a corporation such as SNC that relies upon government contracts has no choice but to fight a criminal conviction virtually to the very end, no matter what its chances are.

## **Conclusion**

FAIR Canada supports Canada entering into settlement discussions with corporations accused of criminal offences such as SNC utilizing the remedy of deferred prosecution agreement. Such an agreement would be a win-win for Canada, Canadian shareholders, employees and communities. It would ensure the survival of one of the few Canadian international companies with a head office in Canada. From the perspective of investors, proceeding with a criminal case is a lose-lose proposition for SNC, innocent shareholders, employees and communities, and ultimately for Canada.