HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 133 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Monday, February 25, 2019

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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): With committee members here and witnesses ready, we are going to start in 30 seconds.

[*Translation*]

Please take your seats.

[*English*]

Good afternoon, everyone.

[*Translation*]

Pursuant to Standing Order 108(2), we are continuing our work on remediation agreements, the Shawcross doctrine and the discussions between the Office of the Attorney General and government colleagues.

[*English*]

This hour we have two witnesses on the Shawcross doctrine.

It's a pleasure to welcome Mary Condon. Ms. Condon is the interim dean at Osgoode Hall Law School. Welcome, Ms. Condon.

[*Translation*]

We also have with us Maxime St-Hilaire, associate professor, faculty of law, Université de Sherbrooke.

Welcome, Mr. St-Hilaire.

[*English*]

Colleagues, to recap what I mentioned at the previous meeting, I am going to hold strictly to time allocations more so than I normally do. I would ask everyone to let witnesses complete their answers, but witnesses to be brief so committee members can get in their questions during their allotted time.

I appreciate your both being here.

[*Translation*]

We will start with Ms. Condon.

[*English*]

Ms. Mary Condon (Interim Dean, Osgoode Hall Law School, As an Individual): Good afternoon, committee members. Thank you for the invitation to speak to you today and for your flexibility in allowing me to appear remotely.

My topic today is that of prosecutorial discretion and the Shawcross doctrine, and I would begin by saying that I was lucky enough to study this topic with two world-renowned Canadian experts, Professor John Edwards and Professor Philip Stenning. I will draw on their works in these remarks about the legal principles involved, for about eight to 10 minutes.

Speaking as an academic, I thought it would be important to start with some first principles to put the Shawcross doctrine into perspective.

As members of the committee know, an Attorney General is required to fulfill multiple roles. He or she is required to be a legal adviser to parliament and to the government, but he or she also exercises the prerogative power to prosecute criminal offences, and it is this power that is the focus of attention today.

It is now established by constitutional convention that the Attorney General will make an independent decision to prosecute or not to prosecute. This requires making a two-step determination about, first, the sufficiency of the evidence and, second, whether the prosecution is in the public interest. Because of the necessity to consider the public interest, commentators often say that the prosecutorial decisions made by an Attorney General are at the intersection of law and politics.

Because of this intersection, many jurisdictions have appointed a director of public prosecutions in order to insulate prosecutorial decision-making from the perception that political considerations are uppermost in the mind of the decision-maker. If a DPP is appointed, however, as has been the case in Canada, there are the same expectations that the DPP will exercise her or his prosecutorial power in the public interest.

So how is the Attorney General or DPP supposed to discern what is in the public interest in order to exercise their discretion? As Professor Edwards argues in his book, the task of the Attorney General or DPP is a difficult exercise of weighing a number of competing considerations. It's in this context that the Shawcross doctrine becomes relevant.

As members of the committee already know, this is a guideline that was first promulgated by Lord Shawcross, the Attorney General in the U.K. in the 1950s, and has since been relied upon in Canada. The doctrine says that the Attorney General must acquaint himself or herself with all the relevant facts and with the considerations that affect public policy. In doing so, he or she may consult with colleagues, and in some circumstances, as Shawcross noted, he or she would be foolish not to.

A good example of the need to consult in order to have a full appreciation of the issues is the well-known case in the U.K. from about 10 years ago, the BAE—or British Aerospace—case. Here, the issue was whether considerations of national security required that the Attorney General discontinue a prosecution. It was considered not reasonable to expect that the Attorney General himself would have a full understanding of what national security would require, so he would have to seek that advice in order to inform the decision.

In the case, the Attorney General consulted a wide range of informants, both inside and outside cabinet. The record shows that there were repeated meetings about the issue. The position taken by several of the Attorney General's parliamentary colleagues in the U. K., including the Prime Minister, was that national security did require that the prosecution be discontinued. I would also note in passing here that the Canadian DPP act explicitly says that the DPP is allowed to engage technical experts to provide advice.

● (1535)

However, the Shawcross doctrine is clear that the assistance and advice of colleagues is confined to informing the Attorney General of particular considerations which might affect her or his decision, and it “must not consist in telling him” or her “what the decision ought to be”. The Attorney General should not be put “under pressure” by colleagues and, in particular, should not be put under partisan political pressure.

Professor Edwards, for example, suggests in his book that the Attorney General should refuse to listen to arguments based on “political expediency”, but rather should apply his or her “judicial mind” to the circumstances at issue. This is necessary to maintain the integrity of the office and the integrity of the administration of justice.

Meanwhile, Professor Stenning and others have suggested that, leaving aside the problem of partisan advice, the most challenging issues arise when there are a number of competing legitimate interpretations of the public interest, so that the relative importance of each has to be assessed and balanced. Again, I would note that in the BAE case, other definitions of the public interest beyond national security were identified. Those included national commercial interests and harmonious relations between the U.K. and Saudi Arabia.

While the Attorney General in the BAE case indicated that he had not based his decision on these factors, it remains the case that where several legitimate public interest considerations are available, ultimate responsibility is placed on the Attorney General to interpret the advice given by parliamentary colleagues or others and to make an independent decision about how to assess them.

As I have said, in this process, considerations of the integrity of the administration of justice and the rule of law are repeatedly [*Technical difficulty—Editor*] No specific remedy is laid out in Shawcross's original account of his doctrine as to the consequences [*Technical difficulty—Editor*] if the principles he enumerated are breached.

Here, a key distinction should be made between parliamentary and legal accountability.

With respect to parliamentary accountability, having made an independent decision, the Attorney General can be rendered accountable to Parliament after a matter has been concluded by being asked to account for actions taken or not taken. Parliamentary accountability may also require that an Attorney General resign if he or she no longer has the confidence of cabinet.

Meanwhile, with respect to legal accountability for a prosecutorial decision, if the prosecution is proceeded with, there will ultimately be a judicial determination as to the appropriateness of the Attorney General's decision to prosecute, in terms of whether the charges result in acquittal or conviction.

On the other hand, where a prosecution is discontinued, as it was in the BAE case, for example, that decision was the subject of judicial review, with the House of Lords ultimately concluding that the rationale of national security was an appropriate one for the Attorney General to use to guide his decision. Another avenue of legal accountability that is available is the abuse of process doctrine.

Let me turn for my remaining couple of minutes to deferred prosecution agreements specifically, since the possibility of the DPP entering into one of these agreements was enacted into the Criminal Code in September 2018.

It's important to recognize that the provisions dealing with DPAs identify a long list of factors that the prosecutor is required to consider in order to determine if it's in the public interest to enter into a DPA, in addition to other conditions that must be met. There is also a list of factors identified that the prosecutor may not consider if the offence is alleged to have been committed under the Corruption of Foreign Public Officials Act. These factors are the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved. It appears that these factors were drawn from the OECD's anti-bribery convention, which was also at issue in the BAE decision in the U.K., which I referred to earlier.

● (1540)

To conclude, then, the fact that the Criminal Code amendments about DPAs identify so many appropriate and inappropriate components of the public interest could make it more feasible for the DPP or Attorney General to ascertain what the public interest is in this context, although the ranking among the various considerations is still something that will need to be addressed on a case-by-case fact-specific basis.

Thank you for your attention. I'm happy to answer any questions.

The Chair: Thank you very much, Ms. Condon. It's much appreciated.

[*Translation*]

Mr. St-Hilaire, the floor is yours.

Mr. Maxime St-Hilaire (Associate Professor, Faculty of Law, Université de Sherbrooke, As an Individual): Thank you, Mr. Chair.

I will really try to be brief. Today, I want to focus on and reproduce the essence of the post that I and my colleague Martine Valois from the Université de Montréal published on the blog called Advocates for the Rule of Law. I want to situate the Shawcross theory and the constitutional convention that applies here in a little wider perspective of a general framework. But I also want to analyze it in the light of what we can call global best practices for the independence of the public prosecutor, or, as we call it, the Attorney General.

I will go straight to the point and state my thesis right away; I will argue the case thereafter. I think that matter that has our attention at the moment gives us the opportunity to focus on how well the rule of law is implemented in Canada. I believe we can do better. My principal source for the global best practices in this area is the second report on the independence of the justice system produced by the Venice Commission, with its specific emphasis on the prosecution service.

Let me quickly explain what the Venice Commission is. The commission is made up of independent experts in constitutional law. It is an advisory body to the Council of Europe, which is now governed with an expanded agreement. The Venice Commission is made up of members from 47 countries that are part of the Council of Europe and 14 other countries that are not part of the council, including the United States. Canada has had observer status at the commission for a long time.

The global standards identified by the Venice Commission are not rules of international law. Rather, they are expert opinions on best practices, when it is possible to provide them.

The commission therefore specifically focused on the matter of an independent prosecution service. It notes at the outset that the institution of an independent public prosecutor is unknown in original common law. The institution comes instead from the European tradition of civil law. The commission notes that most common law countries have adopted the European model and have created positions such as director of public prosecutions, for example. Other ways of adopting the global standards include the solution used by the United Kingdom, where the independence of the Attorney General as a prosecutor is preserved by no longer being a member of the cabinet.

So what are the best practices for the independence of public prosecutions? The commission recognizes that it is normal for the executive to have policies for crimes and to have a kind of general influence over the prosecutor. However, the recognized global standards acknowledge that it should not be possible for the executive to give instructions on specific cases or to substitute itself for the prosecutor in deciding whether to prosecute or not. Those are the best practices.

In Canada, federally, the Director of Public Prosecutions Act, 2006, created the position of an independent director of public prosecutions. Subsection 10(1) and section 15 of the act allow the Attorney General to give instructions on specific cases or to substitute him or herself for the director of public prosecutions after publishing a notice in the *Canada Gazette*. The problem arises from the fact that the Attorney General remains a member of the executive. As a result, the act currently in effect in Canada does not meet global standards, in my opinion.

● (1545)

If the Attorney General were not a member of cabinet, as is the case in the United Kingdom, subsection 10(1) and section 15 of the act could be kept. However, since the Attorney General is still part of the executive, it is relatively clear, in my opinion, that it does not comply with the best practices, and that there should be a way to do better.

To my knowledge, the Shawcross theory goes back to 1951. I am not an expert in the doctrine to the extent my colleague is. But the existence of this constitutional convention changes none of the facts in Canada. We have created the position of an independent director of public prosecutions, while the Attorney General remains a member of cabinet, with all the power to become directly involved, even on specific cases, over and above the simple policy for prosecutions.

