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POLITICS, DISCRETION AND THE RULE OF LAW AS APPLIED TO THE CRIMINAL LAW: A CASE STUDY OF SNC-LAVALIN

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Prime Minister Justin Trudeau has found himself in political hot water these days over allegations that he tried to influence the then-Justice Minister and Attorney-General Jody Wilson-Raybould with respect to the treatment of SNC-Lavalin Group, a Montréal-based company, over allegations of criminal wrongdoing in Libya,[1] and possibly elsewhere.

The Facts

For months, SNC has actively and publicly[2] sought to be offered what is referred to as a "remediation agreement".[3] Under such an agreement, a prosecutor enters into an arrangement with a potential organizational offender[4] wherein if the organizational offender follows the conditions of the remediation agreement, charges would not be brought, or if charges had already been commenced, those charges would be stayed.[5] In fact, SNC went so far as to take out ads in newspapers essentially complaining that the government had not approached them about entering into a remediation agreement, and questioning why this was so.[6] The allegation is now that the Prime Minister wanted to grant SNC a remediation agreement, and allegedly approached the Justice Minister and Attorney-General to accomplish this. When asked about this, the Minister (who was first shuffled to the Department of Veterans' Affairs in January, 2019 and, the next month, quit the Cabinet) claimed solicitor-client privilege over the conversation.[7] The new Justice Minister and Attorney-General claims that the opportunity for such an arrangement still exists for SNC.[8] There seem to be almost daily media revelations on issues around the scandal, and much ink has already been put to paper to

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[1] See e.g. Catharine Turney, "As RCMP lies in wait, legal minds ponder whether SNC-Lavalin scandal warrants criminal probe", *CBC News* (1 March 2019), online: <https://www.cbc.ca/news/politics/rcmp-investigation-obstruction-quetions-1.5037252> [https://perma.cc/FCJ6-VHT2]; Andrew MacDougall, "It's time for Justin Trudeau to put his cards on the table", *Maclean's* (1 March 2019), online: <https://www.macleans.ca/opinion/its-time-for-justin-trudeau-to-put-his-cards-on-the-table/> [https://perma.cc/G8JH-ATS3].

[2] See e.g. Jesse Snyder, "SNC-Lavalin's failure to secure deferred prosecution comes after years of legal fights, lobbying blitz", *National Post* (8 February 2019), online: <https://nationalpost.com/news/politics/snc-failure-to-secure-deferred-prosecution-comes-after-years-of-legal-fights-lobbying-blitz> [https://perma.cc/67Y9-XEJK];
see also Nick Taylor-Vaisey, "Where SNC-Lavalin's push for deferred prosecution came up short", *Maclean's* (22 February 2019), online:<https://www.macleans.ca/politics/ottawa/where-snc-lavalins-push-for-deferred-prosecution-came-up-short/> [https://perma.cc/47DA-DGDD].

[3] *Criminal Code*, R.S.C. 1985, c. C-46 [the "*Code*"], s-s. 715.3(1), *sv* "remediation agreement"

[4] "Organization" is defined under section 2 of the *Code* to specifically include corporations, meaning that SNC is a potential organizational offender.

[5] *Code*, *ibid,* s-s. 715.3(1), *sv* "remediation agreement".

[6] Snyder, *supra* note 2.

[7] Mark Gollom, "What you need to know about the SNC-Lavalin affair", *CBC News* (28 February 2019), online: <https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271> [https://perma.cc/4Q8F-RJW7].

[8] Sean Fine, Robert Fife, and Steven Chase, "Attorney-General Lametti says SNC-Lavalin settlement still possible", *The Globe and Mail* (11 February 2019), online: <https://www.theglobeandmail.com/politics/article-attorney-general-lametti-says-snc-lavalin-settlement-still-possible/> [https://perma.cc/6L7E-9Q24].

keep pace with the testimony and statements of a variety of players with respect to their views and recollections of this controversy. The facts as presented here are not meant to be exhaustive, but rather provide a basic flavour of the background that led to the controversy so that the reader can follow the leader argument offered below.

