T-1843-18

2019 FC 282

SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and **SNC-Lavalin Construction Inc.** (*Applicants*)

v.

The Director of Public Prosecutions (*Respondent*)

INDEXED AS: SNC-LAVALIN GROUP INC. V. CANADA (PUBLIC PROSECUTION SERVICE)

Federal Court, Kane J.—Montréal, February 1; Ottawa, March 8, 2019.

Criminal Justice — Prosecutorial discretion — Motion pursuant to Federal Courts Rules, r. 359 seeking order to strike applicants' application for judicial review without leave to amend — Application involving determination made by respondent (respondent or DPP) in context of respondent's prosecution of applicants on charges pursuant to Criminal Code, Corruption of Foreign Public Officials Act — Decision for which applicants seeking judicial review was DPP's determination not to offer (or invite) applicants to engage in negotiating remediation agreement in accordance with Criminal Code, s. 715.32 — In application, applicants seeking: order declaring that DPP's decision at issue unlawful; order setting decision aside; mandamus directing DPP to issue invitation, to negotiate remediation agreement in good faith — Respondent, moving party herein, arguing in particular that DPP's determination purely exercise of prosecutorial discretion in context of criminal proceeding — Main issue whether application should be struck because not having reasonable prospect of success — Related issues whether, how exercise of prosecutorial discretion subject to judicial review; whether decision at issue exercise of prosecutorial discretion or administrative decision; whether, in context of decision at issue, DPP is "federal board, commission or other tribunal" within meaning of Federal Courts Act, s. 2; whether applicants could seek mandamus on judicial review — Case law clearly establishing broad scope of prosecutorial discretion; that prosecutorial discretion not subject to review by Court; that role of prosecutor quasi-judicial — DPP's decision whether to invite organization to enter into negotiations for remediation agreement clearly exercise of prosecutorial discretion — Nature of decision, case law confirming that decision at issue falling squarely within prosecutor's discretion — Public interest always consideration in exercise of prosecutorial discretion — Given finding that respondent's decision constituting exercise of prosecutorial discretion, only conclusion that could be reached is that DPP in present context not "federal board, commission or other tribunal" within Federal Courts Act, s. 2 definition; that Federal Court not having jurisdiction herein — Prosecutor not exercising powers conferred by DPP Act or Criminal Code but exercising prosecutorial discretion which is derived from common law, Constitution — Not necessary to address question of whether mandamus available as remedy to applicants on judicial review — Prosecutorial discretion not subject to judicial review except for abuse of process — Motion granted

Practice — Pleadings — Motion to Strike — Motion to strike applicants' application for judicial review without leave to amend — Underlying application involving respondent's determination not to offer or invite applicants to engage in negotiating remediation agreement in accordance with

Criminal Code, s. 715.32 — Whether application should proceed because raising novel claims, debatable issues, therefore, should not be found to have no reasonable prospect of success — Test for striking application for judicial review examined — Essential character of application in present case not revealing novel claim — Application having no reasonable prospect of success in context of law, governing case law, when taking realistic view.

This was a motion pursuant to rule 359 of the *Federal Courts Rules* seeking an order to strike the applicants' application for judicial review without leave to amend. [1] The application at issue involved a determination made by the respondent (respondent or DPP) in the context of the respondent's prosecution of the applicants on charges pursuant to the *Criminal Code* and the *Corruption of Foreign Public Officials Act*. The decision for which the applicants were seeking judicial review was the DPP's determination not to offer (or invite) the applicants to engage in negotiating a remediation agreement (a voluntary agreement between a prosecutor and an organization accused of certain economic crimes) in accordance with section 715.32 of the *Criminal Code*. [2] Remediation agreements are governed by Part XXII.1 of the *Criminal Code*. [3]

The applicants were charged in February 2015 with two offences: bribing a foreign public official pursuant to paragraph 3(1)(b) of the *Corruption of Foreign Public Officials Act* and fraud pursuant to subsection 380(1) of the *Criminal Code*. The offences related to conduct occurring between 2001 and 2011. The respondent was prosecuting both charges. [10] Further to the issue of the DPP's decision in October 2018, [21] the applicants, in their application for judicial review, sought an order declaring that the DPP's decision not to issue an invitation to negotiate a remediation agreement was unlawful and setting the decision aside. They also sought an order by way of *mandamus* to direct the DPP to issue an invitation and to negotiate a remediation agreement in good faith. [22]

The respondent, the moving party on this motion, argued, among other things, that the DPP's determination not to invite the applicants to enter into negotiations for a remediation agreement was purely an exercise of prosecutorial discretion in the context of a criminal proceeding; that the law is clear that prosecutorial discretion is not subject to judicial review except where there is an abuse of process; [4] and that the Federal Court did not have the jurisdiction to determine this application because the DPP is not a federal board, commission or tribunal within the meaning of section 2 of the *Federal Courts Act*. [28] The applicants responded that the DPP's decision was an administrative decision based on administrative law principles and was therefore subject to judicial review [5] and argued that the DPP's decision was unlawful because it was unreasonable on several grounds. [24]

The main issue was whether the application should be struck because it had no reasonable prospect of success. The related issues were whether and how the exercise of prosecutorial discretion was subject to judicial review; whether the decision at issue—the DPP's decision to not invite the applicants to enter into negotiations for a remediation agreement—was an exercise of prosecutorial discretion or an administrative decision; whether, in the context of the decision at issue, the DPP is a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act*; whether the applicants could seek *mandamus* on judicial review; and whether the application should proceed because it raised novel claims and debatable issues and therefore should not be found to have no reasonable prospect of success. [39]

Held, the motion should be granted. [8 by implication; 180, Court order last page]

The test for striking an application for judicial review was examined. [p. 21, heading VI] As for prosecutorial discretion, several cases were examined. Case law has clearly established: that prosecutorial discretion is not subject to review by the Court; the broad scope of prosecutorial discretion; and that the role of the prosecutor is quasi-judicial. The prosecutor conducts the

prosecution and all that is included with independence and without political or judicial interference. The Court does not act as a supervising prosecutor given the division of powers and the origins of prosecutorial discretion and because the Court would not be as competent as the prosecutor to consider the various factors involved in the specific decision. [86]