I would like to remind you that, although my colleague was talking about legal principles in her introduction, it became clear as her presentation proceeded, that we are actually talking about the Shawcross theory. This is a constitutional convention. It is not a legal standard; it is a standard that forms part of our political constitution.

With all its wisdom and finesse, the Shawcross theory, as a constitutional convention, is still limited in its effectiveness. This is because it remains difficult to know whether or not it has been applied or not in given cases, because of the secrecy of executive deliberations. It is a logical consequence of cabinet solidarity and of the solidarity of a government that receives its confidence from a bloc in the House. So the theory is limited in its effectiveness.

Besides, the theory took root in the United Kingdom where they did not have an independent prosecutor system such as the one we have tried to create here in Canada, albeit imperfectly. The theory also goes back to a time when they had not yet decided to align themselves with the European model a little more by excluding the Attorney General, as a prosecutor, from the executive.

In general, Canada should not try to become more conservatively British than the British themselves. We should be able to see how the United Kingdom has embraced the global standards borrowed from the European tradition. Then, two practical solutions present themselves: either exclude the Attorney General from the executive and create a distinct position of Minister of Justice, or, leave the Attorney General as a member of the executive, but repeal subsection 10(1) and section 15 of the Director of Public Prosecutions Act.

That is all I had to say.

Thank you.

● (1550)

The Chair: Thank you very much for your testimony.

We now start the first round of questions.

[*English*]

We'll see afterwards how much time we have for a second round and how to allocate it. The first round will be six minutes to the Conservatives, six to the Liberals, six to the NDP and six to the Liberals.

We'll start with Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Great. Thank you, Mr. Chair.

Thank you, Professor Condon and Professor St-Hilaire. I will direct my question to whichever of you wishes to reply.

I'm looking at Justice Rosenberg's summarization of the Shawcross doctrine, wherein he states the following: “Second, the Attorney General is not obliged to consult with cabinet colleagues but is entitled to do so.” That's pretty clear. The Attorney General can consult with cabinet colleagues, but what about the other way around? What if cabinet colleagues approach the Attorney General? Is that appropriate?

Ms. Mary Condon: As I mentioned in my remarks, I think one distinction we need to make is the one between partisan considerations and non-partisan considerations that might influence a discourse between cabinet colleagues and the Attorney General. As I mentioned, I think the better view is that the Attorney General should not pay attention to or be influenced by considerations that are expressed with respect to the interests of a particular political party and so on. On the other hand, if a member of cabinet has something to say to the Attorney General by way of advice about the definition of the public interest, I think it's for the Attorney General to make his or her own decision as to whether to listen and entertain that advice.

With respect to definitions of the public interest or aspects of the public interest that the Attorney General does not have personal knowledge of, it could be helpful to hear, but the key point is that it's for the Attorney General to make up her or his own mind about any unsolicited advice that is received.

Mr. Michael Cooper: Professor St-Hilaire, do you wish to add anything?

[*Translation*]

Mr. Maxime St-Hilaire: I will just repeat my point of view quickly. The institutional perspective that makes us depend solely on this doctrine is inadequate.

You can see that the standard has a byzantine side. We have an institutional situation in which it becomes very difficult to know the facts in detail. Institutionally, over a longer time and on a broader scale, the Shawcross doctrine is inadequate in determining the independence of the prosecutor's work, given that the Attorney General, as we understand the position in Canada, is likely to intervene directly in specific cases while still being a member of cabinet. It can be improved. Amendments need to be made and we need to stop depending on this constitutional convention alone.

● (1555)

[*English*]

Mr. Michael Cooper: Professor, thank you for that. I take your position on that, but perhaps you could respond to the question specifically. I understand your view that the Shawcross doctrine is insufficient and that there could be a more rigorous standard. For example, however, Andrew Roman, a lawyer from Toronto, states:

> If the Attorney General asks for advice, a Prime Minister can respond. But offering unsolicited “advice” in secret about a particular, ongoing case is an intrusion.

Would you agree with that?

[*Translation*]

Mr. Maxime St-Hilaire: The Shawcross doctrine is not a legal rule. It was expounded in parliamentary debates in 1951. We have no caselaw, no strict interpretation.

The doctrine comes down to the fact that decisions are made by the Attorney General. So any discussion of information would be problematic if instructions were given, if pressure was exercised, or if there was any interference in a decision.

Normally, to my knowledge, any advice must be sought. Currently, however, I believe that no one can categorically and definitively state that the theory absolutely excludes the Attorney General being given information that has not been sought. Mr. Forsece, a colleague of mine from the University of Ottawa, suggested as much in a post.

What I am saying is that there is enormous speculation over a convention that basically comes from a parliamentary debate. There are learned theoretical debates, but no one can make the assumption that we are dealing with a rule that is extremely clear.

The essence of the convention is that discussions must not have prevented the AG from making the decisions himself, and that the AG is responsible for not allowing himself to be influenced. If that is the case, he should resign.

[*English*]

The Chair: Thank you. That time has expired.

Mr. Fraser.

[*Translation*]

Mr. Colin Fraser (West Nova, Lib.): Thank you, Mr. Chair.

Thank you both for joining us today.

[*English*]

The committee heard last week from the current Attorney General, the deputy attorney general and the Clerk of the Privy Council. All three said that discussions between the Prime Minister, the PMO and the Attorney General and office are appropriate when discussing a matter like remediation agreements and particularly as it relates to the issue of SNC-Lavalin.

The Attorney General said that the Attorney General is “not an island. These are not easy decisions that face any Attorney General, and his or her ability to get the answer right on behalf of all Canadians is only improved through discussion and debate with the rest of cabinet....”

The Clerk of the Privy Council, who has served as a non-partisan public servant in Canada for decades, said, “I can tell you with complete assurance that my view of those conversations is that they were within the boundaries of what's lawful and appropriate.”

The deputy attorney general, Madame Drouin, who's also a non-partisan public servant, gave an example from the U.K., the same one Professor Condon alluded to. That's the BAE case. Madame Drouin, in referring to that U.K. case, said, "...the Prime Minister, saying that if the Attorney General continued the investigation and the prosecution, blood could be on the street. Finally, the director decided to stop the investigation and not to lay charges." She stated that the case was the subject of a judicial review. She went on to say, "The House of Lords did say that this very difficult conversation didn't break the rule of law. That, I think, really illustrates how serious the conversation can be."

Madame Drouin was alluding to the public safety considerations.

This question is for both of you. Do you share the assessment that it is appropriate for these kinds of difficult discussions between the Attorney General, the Prime Minister and offices about the potential use of, in this case, a remediation agreement?

Ms. Mary Condon: I would be happy to start off with my reaction, which is really to go back to the sense I expressed in my remarks. If the responsibility on the Attorney General is to exercise this really very significant power in the public interest, there needs to be some ability to determine what the content of that public interest is. I think it would be too much to expect an individual, even a very experienced lawyer in the position of an Attorney General or a DPP, to always know by himself or herself the right answer with respect to the public interest.

To me, it is important that there be sources of information and advice. As I say, they can come from inside cabinet or outside cabinet, if it's needed to obtain specialized advice, but I think in order to make the best decision possible in a world in which it is very hard to immediately know the right answer with respect to competing interpretations, it's necessary for inputs to be provided in some way to the Attorney General or the DPP to help make that decision.

● (1600)

Mr. Colin Fraser: Okay.

Professor St-Hilaire, I'd like to hear you on the appropriateness of those discussions.

[*Translation*]

Mr. Maxime St-Hilaire: As I said earlier, from my point of view, there should be no discussion on specific cases within the executive. There should be none of that.

As to your question about applying the Shawcross doctrine, my colleague will be able to answer that much better than I can. In my opinion, we should no longer be depending on the theory. There should be no discussions with a member of the executive on a specific case in terms of whether to prosecute or not prosecute. That should not be allowed to happen in cabinet. It would be very easy to get to that point by amending the act or changing the structure of cabinet.

As an additional comment, I would still like to point out, as my colleague did earlier, that the provisions that have been included in the Criminal Code allowing this kind of agreement considerably reduce the degree of latitude over not only the criteria, the factors to be considered, but also over those that cannot be considered. Economic factors and the size of the company are also specified, according to the OECD treaty.

[*English*]

Mr. Colin Fraser: Thank you.

Professor Condon, perhaps I could go back to you for a moment.

When the director of public prosecutions proceeds with a matter before the courts in a prosecution, what does it mean in terms of any discussions with the Attorney General by cabinet colleagues and others? Are they still appropriate after that point in time if there are still considerations to be made by the Attorney General?

Ms. Mary Condon: It's hard to answer that question definitively, I think. I guess my best answer would be that, in general terms, once a decision has been made to lay charges, all the rules of criminal procedure then come into play in terms of the requirement to disclose relevant evidence to the other side and so on and so forth. To me, the literature has all focused on that initial decision to prosecute or not to prosecute, or now, since 2018, to enter into a remediation agreement. I think once that decision has been made, then the normal processes of criminal procedure need to take effect.

The Chair: Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thank you.

I'd like to thank both professors for being here. I appreciate it very much.

Professor Condon, you talked about how there were no specific remedies for principles being breached. Then you said, I think helpfully, that there's accountability to Parliament, for the Attorney General can talk about the decision that he or she made, and there are legal accountability mechanisms. You referred to the abuse of process doctrine, among other things.

There's an additional remedy that I'd like to ask you to comment on. It was described by criminal defence lawyer Joseph Neuberger, who said that if there was a genuine attempt by anyone in the Prime Minister's Office to speak with the Attorney General about ending an investigation or criminal prosecution of any type, that could amount to obstruction of justice and/or interference with a public official.

Do you accept that this could be the consequence for inappropriate interference with the exercise of independent prosecutorial discretion?

● (1605)

Ms. Mary Condon: I think that's a very interesting question, but I also think it's a novel question.

Certainly, with respect to the offence of obstruction of justice in the Criminal Code, my understanding is that it is a little bit more restricted than the ability to apply it generally to discussions about starting or stopping a prosecution.

Again, I would defer to my colleague or to others better versed in the detail of other Criminal Code provisions, but my understanding is that typically, those kinds of charges are brought in relation to tampering with evidence or tampering with juror independence and so on. So I—

Mr. Murray Rankin: I agree. That is the most common way in which they arise.