Explaining a Remediation Agreement

The *Criminal Code* provisions concerning remediation agreements were added as part of the budget process in the summer of 2018.[9] Similar to "deferred prosecution agreements" in the United States, the provisions make clear that a remediation agreement is supposed to be a mechanism by which we avoid doing serious harm to large numbers of individuals as a result of a prosecution of an organizational offender.[10] For example, in the aftermath of the Enron scandal (one of the largest and most public corporate governance failures in U.S. history), the giant accounting firm of Arthur Andersen LLP was charged as an organization as a result of its role as Enron's auditor.[11] While its conviction was ultimately thrown out by the United States Supreme Court,[12] the damage was ultimately already done. According to some accounts, many Arthur Andersen employees protested the decision to pursue Arthur Andersen in the first place, given that most offices of Arthur Andersen LLP (outside of the Houston, Texas, office, some of whose partners dealt directly with Enron executives) had little or nothing to do with the underlying criminality that would lead to the downfall of Arthur Andersen LLP.[13] Where the organization has taken steps to deal with those parties who were directly involved in the wrongdoing, and where the public interest does not favour visiting hard treatment or censure on a large group of people who had no real opportunity to prevent that wrongdoing, a remediation agreement is designed to limit "collateral damage" to truly innocent parties.[14]

While this is the theory, there are serious questions as to whether this theory can be put into practice. It is beyond the scope of this blog post to explain why the theoretical underpinnings of a remediation agreement may not be as solid as the government that passed these measures may have believed them to be. But such a discussion will have to wait for another day.

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[9] Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, s 404 (assented to 21 June 2018). The "remediation agreement" provisions were added to the *Criminal Code* as part of a very large, omnibus bill (Bill C-74), despite an earlier political attack by the opposition Liberals on the then Conservative government for overuse of large omnibus bills. Again, the degree of political hypocrisy in the decision to use the very tool that one attacks one's political opponents for when they are in government is yet another area that will need to be explored another day.

[10] *Code*, *supra* note 3. For example, paragraph 715.31(f) of the *Code* sets out that one of the objectives of a remediation agreement is "(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."

[11] See e.g. Kathleen Brickey, "Andersen's Fall from Grace" (2003) 81:4 *Washington University Law Quarterly* 917.

[12] Charles Lane, "Justices overturn Andersen conviction", *Washington Post* (1 June 2005), online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053100491.html> [https://perma.cc/6RHB-VF6X]. For the case itself, see *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), *per* Chief Justice Rehnquist, for the Court.

[13] William S. Laufer, *Corporate Bodies and Guilty Minds*, (Chicago: University of Chicago Press, 2006), at 44-47.

[14] There are other purposes as well. These are: (a) denunciation; (b) accountability; (c) proving respect for law with the development of a compliance culture; (d) encouraging voluntary reporting of criminal conduct; and (e) providing a means for reparations for victims. *Code*, *supra* note 3, paras. 715.31(a)-(f).

A Technical Issue

One of the interesting parts of this developing scandal is that, at least on paper, at least some of the charges faced by SNC are not the exclusive province of the federal government in any event. Under the definition section of the *Code*,[15] "Attorney-General" with respect to s. 380 (fraud) can be either the federal Attorney-General or the provincial Attorney-General in the province where the proceedings are commenced. In other words, the language makes an interesting possibility of cooperative federalism. We therefore seemingly have a statute which provides that either Attorney General can enter into remediation agree with the same offender with respect to the same offence. In such a scenario, is there an obligation on the Attorneys General (federal and provincial) to undertake at least consultation (if not outright agreement) before instituting a remediation agreement? It would seem that since a prosecution for fraud (and certain other offences as well) can be instituted at the instance of either of them, the decision to grant a remediation may affect both levels of government. This would in turn suggest a need for cooperation, but the language of the operative provision does not make any mention of this.[16]

The Rule of Law, Politics and the Criminal Law

But, while the technical issue is interesting, in this blog post I wish to address something far more fundamental. The rule of law is clearly a fundamental constitutional principle of the Canadian federation.[17] It is even said that the rule of law is fundamental to both our constitutional structure[18] and democracy itself.[19]

Yet, there are always overtly political decisions that can arise in the execution of law. So, the question that I wish to address here is the appropriate level of interaction between "political" decision making, on the one hand, and the rule of law, on the other. Before going any further, it is necessary to distinguish between two different types of political decision-making. The first is what I will refer to as "ordinary" political decision-making. In one sense, this is the very reason for democratic government. Should taxes be lower or higher? Should the government run a deficit in order to encourage economic growth without increasing revenue? Should government incentivize creation or expansion of new or existing sectors of private industry? These are all overtly political questions that depend on one's view of the relationship between the governed and its government. There is nothing wrong with the government of the day making different decisions than its predecessors. These political choices often find their way into legislation or administrative action.