With respect to the characterization of the DPP's decision at issue, [heading VIII, p. 37] the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement was clearly an exercise of prosecutorial discretion. The statutory language of Part XXII.1 of the *Criminal Code*, and in particular section 715.32, read in the context of the Part XXII.1 regime, supported the conclusion that the decision was purely discretionary. The nature of the decision and the case law, which has identified many other decisions as exercises of prosecutorial discretion, confirmed that this decision fell squarely within the prosecutor's discretion. [117] The requirement to consider the public interest and the factors included in subsection 715.32(2) of the *Criminal Code* to guide the consideration of the public interest was not an indication that this was an administrative decision and subject to administrative law principles. The public interest is always a consideration in the exercise of prosecutorial discretion. [138] Therefore, the decision for which the applicants sought judicial review was an exercise of prosecutorial discretion that fell within the prosecutor's role in bringing and continuing the prosecution and all that it entailed. [141]

The definition of "federal board, commission or other tribunal" found in section 2 of the *Federal Courts Act* was examined. [162, 163] Given the Court's finding that the respondent's decision whether to invite an organization to enter into negotiations for a remediation agreement was an exercise of prosecutorial discretion, the only conclusion that could be reached is that—with respect to this decision—the DPP is not a "federal board, commission or other tribunal" within the section 2 definition and that the Federal Court did not have jurisdiction. [164] The prosecutor is not exercising powers conferred by the DPP Act or the *Criminal Code* but is exercising prosecutorial discretion which is derived from the common law and the Constitution. [171] In the present case, Part XXII.1 of the *Criminal Code* "imports and clothes" the Attorney General—i.e. the prosecutor—with powers that are derived from the common law. [172]

It was not necessary to address the question of whether *mandamus* would be available as a remedy for the applicants on judicial review given the finding that the decision whether to invite an organization to enter into negotiations for a remediation agreement is an exercise of prosecutorial discretion. [174]

Concerning the final issue of whether the application should proceed [p. 68 heading], the essential character of the application did not reveal a novel claim. [179] The application had no reasonable prospect of success in the context of the law and the governing case law and when a realistic view was taken. The law is clear that prosecutorial discretion is not subject to judicial review except for abuse of process. The respondent's decision to not invite the applicants to enter into negotiations for a remediation agreement clearly fell within the ambit of prosecutorial discretion. [180]

STATUTES AND REGULATIONS CITED

Budget Implementation Act, 2018, No. 1, S.C. 2018, c. 12.

Code of Civil Procedure, CQLR, c. C-25.01.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A.

Criminal Code, R.S.C., 1985, c. C-46, ss. 380(1), 579, 715.3 to 715.4 , 715-31, 715.32, 715.33,

715.34, 715.36, 715.37, 715.38–715.41, 715.42, 717.

Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, s. 3(1)(b).

Director of Public Prosecutions Act, S.C. 2006, c. 9, ss. 3, 121.

Federal Accountability Act, S.C. 2006, c. 9.

Federal Courts Act, R.S.C., 1985, c. F-7, s. 2 “federal board, commission or other tribunal”.

Federal Courts Rules, SOR/98-106, r. 359.

Interpretation Act, R.S.C., 1985, c. I-21, s. 11.

Parliament of Canada Act, R.S.C., 1985, c. P-1.

Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10.

Young Offenders Act, R.S.C., 1985, c. Y-1, , (rep. by S.C. 2002, c. 1, s. 199).

Youth Criminal Justice Act, S.C. 2002, c. 1.

CASES CITED

APPLIED:

Okimow v. Saskatchewan (Attorney General), 2000 SKQB 311, [2000] S.J. No. 499 (QL), [2001] 1 W.W.R. 662; *Ochapowace First Nation v. Canada (Attorney General)*, 2007 FC 920, [2008] 3 F.C.R. 571; *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137, [2010] F.C.J. No. 221 (QL); *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 (1990), 73 D.L.R. (4th) 289, [1990] F.C.J. No. 712 (QL) (T.D.); *George v. Canada (Attorney General),* 2007 FC 564, *sub nom. Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police),* [2008] 1 F.C.R. 752, [2007] F.C.J. No. 752 (QL); *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 [1993] F.C.J. No. 1098 (QL) (C.A.), affd [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113 (QL).

CONSIDERED:

R. v. Anderson, 2014 SCC 41, [2014] 2 S.C.R. 167; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Canada v. Chiasson,* 2003 FCA 155, 226 D.L.R. (4th) 351, [2003] F.C.J. No. 477 (QL); *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, 13 C.P.C. (7th) 250, [2012] O.J. No. 168 (QL); *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446, [2015] F.C.J. No. 399 (QL); *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (1994), 58 C.P.R. (3d) 209, [1994] F.C.J. No. 1629 (QL) (C.A.); *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176, 140 C.P.R. (4th) 309, [2016] F.C.J. No. 605 (QL); *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, [2011] O.J. No. 3936 (QL); *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. Power*, [1994] 1 S.C.R. 601, [1994] S.C.J. No. 29 (QL); *R. v. Baptiste*, [2000] O.J. No. 528 (QL), 74 C.R.R. (2d) 333

(Sup. Ct.); *R. v. C. (E. J.)*, 2013 ABPC 28, [2013] A.J. No. 247 (QL); *R. v. T. (V.)*, [1992] 1 S.C.R. 749; *R. v. Saikaly*, [1979] O.J. No. 94 (QL), (1979), 48 C.C.C. (2d) 192, 1979 CarswellOnt 1336 (C.A.); *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 W.L.R. 300; *Zhang v. Canada (Attorney General)*, 2006 FC 276, 42 Admin. L.R. (4th) 300, [2006] F.C.J. No. 361 (QL); *Nelles v. Ontario*, [1989] 2 S.C.R. 170, [1989] S.C.J. No. 86 (QL); *R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392; *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 (1990), 73 D.L.R. (4th) 289, [1990] F.C.J. No. 712 (QL) (T.D.); *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911.

REFERRED TO:

R. v. Basi, 2009 BCSC 1685, [2009] B.C.J. No. 2436 (QL); *R. v. DeSousa*, [1992] 2 S.C.R. 944, (1992), 9 O.R. (3d) 544, [1992] S.C.J. No. 77 (QL).

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Sullivan, Ruth. *Sullivan on the Interpretation of Statutes*, 6th ed. (Markham, ON: LexisNexis, 2004).

MOTION seeking an order striking the applicants' application for judicial review without leave to amend of the respondent's determination not to offer or invite the applicants to engage in negotiating a remediation agreement in accordance with section 715.32 of the *Criminal Code* after charges were brought against them. Motion granted.