Let me ask you a question. We've had a lot of testimony, some from the deputy attorney general. There were questions about the nature of the Shawcross principle. Is it subjective? Is it objective? Let's assume that the facts are that the former attorney general felt subjectively pressured. Let's look at objective criteria that I'd like to ask you to consider. Let's say a decision was made by the director of public prosecutions of a final nature: “We are not going to proceed after September 4 with a remediation agreement, final decision.” Then there were subsequent meetings on September 17 with the Prime Minister; on December 5 with the former attorney general and his chief of staff; on December 18, two staffers in the Prime Minister's Office with the former attorney general's chief of staff. Then, on December 19, the Clerk of the Privy Council called to discuss this as well.

What criteria can we look at in applying the Shawcross principles? For example, would you agree that in addition to the subjective approach, like the feeling of pressure that, let's assume, occurred on the part of the former attorney genera, would these factors matter to you in determining whether the Shawcross line had been crossed? Who initiated the conversation? Did they raise it repeatedly? Was there a threat, direct or veiled? Did the former attorney general ever indicate that her decision was final? If we're trying to find principles here to know whether the line was crossed, we have the subjective, as I've described, and these are the kinds of criteria I was asking you, do you think would indicate, if they were made out on the facts, to have crossed that line.

Ms. Mary Condon: Again, there does need to be a process of fact-finding in order to determine all of the aspects of what occurred. In the British Aerospace case, in the context of the judicial review of the discontinuance of the prosecution, the witness statement that was provided by the Attorney General in that instance showed repeated meetings with the British ambassador to Saudi Arabia, various cabinet colleagues, the home secretary and so on. Yet, in light of that information, it was still available to the House of Lords to determine that the appropriate principles had been followed with respect to the decision to discontinue the prosecution.

Mr. Murray Rankin: Obviously, it's very fact dependent.

Professor John Whyte, former dean of Queen's University, formerly with the University of Saskatchewan, is one of our most eminent constitutional theorists. He has said that some conversations with the Attorney General in the Canadian system are, of course, legitimate. However he says, “The legitimacy of the conversation pretty much stops once you get past ‘explain to me,’ or ‘I'm going to tell you what I think, but I'm not telling you what to do.’...It's tricky, right, because people try to stay on the right side of their bosses.”

Would you agree with that formulation?

● (1610)

Ms. Mary Condon: I do agree with the formulation. I think it's very consistent with Edwards' formulation of this in his book, *The Attorney-General, Politics and the Public Interest*. Advice is one thing; pressure is something else. I think he is clear in saying that the responsibilities of the Attorney General are so important to the rule of law that pressure is inappropriate in that context.

The Chair: Mr. Fraser.

Mr. Colin Fraser: Thank you, Mr. Chair.

I just want to go through some other comments that have come up in relation to this case and get your reaction to them. I note that each case, obviously, has to be taken on its own merits and that these things are decided on a case-by-case basis with general principles. However, when asked about this matter, former B.C. attorney general Brian Smith, who now works at Gowlings, said:

> I would say it’s quite legitimate for the prime minister to have a discussion with her about using that section, and quite legitimate for that to be a discussion in cabinet, and that’s something that she would take into account when she decided [to use] her discretion or not [to ask or direct that remediation be offered].

The interesting thing about that quote is that Mr. Smith resigned as the British Columbia attorney general in 1988 because he felt that he was improperly pressured by the premier's office on legal matters. He resigned his position due to what he deemed to be undue pressure.

An article in the Lawyer's Daily refers to law professor Andrew Flavelle Martin of the University of British Columbia and states:

> In Martin’s view, it would be appropriate for the attorney general to consult with the PMO on remediation—“for example for the PMO to say: ‘We’re very concerned about the economic impact and the lost jobs that would occur—we think you should do this.’ That would be fine. To direct her to do something, or to pressure her to do something, or for example [to say] ‘Do it or you’re fired’—that would be inappropriate, and very, very serious.”

Mark Freiman of Toronto is a former deputy attorney general of Ontario and ex-chief counsel to the Air India inquiry. According to an article in the Lawyer's Daily:

> Freiman noted, however, that the attorney general is obliged to consider the public interest in deciding whether to go to trial or offer remediation, and in assessing the public interest it is necessary and proper for her to consult and receive input, including from the government.

Again, these individuals, all with legal expertise, are publicly stating that it is appropriate for there to be these types of discussions, all, of course, on a case-by-case basis, and that the appropriateness will depend on each circumstance.

Do you agree with the formulation of those individuals as they've arrived at their conclusions?

Ms. Mary Condon: I think that I agree with them, to the extent that many of those formulations distinguish between the provision of advice, information and considerations of the public interest on the one hand and a sense of pressure on the other.

There is something that I think is interesting, and it is the reason why I mentioned the deferred prosecution agreement factors at the end of my remarks. My colleague from the Université de Sherbrooke made the same point. The way that the provisions with respect to DPAs are worded creates a list of factors that are not appropriate to be considered with respect to offences under the Corruption of Foreign Public Officials Act.

In a sense, there is a bit more direction provided in those provisions of the Criminal Code with respect to what the DPP can or cannot take into account than in a traditional decision to prosecute or not prosecute.

Mr. Colin Fraser: With regard to remediation agreements, items, in this case dealing with SNC-Lavalin, on things short of national economic interest that may also impact on some of the reasons that a deferred prosecution agreement may be desirable in order to not impact on local economies or jobs or those sorts of things, don't you think it would be important for the Attorney General to have the full context and information surrounding those sorts of issues in making any determination on the prosecution?

Ms. Mary Condon: My colleague wants to jump in.

Mr. Maxime St-Hilaire: No, please go ahead. I'll go after.

● (1615)

Ms. Mary Condon: Again, I think that certainly it is appropriate for individuals who are in a position to know what considerations or what the effect of various prosecutorial actions might be to bring those to the attention of the DPP.

All I'm saying is that there is now a different framework in which those considerations need to be assessed, and it's a framework that is set out in some detail in the DPA provisions in the code.

Mr. Colin Fraser: Okay, thank you.

Professor St-Hilaire, you wanted to jump in.

[*Translation*]

Mr. Maxime St-Hilaire: I just want to emphasize that the legislation clearly specifies that national economic interest is not supposed to enter into consideration in the decision on the case before us. The legislation states in black and white that the national economic interest is a factor not to consider. Here, that factor is excluded. It is included in the implementation of an international treaty.

I would also like to answer a question that was raised earlier about subjectivity or objectivity. I am not sure whether this interests you specifically, but the Shawcross doctrine has two dimensions: members of cabinet are required to not influence the Attorney General, but the Attorney General is also required to not be influenced and to make his own decisions.

So drawing a very clear line between subjectivity and objectivity becomes a little difficult. In the final analysis, what counts in the present case is knowing whether the Attorney General made her own decision. As for the weight that providing unsolicited information might have, it becomes very difficult to see anything clearly objective there. The theory remains very subjective.

[*English*]

Mr. Colin Fraser: Thank you.

The Chair: Colleagues, that exhausts the first round. We have 15 minutes left.

There are five questions in the second round. Would everybody be agreeable to doing three minutes each on those five questions?

Some hon. members: Agreed.

The Chair: That's agreed.

We'll go then Liberal, Conservative, Liberal, Conservative, NDP.

Mr. Ehsassi.

Mr. Ali Ehsassi (Willowdale, Lib.): Thank you, Mr. Chair.

Thank you, Dean Condon.

As I understand your testimony, you are suggesting that the definition of public interest is very much contested.

I had the opportunity to go over one of your publications, and it says that there can be competing legitimate interpretations of public interest. This is a publication from 2010.

Would you still agree with that statement?

Ms. Mary Condon: Yes. I know it's an academic's prerogative to change his or her mind, but I still agree that there are a number of different considerations that could be legitimate to take into consideration. That's what makes it so difficult for someone in this role, such as an Attorney General or a DPP, to ultimately have to balance and come up with an action one way or another.

I agree that the public interest is not a singular thing. It has a number of different dimensions. We've seen cases where questions of national security become the dominant interpretation of the public interest, but we have also seen other older cases. There are English cases involving questions of prosecuting strikers, for example, in the context of labour relations strife. Those decisions about whether or not to prosecute in that context have also been seen as upholding a definition of the public interest.

Mr. Ali Ehsassi: Thank you.

Your co-panellist said that our DPP regime is not up to global standards. What is your view, having looked at the details, Dean Condon?

Ms. Mary Condon: I think my colleague was certainly putting a great deal of emphasis on the issue of the Attorney General at the federal level in Canada being a member of cabinet, whereas in the U. K. this is not the case.

That certainly is a puzzle because, as I think both Professor Edwards and Professor Stenning have noted, it's not really clear why, if the arrangement whereby the Attorney General is kept outside of cabinet is the appropriate thing to do in the U.K. itself, that wouldn't have been exported to other countries in the Commonwealth complex. Again, I think it is an issue that could well benefit from some serious consideration. I note that my other colleague, Adam Dodek, dean of the University of Ottawa law school, had a column in one of the newspapers this weekend that in part addressed this issue as well.

As I said in my opening remarks, the reason for having a DPP is to insulate the prosecutorial decision-making from overtly political considerations. That is another way to address the issue of how you render the assessment of the public interest somewhat more non-partisan.

● (1620)

The Chair: Thank you very much.

Ms. Raitt.

Hon. Lisa Raitt (Milton, CPC): Thank you, Dean Condon.

I'm sorry, but I'm going to be asking you questions on this matter, too, based upon your testimony. I really do appreciate what you gave us at the beginning.

This is not necessarily a hypothetical, but I'm trying to lay out the facts as a process. Maybe you can help me understand, based upon what you've said.

A decision to prosecute has been made. The criminal proceedings have a date for a preliminary inquiry six weeks on. The Attorney General has decided that they're not going to intervene and has said so, but the pressure continues on the Attorney General to change their mind. Where I'm going with this is that for me it was interesting for you to talk about the remedies. The Attorney General continues to get submissions, and what you said is that, parliamentarily, either they're accountable to Parliament for the decision they made—and I accept and agree—but then you said resign if she didn't think she had the confidence of cabinet.

If nobody told her that she didn't have the confidence of cabinet, how would she know whether or not to resign from the pressure it was putting on her? At what point does she become obliged to put up her hand as the Attorney General, given that nobody is saying, “You're in danger here, your job...we don't believe you, and you're not doing a great job”? If she still enjoys the cabinet's confidence, how would she know whether or not to resign?

