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

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Statement on SNC Part II: Clarification of FAIR Canada Position

Background

FAIR Canada issued a statement on April 15, 2019 in support of the use of deferred prosecution agreements to resolve allegations of certain criminal offences brought against Canadian public companies in order to mitigate the victimization of innocent third parties including shareholders. We have received feedback on our statement. Much of the feedback was positive but some has been critical and has demonstrated a misunderstanding of our position. We provide the following clarification in an attempt to correct such misunderstanding.

FAIR Canada Does Not Defend the Misconduct of SNC Lavalin

As was stated in our statement, FAIR Canada in no way defends the misconduct of SNC Lavalin (SNC) or its former executives, employees or agents who are alleged to have committed bribery offences under the Corruption of Foreign Public Officials Act. **FAIR Canada expressly calls for individuals and corporations responsible for misconduct to be prosecuted for the offences for which each person/entity is responsible and appropriately sanctioned as provided for under the law.**

The FAIR Canada statement sought to use the SNC case to illustrate how a decision by criminal prosecutors to not enter into a deferred prosecution agreement with a public company charged with criminal offences, such as bribery, causes significant collateral harm to innocent stakeholders including investors who are shareholders of the company.

This point has been taken up by other commentators in the past including in an article authored by Bruce McMeekin "*Canadian law makes it too easy to punish a corporation for the sins of rogue employees*", published in the **Financial Post March 17, 2015**. It seems that in all the furor and political intrigue, a rationale understanding of corporate legal responsibility for misconduct by its employees has been lost. As Mr. McMeekin points out many may not be aware or have forgotten that prior to 2004, our criminal law required that in order to convict a corporation for a criminal offence the prosecution must prove that "the directing mind and will of the corporation with executive authority over that aspect of corporate operations from which the alleged offence emanated was a party to the offence". The law was amended in 2004 such that corporate liability is now triggered by the crimes of one or more "Senior Officers". That phrase is defined to include not only a director, CEO or CFO, but also "a representative who is responsible for managing an "important" part of the organization's activities".

In addition he points out, "Any Canadian corporation working outside of Canada on projects funded by foreign states or international organizations will be considered (by law enforcement and industry itself) lax in the extreme if it has not developed a compliance program that fosters a culture adverse to corruption through the adoption of anti-corruption policies implemented by transparent procedures and executed by well-trained employees and management. Yet, ironically, despite having become "anti-corruption" in both words and deeds, a corporation can still be charged and convicted in Canada of corruption if a senior officer, ignoring the organization's policies and procedures, is a party to the offence with the intention of benefitting, even partially, the corporation. Why? Canadian law attaches very little legal significance to anti-corruption compliance programs."

FAIR Canada agrees that these are important public policy considerations that ought to be understood and remembered by the Canadian public and by public policy decision-makers as it is ordinary Canadians who are the ones who will suffer from a criminal conviction of a public corporation through shareholder losses impacting their investment savings and pensions, and from associated job losses at the affected corporation in their communities that are the inevitable collateral consequences from a criminal conviction of a public corporation

The Public Policy Purposes of Deferred Prosecution Agreements

The intention of our statement was to engage in a public policy discussion of the appropriate use of the provisions of the Criminal Code of Canada that permit deferred prosecution agreements and to contribute to the understanding of the appropriate use of non-trial resolutions of eligible criminal charges against a corporation to avoid unintended harm to innocent third parties such as shareholders.

A reasoned debate concerning the SNC case and the prosecutors decision not to enter into a deferred prosecution agreement has been obscured by issues of alleged political interference with prosecutorial independence. Absent from the discussion has been any recognition for or concern for the harm the prosecutors decision had on the shareholders of SNC. The prosecutor has provided little or no public information to explain the decision. Our statement was an attempt to engage in a reasoned discussion of when a deferred prosecution agreement is or is not an appropriate remedy for charges of bribery against a corporation.

The Criminal Code of Canada was amended in 2018 to introduce the concept of deferred prosecution agreements in order to bring Canada's anti-bribery laws into line with other jurisdictions, such as the U.S., EU and UK. To level the playing field as it were**. Deferred prosecution agreements for corporate entities are considered in the public interest where management of the corporation has taken appropriate corrective action, and agrees to all the same criminal penalties that would be imposed upon a conviction.**

According to an article authored by Terence Corcoran published in the **Financial Post on February 27, 2019**, "*SNC-Lavalin Would Get a Deal Anywhere Else. Why Not Here?*", the current anti-bribery laws in Canada have their antecedents in events that occurred in the U.S. in the 1970s

involving Lockheed Aircraft Corporation, which had engaged in payments to foreign politicians and others to secure sales. At about the same time other U.S. corporations such as Gulf Oil, Northrop Corp. and Exxon Mobil, were accused of similar misconduct, resulting in the U.S. Foreign Corrupt Practices Act being signed into law in 1977. The Organization for Economic Co-operation and Development (OECD) anti-bribery convention of 1997 was the result of efforts by the U.S. to level the playing field for U.S. corporations by imposing similar anti-bribery standards on corporations from the other 36 member countries of the OECD. Canada ratified the OECD convention in 1999 and passed the Corruption of Foreign Public Officials Act that same year. Before then it was not an offence in Canada for a Canadian corporation to bribe foreign officials.