APPEARANCES

William McNamara, *W. Grant Worden* and *Emma Loignon-Giroux* for applicants.

David Migicovsky and *Andrew J. F. Lenz* for respondent.

SOLICITORS OF RECORD

Torys LLP, Toronto, for applicants.

Perley-Robertson, Hill & McDougall LLP/s.r.l., Ottawa, for respondent.

The following are the reasons for order and order rendered in English by

[1] KANE J.: The respondent brings this motion pursuant to rule 359 of the *Federal Courts Rules*, SOR/98-106, seeking an order to strike the applicants' application for judicial review (application) without leave to amend.

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

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

[4] The respondent, the moving party on this motion, argues, among other things, that the DPP's determination not to invite the applicants to enter into negotiations for a remediation agreement is purely an exercise of prosecutorial discretion in the context of a criminal proceeding. The respondent submits that the law is clear; prosecutorial discretion is not subject to judicial review, except where there is an abuse of process. The respondent adds that the prosecutor's discretion is derived from the common law and not from a federal statute, and as a result, the DPP is not a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (*Federal Courts Act*[section 2]), and this Court does not have jurisdiction to review the DPP's decision in any event. As such, the application has no chance of success and should be struck.

[5] The applicants respond that the DPP's decision is an administrative decision based on administrative law principles and is, therefore, subject to judicial review. On this motion, the applicants argue that the DPP's decision bears the hallmarks of an administrative decision. They submit that the decision differs from other decisions that a

prosecutor may make regarding the conduct of a prosecution, which would be within their prosecutorial discretion, because the decision to invite an organization to enter into negotiations is made while the prosecution continues and requires the prosecutor to consider a series of factors set out in section 715.32, which if satisfied requires the invitation to be made.

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

[7] The issue on this motion is whether the application for judicial review of the DPP's decision not to invite the applicants to enter into negotiations for a remediation agreement should be struck or should proceed. This depends on whether the application has a reasonable prospect of success. In the present circumstances, this requires the Court to first determine whether the DPP's decision is an exercise of prosecutorial discretion, which is not subject to judicial review except where there is an abuse of process, or whether the DPP's decision is an administrative decision and, if so, whether it is subject to judicial review by this Court.

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

The other issues raised in this motion follow from the finding that the decision is one of prosecutorial discretion.

I. The Background

A. *The Applicants and the Charges*

[9] The applicants describe SNC-Lavalin as a global fully integrated professional services and project management company. SNC-Lavalin employs over 50 000 employees around the world, including many in Canada, who provide, among other things, capital investment, consulting, design, engineering, construction management and operations and maintenance services to clients in the oil and gas, mining and metallurgy, infrastructure, clean power, and nuclear energy sectors, as well as engineering design and project management.

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

B. *The Development of the Remediation Agreement Regime*

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

amendments, now contained in Part XXII.1, were proclaimed in force on September 21, 2018.

C. *The Applicants' Provision of Information*

[12] The applicants note that they made overtures to the DPP regarding their interest in and suitability for a remediation agreement based on the proposed legislation as early as April 2018. The applicants provided extensive information to the DPP regarding how they met the relevant criteria. The applicants continued to make submissions to the DPP following the enactment of Part XXII.1, including following receipt of an indication from the DPP on September 4, 2018 that she would not invite the applicants to negotiate a remediation agreement.

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

D. *The Remediation Agreement Regime*

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

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

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

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

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

[19] Section 715.33 addresses the contents of an offer to negotiate and how the information shared is used and protected. Section 715.34 lists the elements of the remediation agreement, including what must be specifically included and what may optionally be included. Section 715.36 requires that the prosecutor take reasonable steps to advise any victim that a remediation agreement may be entered into. Section 715.37 governs the approval by the Court (which means the Court of criminal jurisdiction in which the prosecution is proceeding) of any remediation agreement that has been negotiated and provides factors for the Court to consider in determining whether to approve the agreement. Where the agreement is approved, subsection 715.37(7) provides that the prosecutor must direct the clerk of the court to enter on the record that the proceedings are stayed. Sections 715.38–715.41 address other aspects of a remediation agreement, including variations of an agreement, termination of an agreement and the recommencement of proceedings where an agreement is not complied with. Of note, where the Court orders that the agreement has been complied with, the proceedings are deemed never to have been commenced. Section 715.42 requires the Court to publish a remediation agreement approved by the Court, and certain other orders, including an order to stay the proceedings, unless non-publication is necessary for the proper administration of justice.

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

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

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

(b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;

(c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;

(d) to encourage voluntary disclosure of the wrongdoing;

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

(f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

Conditions for remediation agreement

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

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

(b) the prosecutor is of the opinion that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;

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

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

Factors to consider

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

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

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

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

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

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

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

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

(h) whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and

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

Factors not to consider

(3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

Notice to organization — invitation to negotiate

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

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

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

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

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

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

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

> **(g)** a warning that knowingly making false or misleading statements or knowingly providing false or misleading information during the negotiations may lead to the recommencement of proceedings or prosecution for obstruction of justice;
>
> **(h)** an indication that either party may withdraw from the negotiations by providing written notice to the other party;
>
> **(i)** an indication that reasonable efforts must be made by both parties to identify any victim as soon as practicable; and
>
> **(j)** a deadline to accept the offer to negotiate according to the terms of the notice.
>
> **Admissions not admissible in evidence**
>
> **(2)** No admission, confession or statement accepting responsibility for a given act or omission made by the organization during the negotiations is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts or admission of responsibility referred to in paragraphs 715.34(1)(a) and (b), if the parties reach an agreement and it is approved by the court.

II. The Underlying Application for Judicial Review

A. *The Decision at Issue*

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

B. *The Applicants' Notice of Application*

[22] The applicants seek judicial review of the DPP's October 9, 2018 decision. The applicants seek an order to declare that the DPP's decision not to issue an invitation to negotiate a remediation agreement is unlawful and to set it aside. The applicants also

seek an order by way of *mandamus* to direct the DPP to issue an invitation and to negotiate a remediation agreement in good faith.

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

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

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

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

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

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

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

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

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

IV. The Applicants' Overall Position

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

[32] The applicants point to the Debate in the Senate on the BIA 2018 that noted the benefits of remediation agreements, including reparations to victims, stimulating change

in corporate culture and allowing companies to continue to operate, thereby sparing jobs and protecting investments.