Ms. Mary Condon: I do want to emphasize that the decision to resign is an extremely serious decision and should really only be taken, I think, by an Attorney General as a last resort. I don't think it's something that anybody would suggest be done lightly. I think it would only be done in a context in which the Attorney General really felt that her or his independent judgment about when and how to prosecute was not respected by colleagues.

As I say, I thank you for the opportunity to clarify that it is a really last-resort response, I think, by someone in this role.

Hon. Lisa Raitt: Thank you. I appreciate that.

Mr. Chair, for the record, I wanted to correct something that the honourable member said with respect to the resignation of Mr. Smith in British Columbia. If you read the Hansard and his actual speech, what he indicated is that he resigned from cabinet because the Premier was removing him from cabinet. As the Attorney General, he felt that he needed to resign in order to be able to tell the truth about the fact that the Premier's office was undermining and eroding the independence of the Attorney General. That's the reason for his resignation.

I have no other questions, Dean Condon. Thank you very much for answering the one I had.

The Chair: Thank you very much. You hit exactly three minutes, so congratulations.

Now we'll go to Mr. McKinnon and then to the Conservatives and then to Mr. Rankin.

Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Chair.

Professor Condon, you said that advice is one thing and pressure is another. The testimony of the Clerk of the Privy Council last week was that pressure is the name of the game for ministers—everything they do is subject to pressure—and the AG is no exception. I think what we're talking about is undue pressure or an inappropriate level of pressure. Would you agree?

● (1625)

Ms. Mary Condon: I'm not sure I can speak to this general concept of all cabinet ministers being placed under pressure, but I guess the reason we're all interested in this question about the Attorney General is that the Attorney General has an extremely specific and critical role within the governing principles of our democracy.

The Attorney General is not the only person responsible for maintaining the rule of law, but she or he clearly has a dominant concern for the maintenance, integrity and public confidence in the administration of justice, and in the pursuit of the rule of law. I think that's the reason particular attention is paid to the independence required for that particular role to discharge the responsibility appropriately.

Mr. Ron McKinnon: I certainly don't question that there needs to be independence, but I believe that in cabinet, with pretty much every decision they make there's a lot of pressure. People are trying to influence cabinet ministers all the time. That's one of the things they do. I'm submitting that what we have to consider here is whether an inappropriate level of pressure was applied.

If you can agree with that, what would constitute undue pressure in your view, and who would decide? What recourse would the Attorney General have in the event they felt they were being subjected to undue pressure?

Ms. Mary Condon: I'll address the last aspect of your question first. I think this comes back to the question of parliamentary accountability, in the sense that one remedy for the Attorney General who finds himself or herself in that position is to seek to describe that circumstance in Parliament.

However, in the context in which this is all happening with respect to a decision to prosecute or not to prosecute the challenge is, I think, that most people in the position of Attorney General or DPP would need to wait until a matter had been concluded, so they were not influencing the procedure of the matter going through the criminal justice process before they would speak on those issues.

The Chair: Thank you.

Mr. Rankin.

Mr. Murray Rankin: Professor St-Hilaire, you said two things in the last intervention which I found to be very important.

The first is you said that what counts is if she made her own final decision. Of course she did here. There was a decision on September 4, and then it was clear that the Attorney General was not going to change it. Then you said about the deferred prosecution agreements that it was—I think I'm quoting you—“clear as black and white”, that you could not apply the national economic interest under that statute. It was clear that was not a factor that could be applied in that circumstance.

If the final decision was made by the DPP and the former attorney general, what possibly could be proper in conversation with the then attorney general after that time? Do you agree with Mr. Andrew Roman? He wrote:

> The only reason for either [the Prime Minister or his senior staff] to discuss her... decision would be to encourage her to change it, without being seen to do so. This is damaging to the rule of law.

Do you agree with that?

[*Translation*]

Mr. Maxime St-Hilaire: I actually have a hard time seeing how the theory could apply, if a decision has already been made. If the decision has already been made, I have a hard time seeing how information that is useful to that decision can be obtained. If there are discussions in cabinet on a specific case and the decision has already been made, that is very dubious.

Does that answer your question?

● (1630)

Mr. Murray Rankin: Yes, it does. Thank you.

[*English*]

The Chair: Mr. Cooper.

Mr. Michael Cooper: Picking up on that, Professor St-Hilaire, you said that you would find it difficult to construe how any further information could be useful once the Attorney General had made her decision on the matter. I guess it would also be further problematic if the nature of those discussions related to matters that were expressly precluded, would it not? That could amount to some indication of some level of pressure, really.

[*Translation*]

Mr. Maxime St-Hilaire: It could.

[*English*]

Mr. Michael Cooper: Mr. McKinnon made the comment that people try to influence cabinet colleagues all the time, but clearly not in terms of the Attorney General exercising his or her prosecutorial discretion. Would you agree?

[*Translation*]

Mr. Maxime St-Hilaire: No one is supposed to exert pressure, but they can make useful information available.

I am not sure whether this is a good time to do this now, but I would like to clarify the recourse available for implementing the Shawcross theory. We have talked about responsibility to Parliament, but I would just like to emphasize something. A distinction has to be made between the government's responsibility before the House, which comes as a bloc, and the individual responsibility of ministers. Ministers are individually responsible for the normal operation of their departments.

Now, when a number of ministers hold discussions in cabinet and there are dissensions or disagreements, that is covered by secrecy. In other words, responsibility before the House is of very limited use in terms of knowing whether the Shawcross theory has been properly applied. It is very difficult because individual ministerial responsibility is largely limited to matters involving the daily operation of the department. In my opinion, it would be difficult to apply that to cabinet discussions where disagreements arose. If there are disagreements between members of cabinet, the individual responsibility would not allow those facts to be revealed to the public. In my opinion, the doctrine remains relatively arcane and difficult to put into practice.

[*English*]

Mr. Michael Cooper: Okay, thank you.

The Chair: Colleagues, Mr. Fortin is asking if he can have three minutes.

Is it okay?

[*Translation*]

Some hon. members: Agreed.

The Chair: Mr. Fortin, you have three minutes.

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Thank you, Mr. Chair.

Dean Condon, as I understand it, you said earlier that the Attorney General is supposed to make sure that they have the confidence of cabinet at all times. If that is not the case, the person should resign.

Am I to understand that, if the Attorney General no longer has that confidence, but does not resign, the Prime Minister can legitimately relieve them of their duties? In other words, what is that person open to if they do not resign when they no longer have the confidence of cabinet?

[*English*]

Ms. Mary Condon: I think what I would say about that is that the critically important role that the Attorney General has to administer justice and pay attention to the rule of law is the consideration that needs to be uppermost in the Attorney General's mind.

Again, without specific facts before us, it's hard to imagine a circumstance in which, if the Attorney General's independent decision-making were being somehow undermined and the confidence in her or his independent decision-making were being undermined by his or her colleagues, it would be possible to continue to execute this really difficult role that this individual has to play.

Having said that, as I said earlier, the decision should not be rendered in a context in which there might be an individual disagreement about a particular interpretation of the public interest. I think this does have to be a rather serious demonstration of lack of confidence before the Attorney General would take that very dramatic step.

I think I am not quite addressing the first part of your comment. Perhaps you could repeat it for me, because I think I've wandered somewhat away from it.

● (1635)

[*Translation*]

Mr. Rhéal Fortin: I did not hear the end of the answer. The interpretation cut out beforehand.

The Chair: She asked you to repeat the first part of your comments.

Mr. Rhéal Fortin: Okay.

As I understand your comments, the Attorney General must resign if he or she no longer has the confidence of cabinet.

My first question was whether the person should make sure to have the confidence of cabinet at all times in terms of the decisions they are making.

Second, inasmuch as that person no longer has that confidence, but does not resign, what is that person exposed to? Would a demotion by the Prime Minister be justified under those circumstances?

[*English*]

Ms. Mary Condon: Well, as I say, I think the reason for resignation is the inability to continue to discharge the role of Attorney General specifically.

Again, to reiterate, this is not something that should happen easily but needs to probably occur if there is some significant series of events that occur that make it difficult for the Attorney General to continue to discharge the role.

As to the question of the appropriate characteristics and qualities that are needed to fulfill the role, presumably there are opportunities for cabinet to determine that, in specific factual circumstances, it may be preferable for someone else to fulfill the role. But, again, the risk is, for a group of cabinet ministers as a whole, that they are also subject to public and political accountability for those kinds of determinations.

[*Translation*]

Mr. Rhéal Fortin: Thank you.

[*English*]

The Chair: Thank you very much.

Colleagues, we have exhausted our time on the first panel.

Before moving to the second panel, we have a budget in front of us for these meetings, and I would ask if everybody would be prepared to accept it. It's for $5,900.

Colleagues, is everybody agreed?

Some hon. members: Agreed.

The Chair: Thank you.

We'll just take a brief pause in the meeting and recess briefly to allow the second panel to be set up.

Thank you.

● (1635)

(Pause)

● (1645)

The Chair: Thank you, everyone.

We will now reconvene the meeting with our second panel of the day.

It is a great pleasure to be joined by Ms. Mary Ellen Turpel-Lafond, senior associate counsel, Woodward and Company, and professor at the University of British Columbia in the law school. Welcome, Ms. Turpel-Lafond. Thank you for joining us.

Here in the room, we have with us, Ms. Wendy Berman, who is a lawyer and partner at Cassels Brock and Blackwell LLP; and Mr. Kenneth Jull, lawyer and academic at Gardiner Roberts. Welcome.

As per our practice, we normally go with the person on video conference first in case anything happens to the connection.

Ms. Turpel-Lafond, the floors is yours. You have eight to 10 minutes.

Ms. Mary Ellen Turpel-Lafond (Senior Associate Counsel, Woodward and Company LLP; and Professor, Peter Allard School of Law, University of British Columbia, As an Individual): Thank you, Mr. Chair.

First of all, I did have a chance to listen in to the earlier presentation and to hear both of those presenters and most of the questions. I regret that I'm not there in person today, but I was able to hear it. Of course, they've covered a fair bit of ground in terms of the rule of law and the applicable legal principles that govern these issues.

I have some points of difference that I would like to address and would be happy to answer questions on.

In particular, I think that what we assess as being rational or not rational requires a much more profound understanding of the facts here. In terms of the law, I think we understand that the rule of law requires that all public officials, when they act, must have a lawful authority to point to that is consistent with the rule of law, consistent with our constitutional conventions and principles and consistent with the important independent role that the Attorney General plays.