In 2015 Canada introduced automatic debarment as an administrative penalty that is imposed not by the court following a criminal conviction but by Public Works Canada when a corporation is convicted of a bribery offence. It is a measure that has attracted significant criticism.

Automatic debarment imposed administratively is seen as a draconian measure which results in potentially disproportionate harm to innocent third parties such as shareholders and employees of a corporation who had no involvement in or responsibility for the actions of those who engaged in bribery.

The 2018 amendments to the Criminal Code to permit deferred prosecution agreements were intended to address the criticism regarding debarment and to bring Canada's anti-bribery laws into line with similar laws in other OECD countries such as the U.S. and UK, where deferred prosecution agreements have been routinely used in order to avoid automatic debarment of corporations.

Unless a deferred prosecution agreement can be entered into, a corporation such as SNC that relies upon government contracts for a significant portion of its business revenue has no choice but to fight a criminal conviction virtually to the very end at significant cost to it and to the government (and thereby to Canadian taxpayers), no matter what its chances are.

The US, UK, and other countries regularly enter into deferred prosecution settlements with corporations for similar offences. The US has been using deferred prosecution agreements 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 OECD 96% of all foreign bribery prosecutions in the US since 1999 have involved non-trial resolutions.**

It is internationally recognized that there are significant public interest benefits from the use of deferred prosecution agreements. "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 investors.

A DPA Achieves the same Criminal Penalties as a Conviction

Unless the criminal prosecutor is seeking a conviction for the purpose of having Public Works impose automatic debarment, the use of a deferred prosecution agreement ought to be a preferred resolution of criminal charges because it allows for a timely resolution that avoids a lengthy trail and achieves all the same criminal penalties as can be achieved by proceeding to trial and seeking a conviction without the considerable burden and cost of a trial.

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 the corporation 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 the corporation failed to live up to the terms of the agreement.

In addition, by refusing to enter into a deferred prosecution agreement, the prosecutor effectively discourages corporate responsibility and remediation as has been done in the case of SNC. There is less incentive for a corporation to proactively take remedial action if the prosecutor is going to drag the corporation into court and seek a conviction and thereby impose debarment regardless.

Is DPA allowed in cases of bribery?

Some commentators have argued a deferred prosecution agreement is not permitted as a resolution for charges of bribery under the Criminal Code and the OECD anti-bribery convention. Section 715.31(f) of the Criminal Code permits the use of a deferred prosecution agreement rather than seeking a conviction against a corporation "to reduce the negative consequences of the wrongdoing for persons - employees, customers, pensioners and others - who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing." However, some commentators have stated the provisions section 715.32(2) preclude the use of a deferred prosecution agreement in cases of bribery. Section 715.32(2) states if the corporation is alleged to have committed an offence under section 3 or 4 of the Corruption of Foreign Public Officials Act, the prosecutor must not consider the "national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved."

It is said by some commentators that the impact on employees through jobs that might be lost or other negative economic impacts of a conviction of SNC, are "national economic interests" and therefore cannot be taken into consideration. However, there has been little or no discussion of whether such concerns are truly "national economic interests" within the meaning of the law.

Not all economic interests are "national". So what is the proper meaning of this provision and how should it be applied in the case of SNC? The term "national economic interest" is not defined in the Criminal Code. As FAIR Canada pointed out in its statement, in a commentary as published in **the Financial Post March 22, 2019** authored by Donald Johnston, the Secretary General of the OECD at the time of the drafting of the OECD Anti-Bribery Convention of 1997 and a former cabinet minister, with the title "*Was SNC-Lavalin Denied a Deal All Because of Three Simple But Misunderstood Words*", Mr. Johnston explains the term "national economic interest" was imported into the Criminal Code from Article 5 of the OECD Anti-Bribery Convention of 1997. The term "national economic interest" in the OECD Convention was aimed at certain corporations at the time of the drafting of the convention who argued that they ought not be prosecuted for bribery in circumstances where it would harm national export markets and thus the national economy. **The protection of jobs or avoiding shareholder losses are therefore not "national economic interests" as was intended when the OECD drafted the anti-bribery convention and, presumably, as was intended by Parliament when it imported the same terminology into the provisions of the Criminal Code.**

FAIR Canada Supports Effective, Proportionate and Dissuasive Sanctions

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 in accordance with the law. The individuals responsible for the wrongdoing, including any members of management or the board of directors who were complicit in the wrongdoing, ought to be held accountable and prosecuted for offences to the full extent of the law. We support ensuring that the sanctions serve as a deterrent to others. However, as a matter of public interest, we do not support a prosecution of a corporation that achieves no other public interest purpose that could be achieved by a deferred prosecution agreement and has a significant negative impact on innocent shareholders such as shareholders.

About FAIR Canada:

FAIR Canada is an independent national charitable organization. As a voice for Canadian investors and financial consumers, FAIR Canada provides information and education to the public, governments and regulators about investors' and financial consumers rights and protections in Canada's capital markets.

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