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

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

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

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

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

[38] The applicants argue that the respondent's motion to strike for the convenience of the respondent to avoid defending the application is "shocking". The applicants

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

V. The Issues

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

- Whether and how the exercise of prosecutorial discretion is subject to judicial review;
- Whether the decision at issue—the DPP's decision to not invite the applicants to enter into negotiations for a remediation agreement—is an exercise of prosecutorial discretion or an administrative decision;
- Whether, in the context of the decision at issue, the DPP is a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act*;
- Whether the applicants can seek *mandamus* on judicial review; and

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

VI. The Test for Striking an Application for Judicial Review

A. *The Respondent's Submissions*

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

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

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

[43] The respondent submits that the fact that the DPP did not provide reasons for declining to invite the applicants to enter into negotiations for a remediation agreement does not prevent the Court from striking the notice of application. The exercise of the prosecutor's discretion does not need to be justified and reasons are not required (*R. v. Anderson,* 2014 SCC 41, [2014] 2 S.C.R. 167 (*Anderson*), at paragraphs 54–55).

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

[45] The respondent submits that the applicants' argument—that the application should proceed on a complete record, which they have not yet obtained—overlooks that

the obligation to produce a record is tied to what is relevant to the grounds pleaded in the notice of application. The Court must first gain a realistic appreciation of the grounds pleaded (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 (*JP Morgan*), at paragraph 50).

B. *The Applicants' Submissions*

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

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

[48] The applicants also rely on *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446 (*Paradis Honey*), at paragraph 116, where the Federal Court of Appeal noted that a novel claim should not be struck because it is novel and found that a claim for monetary relief based on public law principles was novel and should be allowed to proceed.

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

C. *The Principles from the Jurisprudence*

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

> The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" (footnote omitted): *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

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

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

[53] In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 [at page 600], [1994] F.C.J. No. 1629 (QL) (C.A.) (*David Bull*), at paragraph 15, the Court of Appeal noted that a finding that the application is bereft of any possibility of success is "very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion."

[54] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (*Imperial Tobacco*), the Supreme Court of Canada addressed the test for striking out a statement of claim. The Supreme Court noted that the power to strike out a claim is a useful housekeeping tool as it weeds out hopeless claims and this promotes litigation

efficiency (at paragraphs 17, 19 and 20). The same principles which govern striking out claims apply to striking out a notice of application, as confirmed in *JPMorgan.*

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

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

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

> The standard of "reasonable prospect of success" is more than just assessing whether there is just a mathematical chance of success. In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the context of the law and the litigation process, and a realistic view must be taken: *Imperial Tobacco*, above at para. 25. [Emphasis added.]

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

> It is important to keep in mind that on a motion to strike on the basis that a proceeding raises no cause of action, it is not for the Prothonotary who hears the motion, nor for the Motions Judge on appeal, nor for this Court on appeal from him, to determine finally the issue of whether a reasonable cause of action is raised. Instead, such a motion to strike

> should be rejected unless it is plain and obvious that the proceeding has no possibility of success. [Emphasis added]

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

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

> A claim for monetary relief in public law is novel. In assessing whether a novel claim can survive a motion to strike, we must remember that the common law is in a continual state of responsible, incremental evolution: *R. v. Salituro*, [1991] 3 S.C.R. 654, at pages 665–670. While our Constitution is a "living tree capable of growth and expansion within its natural limits" (see *Edwards, Henrietta Muir v. Attorney-General of Canada*, [1929] UKPC 86 (BAILII), [1930] A.C. 124), the common law—and particularly public law—is not a petrified forest. A novel claim should not be struck just because it is novel. See *Imperial Tobacco*, above, at paragraph 21, *Hunt*, above, at pages 979–980 and *Operation Dismantle*, above, at pages 486–487. However, as was said in *Salituro*, above, and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108, at paragraph 42, judge-made reform to judge-made law has its limits.

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

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

- A notice of application must be read holistically to determine the essential character of the allegations;
- A motion to strike a notice of application should only be granted where it has no reasonable prospect of success;
- A debatable issue would not constitute an “obvious fatal flaw” regarding the adequacy of the allegations;
- The Court should err on the side of permitting novel but arguable cases to proceed; and
- A “reasonable prospect of success” should be determined in the context of the law and the litigation process and a realistic view should be taken.

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

A. *The Respondent’s Submissions*

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

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

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

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

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

[68] The respondent also notes that in *Nixon*, the Supreme Court of Canada found that it is a fundamental error to assess a decision made in the exercise of prosecutorial discretion on a reasonableness standard, as this places the Court in the role of supervising prosecutor. The Court noted, at paragraph 52, the "constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions".

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

[70] The respondent also points to jurisprudence where the courts have found that analogous decisions to that of the DPP are exercises of prosecutorial discretion. For

example, in *R. v. C. (E.J.)*, 2013 ABPC 28, [2013] A.J. No. 247 (QL) (*R. v. C. (E.J.)*), at paragraphs 10–11, the prosecutor's decision whether to pursue extrajudicial sanctions for a young offender was found to be within prosecutorial discretion. In *Okimow v. Saskatchewan (Attorney General)*, 2000 SKQB 311, [2000] S.J. No. 499 (QL) (*Okimow*), the Court found that the prosecutor's decision whether to pursue alternative measures was within prosecutorial discretion. In *R. v. T. (V.)*, [1992] 1 S.C.R. 749 (*R. v. T. (V.)*), the Supreme Court of Canada found that it was inconsistent with prosecutorial discretion to permit a judge to decide whether the prosecutor should have charged a young offender or pursued alternative measures. In these cases, the Court also noted that it was not the Court's role to supervise the exercise of the prosecutor's discretion.

B. *The Applicants' Submissions*

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

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

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

the rationale and also provides many examples of what is encompassed within prosecutorial discretion.

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

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

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

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

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

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

> The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):
>
> …
>
> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate

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

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

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

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

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

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

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

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

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

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

[83] Similar concerns had been previously noted by the Ontario Court of Appeal in *R. v. Saikaly*, [1979] O.J. No. 94 (QL), at paragraph 17, 1979 CarswellOnt 1336 (C.A.) (*Saikaly*), where the Court stated that "[i]f the Attorney General must give a hearing to anyone who might be affected every time he proposes to exercise the discretion conferred upon him by virtue of his office the administration of criminal justice would come to a standstill." The Court cited *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 W.L.R. 300, at pages 319–320, where the U.K. Court noted the many powers of an Attorney General, including the power to stop any prosecution, without the need to provide reasons; to institute a prosecution; or to direct the DPP to take over the conduct of a prosecution, noting that the powers were not subject to the control and supervision of the courts.