A slight point of distinction, in my view, with respect to the matter is that there is a fair amount of discussion about the obligation of the Attorney General, when acting as an Attorney General...that they should resign. I did have a chance to listen, and I would have some distinct views on that from what I heard in your prior panel.

Again, we do not know the full facts, and facts are very significant. There are nuances that are very critical here. I think that there could be a rational explanation as to why an Attorney General, acting as the chief prosecutor and chief law officer of Canada, would not resign when their prosecutorial independence was challenged. That's because I think it is a constitutional requirement, consistent with the rule of law in Canada, that prosecutors do not resign, that they stand firm in the face of pressure, if there is pressure—and I appreciate that's not factually fully established—and they stand firmly in the defence of the rule of law.

Prosecutors are very rarely fired for doing their job. However, if an Attorney General was proven to have stood firm in her decision-making as a prosecutor and as a lead prosecutor for Canada, namely as the Attorney General enmeshed and embedded in this very significant and well-articulated rule of law function, I think there would have been a very concerning situation if she had been removed.

With regard to the issue of resignation versus removal, it may very well be that we have a situation where we have a prosecutor that was removed from her role as opposed to an Attorney General who should resign. In fact, prosecutors should not resign. Lead prosecutors, when they've taken a decision, should hold firm in their decision, and that is consistent with the rule of law.

Alternatively, I think it's important that those who may seek to influence or to engage the Attorney General when she's wearing that hat as Attorney General...and I agree with the former panellist that the Shawcross doctrine is a fairly flimsy basis in which to blanket oneself in terms of a public official saying, “I can approach the Attorney General and vigorously attempt to persuade her to another view because I have the Shawcross doctrine.” I think that Shawcross has to be understood more broadly within the Constitution of Canada, the principles of the rule of law, which have been very clearly upheld in the Manitoba language reference, the succession reference, the judge's reference and others.

I think the issue of the Attorney General acting as prosecutor is that they should remain firm. Someone who is seeking to invoke the Shawcross doctrine to say, “I have lawful authority to approach an Attorney General and seek to convince her of another view”, I think has a fairly flimsy foundation in terms of lawful authority. I would be very careful about pointing to that.

All public officials, members of the executive branch and administrative branch of government, must always point to lawful authority for the actions they take. It must be clearly articulated and it must be evident. I think if there are ambiguities of any kind, those ambiguities will always be resolved in favour of these very significant independent and quasi-judical roles, like the independence of the Attorney General of Canada.

● (1650)

Obviously, the independence and the role of the Attorney General are not always subject to scrutiny and review such as we are talking about it today. In the context of actual prosecutions, obviously there's been a fair amount of scrutiny of the role of the public prosecution service and the prosecutors of Canada, whether that be because of charter rights issues, whether that be because of issues where there's impropriety and there may be torts of malicious prosecution. These matters do come to the courts in different ways, but the actual exercise of the discretion to decide to pursue a prosecution is something that is really not looked at unless there is, I think as the late Justice Marc Rosenberg said, “flagrant impropriety”. I think that some of these principles are fairly well-established.

The prosecutorial function has to be exercised independently. We've identified that and we understand that. The decision points in the prosecution role, including the decision to pursue a prosecution, once that commences and we then go into a court process, whether that's a preliminary inquiry stage, whether that's a trial—and again, having been a judge and run many trials, there have been many times when we start a trial, and it ends up with a resolution where I certainly would have counsel before me to say, “Your Honour, we have a joint submission on a resolution of the matter we would like to put to you.” We were well out of the starting gates of the trial, but things changed.

In prosecutions, things do change, but they change within a scope of decision-making that has some very definite parameters. They change because there may be a difference in terms of the likelihood of conviction of one offence. They change to perhaps spare a victim having to testify. They change for a whole variety of reasons. Of course, we do promote resolution of matters without having every case fully tried.

When a prosecutor has decided to test, before a court, the evidence that the investigative branch of government has prepared for them to pursue a prosecution, that decision is a very significant decision point. There is limited lawful authority for anyone to intervene at that decision point and going forward. If, in the instance that you're examining—as I say, we don't know the facts—we're finding there are interventions that are seeking to address that decision point, I think that's a very significant issue that would attract concern for the rule of law in Canada.

Having worked closely with prosecutions and understanding how the prosecution service works, I can say that prosecutors are very well trained. They hold themselves and others to account, and if there's any indication that decisions stray from lawful considerations, they are able to establish boundaries. I'm not sure in this instance if this is a case where there was not the ability to establish boundaries, but perhaps this is an instance where a prosecutor was actually fired for establishing a boundary that was not popularly accepted. I'm not sure of that. I think there is some suspicion and concern about that.

I would also say that to the extent that we have any ambiguity about what the rules that apply are, that ambiguity rests in the issue of what lawful authority public officials or other members of the executive branch of government rely on to justify their actions. I haven't followed the matter very closely, but other than the Shawcross doctrine, which I think is a somewhat flimsy foundation for this, the lawful authority is somewhat shaky in terms of being able to intervene with a prosecutor.

I do think the facts are extremely important. It is not inappropriate for a public official to engage with prosecutors and say, “Should you require additional information, I am standing ready to provide it to you.” That's a fairly fair position. When we get beyond that position, that would be a more passive and respectful approach, and we get into a very vigorous position of saying, “I challenge you to take a different position.” I think we are into very serious issues with the rule of law.

There are a variety of factors at play, and some of them were identified by the previous panellists, but certainly, we would need to understand very clearly how that experience or situation may have unfolded. This is not to suggest, by any means, that an Attorney General is a thin-skinned individual who can't take push back; the issue is the propriety of entreaties that may be made to an Attorney General. The propriety really goes to the zone of, for what purpose?

• (1655)

If the purpose was to persuade the Attorney General as chief prosecutor to take a different position on a prosecution, it triggers a serious rule of law concern. How will we know whether that's serious or not? Well, obviously, you need to hear from those who may have been involved. Maybe this is completely unfounded and we have no reason to be concerned about the rule of law. I certainly would hope that this is the case. However, when I think about the spectrum of entreaties that can be made to an Attorney General, I think there's a range that would be very troubling to me, and there are some that would be deeply troubling to me.

One of the areas that would be most troubling to me would be if public officials and members of the executive went to an Attorney General and said, “I don't like the decision that you have reached and I would like you to get another opinion from someone else.” That would be very troubling. I'm not saying that is the case here, but that's an example, upon reflection, where I think it's somewhat of a repudiation of the decision point role for the Attorney General as lead prosecutor. If the discussion was, as I said earlier, to indicate point of information, “There's material that we may share, should you be interested in receiving it....”

In between those two extremes, one being “We may insist on you getting a different opinion because we don't agree or respect your opinion”—I'm not saying that applied here, but if that did pertain, it's very serious, and the other, “We're standing ready to provide information if you want it,” there's a whole range and degree of entreaties that could have occurred, all of which would engage serious rule of law issues and would need to be carefully examined incident by incident if they happened.

Obviously, in terms of the rule of law—

The Chair: Ms. Turpel-Lafond, I would just give you a cautionary signal. You are at 12 minutes. If you could wrap it up in the next minute or so, that would be amazing.

Ms. Mary Ellen Turpel-Lafond: I will and I apologize.

The final point I wanted to say about the exercise of lawful authority and prosecutorial discretion is that the rule of law is informed by our conventions, our practices, our legislation that governs prosecutions, prosecutor's desk books, and other things that inform our rule of law. What also informs our rule of law is our international conventions and obligations.

If we have international normative standards with guidelines, for instance, with respect to how bribery or corruption offences are prosecuted, in keeping with our role as a global citizen and a participant in a broader legal network, those factors would also be part of the rule of law in Canada. With regard to considerations about being a good adherent to international conventions and treaties—I think there are three international treaties, including the OECD treaty, applying to bribery and corruption—prosecutors would be expected as part of the rule of law to consider those factors, which are important. Where we have multi-state treaties at an international level, they become part of the rule of law of Canada as well.

I will end it there and say that these are nuanced issues. Obviously, I've heard the prior panel, and I affirm much of what they said although I have a somewhat different understanding of it. I would suggest to the committee that those engaging in entreaties to an Attorney General exercising the authority as a chief prosecutor must point to lawful authority that actually backs up their actions. I would say the Shawcross doctrine is a flimsy authority.

• (1700)

The Chair: Thank you very much.

We're now going to Ms. Berman.

Ms. Wendy Berman (Lawyer and Partner, Cassels Brock & Blackwell LLP, As an Individual): Thank you, Mr. Chair.

Thank you, members of the Standing Committee on Justice and Human Rights for inviting me to participate today.

I have come to speak to you about remediation agreements and deferred prosecution agreements as a defence counsel who has been involved in negotiating such agreements.

As you well know, the regime in Canada on the criminal side is recent and so there are not a lot of deferred prosecution agreements in that context, but in the securities regulatory enforcement context and other contexts involving serious allegations of complex corporate misconduct, those prosecutors have a panoply of tools in their tool box to deal with corporate misconduct.

In terms of that, one of those tools is a deferred prosecution agreement. I have been involved for many years in a number of contexts to ensure that the tool was available to prosecutors. It has a negative connotation in some spheres as being a way for corporations to buy out from their responsibility, and that misconstrues the nature of a deferred prosecution agreement and the unique nature of a corporate organization that is facing allegations of corporate misconduct such as bribery and securities law disclosure violations.

The corporate entity that is charged with that offence or is facing an investigation into such allegations is unique and different from individuals charged with those very same allegations of misconduct.

The deferred prosecution agreement, in terms of its nature, does hold the corporate entity to account for the misconduct. It does meet, in my respectful view, all of the objectives that are necessary for a robust criminal justice system. It allows, more importantly, for benefits that aren't available from the rigidity of a binary conviction or no-conviction regime.

In particular, provided that a deferred prosecution agreement regime is robust—and in my respectful opinion the regime implemented by Canada is a robust regime. It's very similar to that adopted in the U.K. and has improvements, I think, that make it different from the regime adopted south of the border in the United States.

For example, corporations availing themselves of a deferred prosecution agreement will admit and will take account and responsibility for their conduct. There will be a statement of facts in any deferred prosecution agreement that outlines the nature of the conduct involved. There will be terms in a deferred prosecution agreement that include remediation terms, both in terms of enhancements to internal compliance regimes and a financial penalty, so reparation for the conduct accused.