[84] In *Zhang v. Canada (Attorney General)*, 2006 FC 276, [2006] F.C.J. No. 361 (QL) (*Zhang*), this Court considered an application for judicial review of the Attorney General's decision not to consent to a private prosecution. The Court noted at paragraph 9, that the jurisprudence has "consistently and repeatedly stressed that an exercise of prosecutorial discretion is largely beyond the legitimate reach of the court" (emphasis in original). The Court cited, as an example of the established principle, *Nelles v. Ontario*, [1989] 2 S.C.R. 170, [1989] S.C.J. No. 86 (QL), where the Supreme Court of Canada explained [at paragraph 76] that the Attorney General, in exercising the role of prosecutor "enjoys an absolute and total immunity on the basis that he is performing a judicial function."

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

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

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

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

A. *The Respondent's Submissions*

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

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

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

stay of proceedings entered in other circumstances. The respondent notes that a decision to stay a criminal proceeding is clearly an exercise of prosecutorial discretion.

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

[91] The respondent notes that the jurisprudence has provided many examples of analogous decisions made in the course of a prosecution that fall clearly within prosecutorial discretion. The respondent also points to the permissive and discretionary wording of the statutory provisions.

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

[93] Where the prosecutor does not invite an organization to negotiate or having invited the organization to negotiate, fails to reach an agreement, or where an agreement is not approved by the Court, the criminal proceedings continue. In the

present case, the DPP advised the applicants that it would not invite them to negotiate a remediation agreement; therefore, the prosecution continues.

[94] The respondent points to *Anderson*, at paragraph 40, where the Supreme Court of Canada clarified the meaning of prosecutorial discretion and provided examples. In *Anderson*, the Supreme Court of Canada found that the prosecutor's decision whether to give notice to the accused of the intention to seek a higher penalty in an impaired driving prosecution was an exercise of discretion. The Court clarified the expansive scope of prosecutorial discretion and provided several examples, including whether to bring a prosecution, continue a prosecution, accept a plea to a lesser offence, or to enter a stay of proceedings.

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

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

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

[98] In addition, section 715.32 and the related provisions in Part XXII.1 do not provide any mechanism to address a failed negotiation. The respondent notes that if there was an obligation, as the applicants submit, to extend an offer to negotiate a

remediation agreement, there would need to be a mechanism to address how to resolve an unsuccessful negotiation.

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

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

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

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

[103] The respondent also notes that the DPP was created to be at arm's length from the Government. The DPP Act was introduced as part of the *Federal Accountability Act*, S.C. 2006, c. 9 in 2006 for the purpose of highlighting the independence of that function from that of the Attorney General's dual role as Minister of Justice. The respondent points to excerpts from the Parliamentary debates where the Government explained

that the purpose of the DPP Act is to ensure that there is no appearance of political interference with the Attorney General in the role of prosecutor given that the Attorney General has a dual role as Minister of Justice.

B. *The Applicants' Submissions*

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

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

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

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

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

[109] The applicants note the objectives of Parliament for the remediation regime at section 715.31, including to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community, to hold the organization accountable, to impose obligations on the organization to put in place corrective measures and promote a compliance culture, to encourage voluntary disclosure of the wrongdoing, to provide reparations to victims or to the community, and "to reduce the negative consequences of the wrongdoing for persons—employees, customers, pensioners and others—who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing." The applicants emphasize that these objectives, in particular the impact on stakeholders, will not be met unless the prosecutor's decisions are subject to review.

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

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

[112] The applicants dispute that the decision whether to invite an organization to negotiate is like other examples of decisions found to be within prosecutorial discretion, including alternative measures. The applicants argue that the remediation regime differs from the provisions of the *Criminal Code* permitting alternative measures, which do not include specific factors for the prosecutor to consider, for example the interests of stakeholders other than victims.

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

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

[115] The applicants submit that section 715.32 bears the hallmarks of administrative decision making. The applicants note that paragraph 715.32(1)(c) includes the condition that “the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances” (emphasis added). The determination of “public interest” is further guided by a list of factors in subsection 715.32(2). The applicants submit that the decision to invite an organization to negotiate a remediation

agreement does not only affect the accused and the prosecutor, but many others who are not usually considered in a decision to prosecute. The remediation agreement has a specific focus on particular public interests—including that of stakeholders—which sets the decision apart from other decisions a prosecutor may make.

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

C. *The DPP's Decision is an Exercise of Prosecutorial Discretion*

[117] Despite the applicants' submissions regarding how the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement could be characterized as an administrative decision, this decision is clearly an exercise of prosecutorial discretion. The statutory language of Part XXII.1, and in particular section 715.32, read in the context of the Part XXII.1 regime, supports the conclusion that the decision is purely discretionary. The nature of the decision and the jurisprudence which has identified many other decisions, some very similar to the decision at issue, as exercises of prosecutorial discretion confirm that this decision falls squarely within the prosecutor's discretion. The consideration of the public interest and the specific factors to guide the public interest does not transform section 715.32 into an administrative decision.

(1) The Statutory Language

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

“a remediation agreement may include”, and “the prosecutor must take reasonable steps to inform any victim”.

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

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

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

(2) “May” Does Not Mean “Shall”

[122] I do not agree with the applicants’ proposed interpretation of section 715.32 that the term “may” really means “shall” and couples permission or empowerment with a duty to invite an organization to negotiate where the conditions are met. Applying the principles of statutory interpretation and reading section 715.32 holistically and

harmoniously in the context of Part XXII.1 and the *Criminal Code* more generally leads only to the conclusion, as explained above, that “may” means “may”. The statutory language conveys that the decision to invite an organization to negotiate is within the prosecutor’s discretion, albeit guided by several factors.

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

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

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

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

(3) The Scope of Prosecutorial Discretion

[125] The jurisprudence from the Supreme Court of Canada has provided many examples of decisions that fall within the ambit of prosecutorial discretion, all of which support that a prosecutor’s decision to invite an organization to enter into negotiations for a remediation agreement is also an exercise of prosecutorial discretion.