In terms of the criminal justice objectives, it meets those in terms of assuming responsibility. It meets those in terms of ensuring the harm is addressed in the marketplace and to those affected by the conduct. It meets that in terms of ensuring deterrence.

The most important part of a deferred prosecution remediation agreement is that it allows for a very timely resolution. Complex issues and complex conduct are involved, so typically, these prosecutions take multiple years before there is any statement to the public or any guidance to the public in terms of what is expected.

The real benefit of a deferred prosecution agreement for the country as a whole and for our markets is that it allows for us to move that needle. It allows for a prosecutor to make a statement regarding what is expected in terms of evolving best practices for corporate governance for compliance regimes in a very timely manner without the delay that we would see in a normal prosecution.

The other very important part is that it avoids the collateral damage. A corporation acts through individuals, and if a corporation is to take steps to address alleged misconduct, to improve its regime and to address the wrongdoing done by individuals through disciplinary actions or through a change in the upper level or the medium level of management to remove those who are responsible for the misconduct and, in that situation, to improve its own internal compliance regime through a remediation agreement, then it meets the objective by moving the needle, as I said before, in terms of enhancing best practices for corporate governance for corporations and setting a standard that all Canadian corporations will have to meet in improving that standard.

● (1705)

The collateral damage from the binary conviction or no-conviction regime is that today's stakeholders pay the price of a conviction. So in certain circumstances, it may be appropriate to explore a deferred prosecution agreement to avoid that collateral damage. The collateral damage will be felt by all who are involved with the corporation. Whether they are employees, pensioners, business partners, suppliers or downstream or upstream business partners to that organization, they will feel that impact if that organization faces a conviction, with the resulting reputational harm, as well as the harm to its business from a conviction that may make it impossible for a corporation to continue to operate.

So, there's a real risk in certain circumstances that a corporation could, for lack of a better expression, wither away and cease to exist, with all of the collateral damage to those who rely on the corporation for economic benefits. In those situations, the prosecutor may, in balancing with what the other panel members discussed—being the public interest—look at those factors in determining that here are some circumstances that make sense for looking at something other than that convict or no-convict regime.

It's important to know that a deferred prosecution agreement is not a non-prosecution agreement, which is another tool available to prosecutors in other jurisdictions. That is a situation where a corporation is not charged and does not take any account for its conduct. Here, in the deferred prosecution agreement, a corporation does. The corporation is charged. The state, through the DPP, enters into a remediation agreement, which allows for a suspension of the prosecution against the corporation, and that suspension is a contingent suspension. The corporation must meet all of the terms of the remediation agreement, which as I outlined earlier, would include a number of terms of certain steps the corporation has to take regarding its own internal organization and internal regime for compliance: the payment of a financial penalty; often the imposition of a monitor, an independent third party to review the steps that the corporation takes; and often an obligation to report to the court or to the prosecutor on its progress in meeting the terms of the remediation agreement.

If the remediation agreement is breached, then in those circumstances, the corporation will be prosecuted. If all of the terms of the agreement are met by the corporation, then the charges are dismissed.

The important objective in the criminal justice system of holding others accountable for their wrongdoing is met in these circumstances and met in a way that avoids the sometimes very draconian result that can occur when a corporation is facing a conviction.

When Canada considered implementing such a regime, it was able to look to other states that had implemented deferred prosecution regimes or similar ones, and it did. Canada now has, with the benefit of a deferred prosecution regime, this effective tool similar to those of many other states globally, including the U.K., the United States, other members of the EU, and Australia, which most recently adopted a deferred prosecution regime.

● (1710)

We have the benefit of looking at the experience—the U.S. has had a deferred prosecution regime in place since the early 1990s, the longest period of time in that list of countries. Its regime is different from Canada's. What we see demonstrated from their regime is that it's used in limited circumstances, and that's where it's meant to be used. Certain conditions have to be met so a corporation will qualify to be considered for a deferred prosecution agreement. For example, in 2018 alone, across the United States there were 24 deferred prosecution agreements and non-prosecution agreements. That is not an astounding number, given the number of active investigations and the number of cases on the go.

The U.K. adopted a deferred prosecution regime in 2013, and there have been only four deferred prosecution agreements. The fear around their use is not realized when we look at other jurisdictions.

In Canada's regime, we have some very important attributes that make it robust, and that includes conditions that the prosecutor must meet to even consider negotiating remediation agreements. One of those, interestingly and importantly, is that the DPP requires the consent of the Attorney General prior to beginning the negotiations. The prosecutor performs a gatekeeping role; the courts perform another very important gatekeeping role, and then finally and most importantly, the regime ensures transparency. We move the deterrence ball forward and we move the needle forward on best practice for corporations, because all DPAs will be made publicly available, unless there are reasons for the court to defer the publication.

I'll move it across to my colleague Mr. Jull who will also speak to deferred prosecution agreements.

The Chair: Thank you very much.

Mr. Jull.

Mr. Kenneth Jull (Lawyer and Academic, Gardiner Roberts LLP, As an Individual): Thank you.

Mr. Chair and members of the standing committee, it's an honour to be invited to attend to speak about remediation agreements.

Since 2014, I along with others have argued that we ought to have deferred prosecution agreements, and I was happy to see that in 2018 the legislation passed. The legislation sets out six purposes or objectives in the statute. I want to go through those.

The first purpose of these agreements is to denounce wrongdoing. The second is to hold organizations accountable. The third is to promote a compliance culture. The fourth purpose, and this is a very important one, is to encourage voluntary disclosure of wrongdoing. This is the idea of a company coming in from the cold and telling prosecutors something that the government hasn't discovered yet. I'm going to come back to that if I have time. The fifth purpose is to provide remedies for harms done to victims. The sixth purpose is to reduce the negative consequences for employees, customers, pensioners and others who did not engage in the wrongdoing.

I want to spend some time on that last objective. A similar test is used in the United Kingdom legislation, which refers to collateral effects on public employees and shareholders, as Ms. Berman has stated. I think we need to talk a little bit about this to understand it. Negative or collateral effects on persons who are not guilty of any wrongdoing are particularly acute if the particular corporation is doing a lot of government work. That is because a conviction in Canada leads to debarment, and with the present regime, it leads to debarment for a 10-year period, subject to reduction to a five-year period. That is a very real collateral effect on employees, pensioners and customers if the company can't tender or do government work for 10 years.

I don't want to, but I may find myself giving a little bit of a lecture on corporate criminal liability. You really have to understand corporate criminal liability as set out in the Criminal Code under section 22.2 to understand the dynamic of a corporation vis-à-vis the individuals.

Let me give you an example. There's only one such litigated case in Canada. It's called R. v. Pétroles Global Inc. In that decision, Justice Tôth said:

> It will no longer be necessary for prosecutors to prove fault in the boardrooms or at the highest levels of a corporation: the fault even of middle managers may suffice.

It means that it is possible that senior managers or even middle managers, acting within the scope of their authority—and that's an important point—may have committed an offence such as bribery, while many of the employees had no idea about that act. Customers and pensioners are a further step removed from the circle of knowledge about that bribery. These are the people, in my submission, who are referred to in the purpose section to reduce the negative consequences of the wrongdoing for persons who were not part of it.

The reduction of negative consequences has economic consequences. An important question, then, is how this objective relates to the prohibition against considering the national economic interest. I want to turn to that. Subsection 715.32(3) of the Criminal Code states:

> 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.

This section is very similar to the U.K. legislation and, as was mentioned earlier, is consistent with the OECD treaty.

● (1715)

When this legislation was passed, I wrote about it in my text. At the time, none of the recent events had occurred, so I went back and I looked at what I said at the time. I want to read to you what I said, and give a comment. What I said at the time about this provision is as follows:

> This clause is designed to avoid political or economic factors interfering with the administration of justice. Conceivably this clause prevents an organization that is a prominent Canadian company from seeking special treatment on the basis that a conviction of the corporation would impact the national economic interest. There is, however, room for such a corporation to argue that it should be considered for a remediation agreement under the purpose section (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.

Members of the committee, you might ask how it is logically possible to consider the reduction of negative economic consequences for employees and pensioners and those not guilty of wrongdoing while at the same time not considering the impact on the national economic interest. It seems like a logical paradox, right?

I'm going to suggest that there is a way out of that logical paradox. It comes back to the concept of the essence of corporate criminal liability. If you have a situation where a crime is committed by senior or even middle-level officials, but there's a whole range of folks who had nothing to do with it, those two provisions work together. You can give a deferred prosecution to save those people from being affected, while at the same time it has absolutely nothing to do with economic interest. It's designed specifically to deal with protecting the people who had nothing to do with the bribery.

Let's take the complete reverse scenario. Suppose you have a company where the corruption extends right down to most of the employees. Suppose you have a company that really can't say they're a lot of innocent folks. If that company goes to the prosecutor and says, “We still need a deferred prosecution agreement, not because we're protecting innocent people but because it's in the national economic interest and you can't let us fail”, that's prohibitive, in my view, and then there are all sorts of permutations and combinations that apply to considering the situation for pensioners and/or customers in that scenario.

Each case, as has been said before by the prior speakers, needs to be evaluated on its facts. There are no simple answers here.

I want to briefly touch on something that Ms. Berman talked about. She has spoken a lot about deferred prosecutions not being what I call “free passes”, and I'm not going to spend much time on it because she's done such a great job on that. I think the one thing I would want to say is that when we talk about these arcane examples, you need a fact pattern to give it substance. Let me give you an example of one that happened recently.

Panasonic, in 2018, received a deferred prosecution agreement in the United States. They had been accused of paying bribes to get their entertainment systems, through a subsidiary, onto Middle East Airline planes. Over a period of time they paid about $7 million and disguised this as consulting fees when they weren't really consulting fees. Not only were they paying bribes, but they were falsifying books and records.

They received a deferred prosecution agreement, but to Ms. Berman's point, listen to the penalties. The disgorgement of the profit.... They made a profit of $126 million. That was disgorged. They had to pay that back. On top of that, they then had to pay a penalty of $135 million, and that was with a 20% discount. Then they had a monitor imposed for a period of two years. That's a good example of how powerful these can be.

There have been a lot of people talking about gatekeepers. I'm not going to comment on that because people have done such a fantastic job, except to reiterate one point, and that is, what people haven't been talking about a lot is the fact that because the Canadian system requires court approval, a judge ultimately has that ultimate approval.

● (1720)

I'm speaking completely hypothetically here. Even if an Attorney General felt pressured and ultimately put something before a court as a remediation agreement, a judge has the right to say he needs to know the factors. The judge in our legislation has to be satisfied that it's fair, that it's appropriate. A judge could say that if you are only considering the national economic interests, that's a prohibitive factor and he's not going to approve this agreement. There is that judicial check. We have to keep that in mind.

I'm starting to run out of time so I'll probably save this for questioning. If anybody's interested in it, I'm happy to talk about the whole concept of coming in from the cold and how it applies. I think this is important in this spectre.

This is complex, and we're neophytes as Canadians. I think we ought to give some serious thought to the passing of guidelines. This legislation gives the cabinet power to pass guidelines for the implementation of remediation agreements. I think we ought to set up a panel of some really smart people, some of whom have come before you. I'm not saying I'd be one of them, but get some really smart people together and study this so guidelines could be passed by way of regulation that would help the Attorney General, the cabinet and the parties understand the differences between some of the factors that may be more partisan and some of them that are more legal.

Thank you.

● (1725)

The Chair: Thank you very much.

We'll now go to one round of questions, and then we'll see where we are after that.

Ms. Raitt, you're up first for six minutes.

Hon. Lisa Raitt: Thank you very much, Mr. Chair.

Professor Turpel-Lafond, thank you very much for your interventions. Thank you for all the work you do as a voice for children and youth in this country. You've done an incredible amount and I appreciate it.

My question for you has to do with something you said on TV recently. If I could quote, it was, “A political official or an administrative official in government that attempts to influence a prosecution...is not only immoral but is illegal”. What did you mean by “illegal”?

Ms. Mary Ellen Turpel-Lafond: First of all, it's very important to look at the context. I think that was a quote, perhaps from the Globe and Mail, when it put a scenario to me.

What I mean is pretty much consistent with what I've said today, which is that all public officials must point to lawful authority to ground their actions. If they're senior administrative officials in government, whether in the Privy Council Office, the Prime Minister's Office, whether it's the Prime Minister or a member of cabinet, all public officials must point to lawful authority. If any public official seeks to influence a prosecution in any form, or bring information to a prosecution, they must point to lawful authority for that.

In my respectful view, the Shawcross doctrine is very flimsy authority in terms of the rule of law in Canada and whether or not it even has the status of a legal convention.... What does have clear legal status is the independent and quasi-judicial role of the Attorney General and the director of public prosecutions, who is an assistant attorney general.

Certainly I'm very reluctant to ever be in a role to play prosecutor because I highly respect the decisions of prosecutors. I do not think prosecutors are unaware of their lawful obligations, but I do worry about people who approach prosecutors and claim to be able to have discussions with them, and claim that there's legal authority. They must point out the explicit legal authority because these are highly sensitive issues, and we have a range of offences in the Criminal Code that speak to integrity. One should be able to point very clearly to your committee what legal authority they are claiming should they be seeking to intervene with an Attorney General who's made a decision on a prosecution.

Hon. Lisa Raitt: Thank you.

You also mentioned today that we need to understand clearly how the facts have unfolded. I take the point very well. I don't think we know the conversations that have happened, what their content was. You did say something else, and I'm sorry to quote you back, but you said, "If there is evidence, if this story proves accurate, then this must be turned over to the RCMP for a full investigation.” I'm trying to get my head around what breach it would be. The public authority does not have...as you pointed out, they're not grounded in what legal authority they may have to intervene with the prosecutor. What is the response to what they have possibly breached within the Criminal Code?

Ms. Mary Ellen Turpel-Lafond: Well, there are issues of integrity and ethics. It's a spectrum. On the Criminal Code issue—and I'm not suggesting there's been a criminal offence—I'm saying that the integrity unit in the RCMP should thoroughly examine the issue, and they may very well be examining the issue. I think they indicated they were aware of the matter. These are issues about positive obligations.

If, for example, the Attorney General acting as the lead prosecutor for Canada in this very important role was actually fired from her job because she didn't make a decision that comported with her colleagues or whomever, and I'm not saying this is the case, but if she did get fired, I do not think the obligation is on her to resign. Arguably, a rational person may say you don't have to resign because you're being a prosecutor, but if there's evidence that a prosecutor was fired and there was an attempt to influence or direct her attention to something that didn't have lawful authority, then it does raise the spectre of obstruction of justice, because obstruction of justice requires a fear or favour element.

I think we have to come back to this key piece, which is, when someone is making entreaties to the Attorney General, is the subtext of those entreaties and is it implied in those entreaties that you will lose your job if you do not listen to me? This is why the rule of law issues become not only engaged, but it could potentially be very serious. I hope it isn't, because it affects public confidence, but because it's so serious, we have to look at it from every angle of integrity, including our normative systems that appear in our Criminal Code and our rule of law principles, which I appreciate you're studying today.

One of the critical rule of law principles, and I'm flipping it back, is saying that, if you seek to influence a prosecution, you had better be able to show lawful authority for your action. If your only basis of your lawful authority is a 1951 political convention that really doesn't even comport with our constitutional order in Canada, then I think we should be looking at that very carefully.

● (1730)

Hon. Lisa Raitt: Is that it?

The Chair: Yes, we're at six minutes.

Thank you so much.

We're now going to Mr. Ehsassi.

Mr. Ali Ehsassi: Thank you, Mr. Chair.

I will turn everyone's attention to deferred prosecution agreements.

Ms. Berman, I understand that you've been practising in this area for many years. We heard from Mr. Jull that he's been an advocate of these agreements since four years ago. My understanding is that there has been a lot of chatter and discussion among leading Canadian experts on the need to have a DPP regime for many years now.

How long do you recall this discussion having been going on for?

Ms. Wendy Berman: I'd say the discussion about deferred prosecution agreements has been going on probably as long as I've been practising, and I'm going to decline to say how long that is.

Some hon. members: Oh, oh!

Ms. Wendy Berman: It's been a discussion for quite some time. Whether it's quasi-criminal, criminal or regulatory responsibility for corporations, it's been a discussion in all three spheres. Certainly it's come in faster in other spheres, and we've seen great result in terms of the objectives that I talked about before, and limited use of it in the appropriate circumstances.

Mr. Ali Ehsassi: Thank you.

It's good to know that it wasn't a surreptitious development that was introduced last year. One of the members of the opposition on this committee said a while back that the government snuck it into the Budget Implementation Act and that there were no consultations held by Justice Canada.

Could you tell me if there was a consultation process in place in the fall of 2017?

Ms. Wendy Berman: Yes, there was. In fact, a number of people participated in that consultation and either put in written submissions or appeared at round table and other discussions.

I put in submissions in terms of the deferred prosecution agreement jointly with another law firm. I don't have the numbers offhand, but I believe they received close to 40 written submissions, and then there were a number of people who came and made oral submissions.

There was, in my view, a very broad consultation process around the implementation of deferred prosecution agreements, but 2017 wasn't the first time that it had been discussed with government officials, bringing in a deferred prosecution regime. It was the first time that I can recall a very formal process to consult stakeholders, defence counsel, prosecution and corporations, broad consultation.

Mr. Ali Ehsassi: According to the government itself, 70 submissions came in. There were 370 Canadians, industry associations, businesses and NGOs that took part in the exercise.

Mr. Jull, do you think that is sufficient consultation? Did you partake in that process?

Mr. Kenneth Jull: There are two parts to that question. As I say, I certainly advocated in my writing and my teaching, and I was part of a round table, but then I happily came here to Ottawa in the fall of 2016 to do an interchange with the Competition Bureau. At that time, I became a Department of Justice lawyer for two years, so I couldn't participate actively in that capacity.

With respect to the number of consultations, it's a hard, subjective question. I think this was important legislation. We can always have more study, of course, but there's an expression some people have, which is “analysis paralysis”. At some point, it's appropriate to move forward. I think this legislation was carefully drafted in that regard.

● (1735)

Mr. Ali Ehsassi: Thank you for that.

It appears pretty straightforward to me that, given developments we heard about in other jurisdictions in the world, the government's attempt to adopt this legislation was really meant to level the playing field. I know, Ms. Berman, in your writing on this, you referred to this development five or six months ago as Canada playing catch-up. Could you elaborate on that for us, please?

Ms. Wendy Berman: As I said, we saw the U.S. being at the forefront for deferred prosecution agreements, non-prosecution agreements and no-contest settlements—a whole panoply of tools that prosecutors can use to resolve corporate misconduct. Canada never had it for pure criminal allegations and investigations against corporations. That's the catch-up.

The U.K. brought it in in 2013. Ours is largely modelled after that regime. What we were missing was.... We were not harmonized with other major economic players globally and it made it very difficult. The reality is that most corporations are global entities. They operate around the world. We weren't able, in many cases, to negotiate a global resolution because of the lack of that tool in the kit that other nation-states had. We certainly were playing catch-up, and we made it.

Mr. Ali Ehsassi: Thank you.

The Chair: Mr. Ehsassi, you have 15 seconds left, if you want to rattle off something quick.

Mr. Ali Ehsassi: The made-in-Canada version was adopted. Do you think it's more robust than the British system, given the use of judicial approval and oversight and of independent monitors?

The Chair: Give us a quick answer, please.

Mr. Kenneth Jull: I think it's very similar to the U.K. system, because both have the judicial supervision model.

By the way, in the United States, there is some discussion by some judges that they want to do that, but ours is pretty close to the U.K. model.

The Chair: Thank you very much.

Mr. Rankin.

Mr. Murray Rankin: I would like to start by welcoming Professor Turpel-Lafond, who I think lives in my home riding of Victoria, so she's particularly welcome here, Mr. Chair.

Hon. Lisa Raitt: What's that got to do with it?

Voices: Oh! Oh!

Mr. Murray Rankin: I want to take you back to some of the things you said in your opening remarks. You talked about the importance of defending the rule of law, and that prosecutors ought not to, in fact, succumb to pressure and resign. You said that we're into serious issues here with respect to the rule of law, particularly as we focus on what you called the propriety of entreaties to the Attorney General.

You also said, in the context of this, that we need to hear from those involved. I presume that would mean you accept that, in these circumstances, to clear the air and to do our job, we should hear from those involved, not just from the former Attorney General.

Ms. Mary Ellen Turpel-Lafond: Yes, of course. In the interest of transparency, this has become almost of the character of a crisis, in terms of the rule of law which requires this committee, or more generally, an inquiry of some kind, to hear fully from the critical individuals. Of course, the Attorney General is a very significant individual who will need to share her experience. Whether she can share that experience in your committee, I don't know.