[126] In *Krieger*, *Nixon* and *Anderson*, the Supreme Court noted the following decisions as falling within prosecutorial discretion: whether to bring the prosecution of a

charge, whether to proceed summarily or by indictment, whether to prefer an indictment, whether to enter a stay of proceedings, whether to accept a guilty plea to a lesser charge, whether to repudiate a plea agreement, whether to withdraw from criminal proceedings altogether, whether to take control of a private prosecution, whether to pursue a dangerous offender application, and whether to pursue an appeal. As noted in *Anderson*, at paragraph 44, "[a]ll pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice."

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

[128] The Court stated, at paragraphs 30–31 [pages 767 and 768]:

> In any event, I have come to the conclusion that the argument advanced by the respondent is not at all consonant with recent pronouncements of this Court on the nature of s. 3(1). In *R. v. S. (S.)*, [1990] 2 S.C.R. 254, the accused, a young person, had been charged with possession of stolen goods but before entering a plea brought a motion alleging that the failure of the Ontario government to designate an alternative measures program constituted a violation of his s. 15 rights as guaranteed by the *Charter* . He relied on ss. 3(1)(*d*) and (*f*), arguing that in conjunction with s. 4 , they showed the government to be under a positive duty to initiate such programs. The trial judge accepted this argument as did the Court of Appeal. This Court reversed. Speaking through Dickson C.J., the Court held that no such mandatory duty could be inferred from the language Parliament had chosen in drafting the legislation. At page 274 Dickson C.J. states:
>
> > … the use of the term "should" in s. 3(1)(*d*) does not provide evidence of a mandatory duty. While I agree that s. 3(2) dictates that a liberal interpretation be given to the legislation, in my opinion that does not require the abandonment of the principles of statutory interpretation nor does it preclude resort to the ordinary meaning of words in interpreting a statute. In the context of s. 3(1)(*d*), I find that the word "should" denotes simply a "desire or request" … and not a legal obligation.

> In the circumstances of this case I am of the view that this pronouncement significantly undermines the submission of the respondent since she is arguing, in effect, that pursuant to s. 3(1)(*d*) the prosecutor is under a positive obligation to consider the bringing of no charges where doing so would be consistent with the underlying philosophy of the Act and, if the prosecutor fails to abide by this obligation and brings charges where they are not warranted, the Youth Court has authority to dismiss those charges. As seen from the decision in *R. v. S. (S.)*, no such positive obligation may be gleaned from the wording of s. 3(1)(*d*) and, consequently, none may be imputed to the authorities.

[129] In *R. v. C. (E.J.)*, the Crown refused to approve extrajudicial sanctions for a young offender—i.e., an alternative to prosecution, very similar to the alternative measures provisions in the *Criminal Code*. The Court noted that it is the role of the Crown to decide whether to proceed with a prosecution.

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

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

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

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

> If a judge should attempt to review the actions or conduct of the Attorney-General — barring flagrant impropriety — he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.
>
> For these reasons therefore I decline to order the review requested by the applicant.

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

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

[135] The remediation agreement regime could also be characterized as restorative justice, an approach which recognizes that a prosecution of an accused which may lead

to a conviction will not necessarily ad dress the harm done to society, victims or communities that may be affected, and that broader interests should be considered. Restorative justice approaches have also existed, without any specific provisions in the *Criminal Code*, for over 25 years. The determination by a prosecutor to pursue a restorative justice approach rather than to prosecute involves many considerations. Where pursued and depending on the circumstances, the charges could be stayed or dismissed. Such approaches fall clearly within prosecutorial discretion.

[136] I do not accept the applicants' submission that the remediation agreement regime is a parallel process and, as such, is not in the same category as decisions made regarding a prosecution which have been found to be within prosecutorial discretion. There would not be a remediation agreement regime or the possibility of being invited to enter negotiations for a remediation agreement unless an organization was charged with an offence and a prosecution had been launched. The remediation agreement regime is not a pre-charge type of diversion. The goal of a successful remediation agreement—one that is negotiated, approved and complied with—is a stay of proceedings. The very definition of a "remediation agreement" in Part XXII.1 [subsection 715.3(1)] is "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement" (emphasis added). The prosecutor would not take the first step without considering the possible end result of a stay of the criminal proceedings. The remediation agreement regime exists within the criminal proceedings and offers an approach to permit a stay of those proceedings.

[137] The applicants' submission that the jurisprudence that establishes that prosecutorial discretion is not subject to review should be distinguished because it is premised on unfettered discretion, which is unlike the discretion provided in section 715.32, does not detract from the principles established. As noted above, the courts have continued to find that decisions guided by factors remain within the ambit of prosecutorial discretion given that the overall context is whether and how the prosecution continues. The inclusion of factors in section 715.32 does not fetter the discretion to the extent that it takes away or constrains the prosecutor's authority to

continue or stay a prosecution or to take other decisions within the course of the prosecution. As noted in *Anderson*, at paragraph 44, “[a]ll pertain to the nature and extent of the prosecution.”

(4) The Consideration of the Public Interest

[138] I do not agree that the requirement to consider the public interest and the factors included in subsection 715.32(2) to guide the consideration of the public interest is an indication that this is an administrative decision and subject to administrative law principles. The public interest is always a consideration in the exercise of prosecutorial discretion. As noted by the respondent, although there may be a reasonable prospect of conviction in many contexts, the public interest may dictate that the prosecution not be pursued. The inclusion of the public interest factor in the decision whether to invite an organization to negotiate a remediation agreement elaborates on the considerations that are relevant in the context of a remediation agreement and on those that are not. In particular, subsection 715.32(3) provides that where an organization is alleged to have committed an offence under the *Corruption of Foreign Public Officials Act*, as in this case, the prosecutor is not to consider the national economic interest when forming an opinion that a remediation agreement is in the public interest. The inclusion of the public interest factors does not point to administrative decision-making, but to informed and thoughtful prosecutorial discretion.

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

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

[140] This passage does not assist in characterizing the DPP’s decision as administrative. The reference to the public interest in paragraph 715.32(1)(c) or the factors in subsection 715.32(2) which elaborate on what to consider in the context of

determining whether the prosecutor “is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances” do not convert the decision into an administrative decision. This approach overlooks that the public interest is always a consideration in the exercise of prosecutorial discretion. It is also an oversimplification to suggest that consideration of the public interest in the exercise of discretion converts the decision to an administrative decision. That approach would mean that countless decisions of a prosecutor would be administrative.