Mr. Murray Rankin: It's for her to tell us.

Ms. Mary Ellen Turpel-Lafond: I mean, even if she has solicitor-client privilege—

Mr. Murray Rankin: Yes, I understand.

Ms. Mary Ellen Turpel-Lafond: —and even if her privilege is waived, I am concerned—

Mr. Murray Rankin: In the interest of time—it's very limited—I simply wanted to confirm that you said we need to hear from those involved. I'm pleased you agree that it includes more than just her.

Ms. Mary Ellen Turpel-Lafond: Yes, absolutely. You need to hear fully from all involved.

Mr. Murray Rankin: Yes.

I agree as well with the Liberal member of Parliament for Toronto Beaches, Mr. Erskine-Smith, when it comes to the merits of a remediation agreement with this particular company SNC-Lavalin. He said:

> Whether or not an intervention [by the Prime Minister's Office] may have been justified in substance, the real question is the nature of that intervention. Specifically, was undue pressure exerted, contrary to the constitutional convention of Attorney General independence?

That seems to me very similar to the points you are making here with us today.

Ms. Berman, you talked about the deferred prosecution agreements. I appreciate your experience in the field with corporate misconduct. The history of Canada in this area, and I want to see if you agree, is rather limited. Canada was criticized by the OECD in 2011 for its lack of investigators and weak penalties in the rare event of a conviction. Last year Transparency International, in its annual report entitled “Exporting Corruption”, talked about the fact that not only is Canada characterized by, quote, “limited enforcement”, it found that it was also one of four countries that had, quote, “regressed” in terms of the application of the Corruption of Foreign Public Officials Act.

It's rather grim. One hopes, therefore, that we continue with prosecutions. That might have been what led an independent director of public prosecutions to not waver, to not decide to enter into a DPP, and for the Attorney General to sustain that. After that, of course, the evidence would appear to show a considerable intervention by other cabinet ministers, PMO officials and the like to get her to change her mind.

Talk to us a little bit, if you would, please, about the importance of going after people under the Corruption of Foreign Public Officials Act and Canada's record in that regard.

● (1740)

Ms. Wendy Berman: In terms of Canada's record, we've not dedicated the same resources, even on a per capita basis, that the U. S. has dedicated to investigations of foreign corruption. In terms of prosecuting and enforcing the law on foreign corruption, that involves investigations and prosecutions and taking matters to trial. It's the entire range. So entering into a deferred prosecution agreement with a company that has been charged would not indicate lax enforcement by Canada, in my view. What indicates lax enforcement is probably more the number of investigations and the length of time. That's because foreign corruption is very complex to investigate and very resource-intensive. You have to go to multiple jurisdictions and review millions of documents to piece together a corruption case.

As a result, one of those tools, such as a deferred prosecution agreement, would likely assist Canada in upping its game regarding enforcement of foreign corruption, because it would promote corporations to come in and self-report. It even can be a condition of a deferred prosecution agreement that they self-report and that they identify and provide information about the nature of the conduct and identify the individuals who engaged in the conduct. That would allow Canada to prosecute the individuals in a much more streamlined fashion with the collaboration from a corporation that has replaced its C-suite and replaced its board of directors with new individuals who are taking the corporation in a direction of enhanced compliance.

Mr. Murray Rankin: Thank you.

The Chair: Mr. Rankin, you have about 10 seconds left if you want to fire a quick one off.

Mr. Murray Rankin: I'm wondering if either of you has had any experience doing business with the federal government, which has a 10-year rule if someone has been convicted of an offence under this. Last year there were consultations on maybe changing the 10 years to something a little bit less. Have either of you had any experience with those consultations to relax the 10-year ban?

Mr. Kenneth Jull: Again, because of my role at the government, I wasn't formally part of the consultations, but I've written about it. It's a very interesting new development, because it's creating a matrix. A matrix is very critical to corporate compliance. You look at the seriousness of the conduct on the one hand. On the other hand, you look at the remedial effects and the attempts by the corporation to put in a compliance culture. You balance those two. The proposals for the new debarment regime are saying, in effect, that it could be up to 10 years but lower. It's using more of a matrix analysis to balance those two.

Could I just take one minute to follow up on an earlier question, if that's permitted?

The Chair: Mr. Boissonnault's time is going to start, so I think I have to turn to Mr. Boissonnault.

● (1745)

Mr. Kenneth Jull: Okay.

The Chair: If you manage to work it into an answer to Mr. Boissonnault, you're more than welcome to do so.

Mr. Kenneth Jull: All right. Thank you, Mr. Chair.

The Chair: Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thanks, Mr. Chair.

Thank you to all the witnesses for joining us today. Each of your testimonies has been very instructive.

I come at this with a different perspective from yours. I chose a different path. I didn't go down the law school path, and I come to this committee through other means. In looking at these matters from a non-legal perspective, it strikes me that remediation agreements raise an issue for which there is public sympathy. If I can look at one of the things you said, Mr. Jull, it's regarding the purposes of a remediation agreement. It's to reduce harm that a criminal conviction of an organization could have for employees, shareholders and other third parties. In layman's terms, it's so innocent people don't pay the price for the misdeeds or wrongdoing or malfeasance of a few.

If we remember the reaction of Canadians to Sears pensioners who were last in line for their pensions, if we listen to the very real concerns of GM workers in Oshawa, workers shouldn't have to pay for the decisions or illegal activities of a few corporate executives or even, in your language, middle management.

I would feel the same way if this were an oil and gas company, a mining or construction company from the west whose workers could be vulnerable if they found themselves in the same situation as the workers, suppliers and pensioners of SNC-Lavalin. There has been some observation on this part of the act. It states that, when considering a remediation agreement and, Mr. Jull, you also referred to this:

> 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.

The national economic interest is a big term. You also pointed us to another part of the act that talks about mitigating the effects on workers. But even that term, “the national economic interest”, doesn't mean that the Attorney General couldn't consider the impacts on specific employees, for example, or pensioners, or the many thousands of people who work at the company and did nothing wrong. Furthermore, while the act does prohibit the consideration of the national economic interest, the act expressly states that factors that can be considered include “any other factor that the prosecutor considers relevant”.

Would you say that leaves quite a lot of room for the prosecutor, who could be the Attorney General, to consider a vague range of items, including the effects on the local economy of not proceeding with a remediation agreement? We've already established that the Attorney General can have discussions with the Prime Minister in his or her office about such considerations, and you can imagine these conversations to be quite wide ranging. Is it the case that the national economic interest doesn't mean that no economic interest whatsoever should be considered?

Mr. Kenneth Jull: As I said, I think it comes down to the facts of the case and the extent to which the corporation is corporately criminally liable. It comes back to this notion of the senior officer. That, to some extent, guides what section you're going to fall within.

If you have a situation in which senior officers have committed bribery but many employees have had nothing to do with it, I think there you can fall within the purpose section and say you're going to protect those people who didn't have anything to do with the wrongdoing.

If, on the other hand, that is not your scenario.... I'm sorry to repeat myself, but if that's not your scenario, and the corporation, for want of a better word, let's just say, is rotten to the core—

Mr. Randy Boissonnault: You made that very clear, very carefully. The two different—

Mr. Kenneth Jull: —then, in that case, they can't go.... It's a prohibitive factor. It's pretty rare in legislation to see a prohibitive factor that says “you shall not consider this”, and that's what this says. In that case, it's simply something that, on its own, ought not to be considered. In other words, all things being equal, you just can't look at that factor if there's nothing else you can hang your hat on.

Mr. Randy Boissonnault: Ms. Berman.

Ms. Wendy Berman: But we have to also go back to the purpose, which is laid out in the statute.

The purpose does talk about the consequences, which include financial consequences to pensioners, employees and other stakeholders. It's not as if economic harm, whether it's national, local or—

Mr. Randy Boissonnault: —regional—

Ms. Wendy Berman: —regional, or just to that company and the stakeholders who are affected by that company. They aren't separate spheres. They're overlapping spheres, in my opinion.

Mr. Randy Boissonnault: That's completely legitimate information to be providing to an Attorney General in the context of public interest, and understanding the full context of public interest, as we heard from one of the earlier panellists who raised these kinds of matters.

Ms. Wendy Berman: I'm not an expert, and I'm not here to testify on what can be said to the Attorney General, but I do think that the Attorney General, just like the director of public prosecutions, should be considering the financial consequences to all of those stakeholders as a result of a criminal conviction of that corporation. I do think that information provided to either of those offices by anybody is important information that both of those offices should be considering in determining whether this is a circumstance in which a deferred prosecution agreement should be implemented.

Remember, a deferred prosecution agreement can be implemented at any time, even on the eve of a trial and even during a trial. On the notion of when, I have negotiated them on the courtroom step many times. I've negotiated them during a hearing. That consideration is an ongoing thing.

● (1750)

Mr. Randy Boissonnault: Once again, with 10 seconds left on my clock, do you both agree that remediation agreements are important parts of the tool kit for Canada?

Ms. Wendy Berman: Yes.

Mr. Randy Boissonnault: What about you, Mr. Jull?

Mr. Kenneth Jull: Yes, and can I sneak in my answer on that one?

The Chair: I'll give you 30 seconds.

Mr. Kenneth Jull: Okay.

Five or six years ago, before deferred prosecutions occurred, a client called me and said, “We are a Canadian company. We've discovered a serious bribery scam in a foreign country. What do we do?” I said, “Stop it”, and then he said, “What do we do?” I said to do an internal investigation and he should self-report. He then said, “What will happen?” and I said, “You will be convicted. It's not the United States”, and then he said, “What will happen?” and I said, “You'll be debarred.”

What do you think they did?

Mr. Randy Boissonnault: They didn't self-report.

Mr. Kenneth Jull: Of course they didn't, and to my mind, that goes back to the earlier question that was raised by Mr. Rankin about the enforcement of white-collar crime. We don't have the resources —these are hidden schemes, often, and you're policing all of Canada and the world. If we don't have some sort of carrot or incentive to invite companies to come in from the cold and report things that we're not aware of, then it's very difficult.

Mr. Randy Boissonnault: Thank you both very much.

The Chair: Thank you very much.

Colleagues, we've exhausted the hour, so are we agreed that we're going to stop here?

I want to thank each of the witnesses. Your testimony was very helpful and it's very much appreciated.

Colleagues, remember, we're meeting tomorrow at 8:45 a.m., to deal with Mr. Cooper's private member's bill.

The meeting is adjourned.

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