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

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

A. *The Respondent’s Submissions*

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

[143] The respondent submits that to fall within the definition in section 2 the person or body—in this case, the DPP—must derive their powers under an Act of Parliament. The respondent submits that the source of the DPP’s power or authority to invite an organization to enter into negotiations for a remediation agreement is not the *Criminal Code*, the DPP Act or any other Act of Parliament. Rather, the source of the DPP’s prosecutorial discretion, as delegated by the Attorney General, is the common law and the Constitution.

[144] The respondent points to *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, [2010] F.C.J. No. 221 (QL) (*Anisman*), which established a two-step test to determine whether a body or person meets the section 2 definition. First, the jurisdiction

or authority exercised must be identified. Second, the source of the jurisdiction must be identified.

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

[146] The respondent submits that the fact that Parliament has passed a statute defining the duties or powers of a body does not mean that the source of the powers is the statute (*Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465, [1990] F.C.J. No. 712 (QL) (T.D.) (*Southam Inc.*), at paragraph 26). In the present case, the *Criminal Code* elaborates on the powers of the prosecutor to exercise prosecutorial discretion, but the discretion is derived from the common law and the Constitution.

[147] The respondent notes that in *George v. Canada (Attorney General)*, 2007 FC 564, *sub nom. Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, [2008] 1 F.C.R. 752, [2007] F.C.J. No. 752 (QL) (*George)*], the Court found that the decision of an RCMP officer to pursue a criminal investigation of the applicant's conduct could not be judicially reviewed because the RCMP officer was engaged in law enforcement and acting pursuant to common law powers, not pursuant to the statute that created the RCMP. The Court stated, at paragraph 44:

> … While I recognize that the powers of peace officers are incorporated into the RCMP Act, nevertheless, it is well established that when peace officers conduct criminal investigations they are acting pursuant to powers which have their foundation in the common law

> independent of any Act of Parliament or Crown prerogative. In other words, the RCMP Act imports and clothes with statutory authority police powers, duties and privileges which remain largely defined by common law: *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Div. Ct.). [Emphasis added.]

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

[149] The respondent also points to *Ochapowace*. The Federal Court found that the decision of the RCMP, in its law enforcement role, not to pursue charges for trespass was not reviewable. The respondent notes that the Court extensively reviewed the jurisprudence regarding prosecutorial discretion and the rationale for why it is immune from judicial review (at paragraphs 40–45). At paragraph 56, the Court held that the decision could not be found to have been made by a federal board because the police officer was exercising powers found in the common law.

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

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

[152] The respondent suggests that if the applicants seek to challenge the DPP's decision to not invite them to negotiate a remediation agreement, they should do so within the context of the criminal proceeding in Quebec. The respondent relies on the principle that criminal proceedings should not be fragmented by interlocutory

proceedings that take on a life of their own (*R. v. Basi*, 2009 BCSC 1685, [2009] B.C.J. No. 2436 (QL); *R. v. DeSousa*, [1992] 2 S.C.R. 944, [1992] S.C.J. No. 77 (QL)).

B. *The Applicants' Submissions*

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

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

[155] The applicants rely on *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911, at paragraph 80, where the Court noted, "[t]o fall within the scope of the definition, a body need only exercise or purport to exercise jurisdiction or powers conferred under an Act of Parliament or under an order made pursuant to a Crown prerogative."

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

[157] The applicants also argue that the decision made by the DPP is derived from the assignment of powers under the DPP Act, paragraph 3(3)(g), which provides that the Director, under and on behalf of the Attorney General, "exercises any other power or

carries out any other duty or function assigned to the Director by the Attorney General that is compatible with the office of Director." The applicants argue that this demonstrates that the DPP's power is not derived from the common law, but from statute, and that the DPP is a federal board and the Federal Court can review the DPP's decision.

[158] The applicants also dispute the respondent's suggestion that the DPP's decision could be challenged in the Court of Quebec, which is the court of criminal jurisdiction. The applicants submit that the Quebec *Code of Civil Procedure* [CQLR, c. C-25.01] governs judicial review and limits review to decisions made by a person under the authority of the Parliament of Quebec.

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

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

[161] The applicants dispute the respondent's submission that the DPP's decision does not have legal consequences for them. The applicants note that their notice of application sets out the benefits of a remediation agreement for the company and its innocent stakeholders—and highlights the grave consequences of a continuing prosecution.

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

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

Definitions

2(1) …

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

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

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

[164] I acknowledge the applicants' submission that *Anisman* does not resolve the issue in dispute regarding the characterization of the DPP's decision. The key issue is whether the DPP is exercising prosecutorial discretion. Given the Court's finding that the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement is an exercise of prosecutorial discretion, the only conclusion that can be reached is that—with respect to this decision—the DPP is not a "federal board, commission or other tribunal" within the section 2 definition and this Court does not have jurisdiction.

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

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

> In Canada, the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*. Although the specific duties conventionally exercised by the Attorney General are not enumerated, s. 135 of that Act provides for the

> extension of the authority and duties of that office as existing prior to Confederation.…
>
> …
>
> This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. In *R. v. Power*, [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:
>
> > It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive ….
> >
> > Donna C. Morgan in "Controlling Prosecutorial Powers—Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 *Crim. L.Q.* 15, at pp. 20-21, probes the origins of prosecutorial powers:
> >
> > > Most [prosecutorial powers] derive … from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.

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

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

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

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

> The only possible source of jurisdiction was section 18.1 of the *Act*, which confers jurisdiction to review decisions made by "a federal board, commission or other tribunal" …,

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

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

[172] The applicants' submission that the powers are not derived from the common law because they are new powers and that the DPP Act governs in assigning certain powers of the Attorney General to the DPP does not change the finding that the decision at issue is an exercise of prosecutorial discretion. The new provisions in Part XXII.1 guide the exercise of the discretion within the criminal proceedings. In *Southam Inc.*, at paragraph 26, the Federal Court of Appeal found that the privileges of the Senate were not conferred by the *Parliament of Canada Act*, R.S.C., 1985, c. P-1, but by the Constitution. The Act elaborated on the powers but is not the source of the powers. Similarly, as noted above in *George,* the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 set out specific powers, but the underlying source of the power at issue was the common law. To borrow wording from *George*, at paragraph 44, in the present case, Part XXII.1 of the *Criminal Code* "imports and clothes" the Attorney General—i.e. the prosecutor—with powers which are derived from the common law.

[173] The applicants' submission that if Parliament intended to exclude the DPP from the section 2 definition, it should have done so in express language misses the distinction between a decision of the DPP that falls within the exercise of prosecutorial discretion and other decisions of the DPP, which, depending on their nature, could be

subject to judicial review (as in *George*). The nature of the power being exercised and the source of the power are determinative.

X. *Mandamus*

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

[175] The Court notes that the availability of *mandamus* would also be determined by the same findings. The test for *mandamus* established in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, [1993] F.C.J. No. 1098 (QL) (C.A.), aff'd [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113 (QL), requires among other elements that there is a public duty to act. As found above, there is no duty imposed on the DPP to invite the applicants to enter negotiations for a remediation agreement. In addition, *mandamus* cannot be used to compel the exercise of discretion in a particular way.

XI. The application for judicial review does not raise novel claims and debatable issues which should be allowed to proceed

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

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

[178] Similarly, the fact that the DPP's decision arises in the context of new legislation does not necessarily mean that the issue raised is novel and should proceed to be determined. The issue is whether the DPP's decision falls within the exercise of prosecutorial discretion. That issue has been squarely addressed and determined. As noted above, many analogous decisions have been found to be within prosecutorial discretion. Other *Criminal Code* provisions (for example alternative measures), former *Young Offenders Act*, R.S.C., 1985, c. Y-1 [rep. by S.C. 2002, c. 1, s. 199] provisions (diversion) and *Youth Criminal Justice Act* provisions (extrajudicial sanctions) have been found to be within prosecutorial discretion. As with the remediation agreement regime, these provisions exist within prosecutorial discretion, which originated long before the statutory amendments. At the heart of the remediation agreement regime is a stay of the criminal proceedings—again, not a novel concept or a new legal principle.

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

essential character of the application does not reveal a novel claim. It is a long established principle that the exercise of prosecutorial discretion is not subject to judicial review, except for abuse of process.

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

ORDER in T-1843-18

THIS COURT ORDERS that

1. The application for judicial review is struck without leave to amend.

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

Appendix A

Criminal Code, RSC 1985, c C-46

PART XXII.1

Remediation Agreements

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

court means a superior court of criminal jurisdiction but does not include a court of appeal.

offence means any offence listed in the schedule to this Part.

organization has the same meaning as in section 2 but does not include a public body, trade union or municipality.

remediation agreement means an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.

victim has the same meaning as in section 2 but, with respect to an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, it includes any person outside Canada.

Acting on victim's behalf

(2) For the purposes of this Part, a third party not referred to in section 2.2 may also act on a victim's behalf when authorized to do so by the court, if the victim requests it or the prosecutor deems it appropriate.

Purpose

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

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

(b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;

(c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;

(d) to encourage voluntary disclosure of the wrongdoing;

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

(f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

Conditions for remediation agreement

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

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

(b) the prosecutor is of the opinion that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;

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

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

Factors to consider

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

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

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

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

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

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

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

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

(h) whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and

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

Factors not to consider

(3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

Notice to organization — invitation to negotiate

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

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

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

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

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

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

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

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

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

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

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

Admissions not admissible in evidence

(2) No admission, confession or statement accepting responsibility for a given act or omission made by the organization during the negotiations is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts or admission of responsibility referred to in paragraphs 715.34(1)(a) and (b), if the parties reach an agreement and it is approved by the court.

Mandatory contents of agreement

715.34 (1) A remediation agreement must include

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

any public statement that contradicts those facts;

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

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

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

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

> **(i)** forfeit it to Her Majesty in right of Canada, to be disposed of in accordance with paragraph 4(1)(b.2) of the *Seized Property Management Act*,
>
> **(ii)** forfeit it to Her Majesty in right of a province, to be disposed of as the Attorney General directs, or
>
> **(iii)** otherwise deal with it, as the prosecutor directs;

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

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

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

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

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

(k) an acknowledgement by the organization that the agreement has been made in good faith and that the information it has provided during the negotiation is

accurate and complete and a commitment that it will continue to provide accurate and complete information while the agreement is in force;

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

(m) a warning that the breach of any term of the agreement may lead to an application by the prosecutor for termination of the agreement and a recommencement of proceedings;

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

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

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

Admissions not admissible in evidence

(2) No admission, confession or statement accepting responsibility for a given act or omission made by the organization as a result of the agreement is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts and admission of responsibility referred to in paragraphs (1)(a) and (b), if the agreement is approved by the court.

Optional content of agreement

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

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

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

(c) an indication of the fact that an independent monitor has been appointed, as selected with the prosecutor's approval, to verify and report to the prosecutor on the organization's compliance with the obligation referred to in paragraph (a), or any other obligation in the agreement identified by the prosecutor, as well as an indication of the organization's obligations with respect to that monitor, including the obligations to cooperate with the monitor and pay the monitor's costs.

Independent monitor — conflict of interest

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

provide an independent verification.

Duty to inform victims

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

Interpretation

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

Reasons

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

Application for court approval

715.37 (1) When the prosecutor and the organization have agreed to the terms of a remediation agreement, the prosecutor must apply to the court in writing for an order approving the agreement.

Coming into force

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

Consideration of victims

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

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

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

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

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

Victim or community impact statement

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

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

under subsection (6);

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

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

Victim surcharge

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

Approval order

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

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

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

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

Stay of proceedings

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

Other proceedings

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

Limitation period

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

Variation order

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

Termination order

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

Recommencement of proceedings

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

Stay of proceedings

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

Order declaring successful completion

715.4 (1) On application by the prosecutor, the court must, by order, declare that the terms of the agreement were met if it is satisfied that the organization has complied with the agreement.

Stay of proceedings

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

Deadline

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

Deeming

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

Publication

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

(a) the remediation agreement approved by the court;

(b) an order made under any of sections 715.37 to 715.41 and the reasons for that order or the reasons for the decision not to make that order; and

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

Decision not to publish

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

Factors to be considered

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

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

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

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

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

(e) the salutary and deleterious effects of making the decision referred to in subsection (2); and

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

Conditions

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

Review of decision

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

Regulations

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

(a) the form of the remediation agreement; and

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

(i) the qualifications for monitors,

(ii) the process to select a monitor,

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

(iv) reporting requirements.

Amendment of schedule

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

Deleting offence

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