The second type of political decision-making is what I will refer to as "partisan political decision-making". Should members of government grant access and influence to those who are friendly to the political party that currently finds itself in power? Do the characteristics of the individual subject to law determine whether administrative or other action will be taken against that person? Should the government of the day be more likely to use, for example, tax auditing as a way to investigate people that are less likely to vote for that particular party?

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[15] *Code*, *ibid*, s 2, *sv* "Attorney General", paragraph (g).
[16] *Code*, *ibid.*, para. 715.32(d).
[17] See for example, *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 2 S.C.R. 519, *per* Chief Justice McLachlin, for the majority.
[18] *Roncarelli v. Duplessis*, [1959] SCR 121[*Roncarelli*], at 142, per Justice Rand.
[19] See *Reference re: Secession of Quebec*, [1998] 2 SCR 217 at para 67, *per* The Court.

I begin this discussion of the relationship between administrative action and political decision-making, on the one hand, and the criminal law, on the other, with the basic assertion that while both forms of political decision-making may be problematic when applied to the criminal law, the second is far more problematic than the first.

In fact, there is built in to even the criminal law a certain number of ordinary political decisions of the first type that may need to be made at any given point. One sees this type of political decision-making specifically recognized in the *Criminal Code* in a number of areas. One example of this overt political decision-making is found in the decision to prefer an indictment against an accused where, for example, the Crown's case has been dismissed at preliminary inquiry, amongst other reasons.[20] There is a political element to this decision. Is the decision of the preliminary inquiry judge to be respected in all cases? Alternatively, if not, under what circumstances should the government prefer an indictment to be able to go to trial notwithstanding the judge's decision?

Moreover, the *Code* clearly draws a distinction between the "prosecutor", on the one hand, and the Attorney General, on the other.[21] In certain circumstances, a prosecutor in charge of a case may prefer an indictment.[22] In other circumstances, the consent of the Attorney-General is required.[23]

It is clear that there is a similar division with respect to remediation agreements. A "prosecutor" must believe all of the following: (i) that the offence has a reasonable prospect of a conviction;[24] (ii) the offence meets certain other criteria[25] (no likelihood of bodily harm or death, no injury to national defence, no "criminal organization"[26]); and (iii) the negotiation of a remediation agreement is both appropriate and in the public interest.[27] Then (and I would argue, *only then*), the Attorney General must consent to the negotiation.[28] At this point, to me, this is one of those political decisions that belongs in the first category.

Lest I be misunderstood, I believe there is nothing wrong with leaving decisions of this type to the Attorney General, or any other administrative official. Parliament itself is making the decision to leave these types of political decisions within the administrative framework of the executive branch. When Parliament makes the decision to place these in the hands of an administrative official, there is generally nothing scandalous about allowing that administrative official to make the decision placed

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[20] See, for example, *Code, supra* note 3, s 577.
[21] Technically, the definition of "prosecutor" includes the Attorney General, but only if the Attorney General chooses to intervene in a prosecution. See *Code*, *ibid.*, s 2, *sv* "prosecutor".
[22] See, for example, *Code*, *ibid.*, s-s. 574(1).
[23] See, for example, *Code*, *ibid.*, para. 485.1(a)
[24] See, for example, *Code*, *ibid.*, para. 715.32(1)(a)
[25] See, for example, *Code*, *ibid.*, para. 715.32(1)(b)
[26] This, of course, is different than a criminal offence committed by an "organization". "Criminal organization" is defined as follows: "*criminal organization* means a group, however organized, that (a) is composed of three or more persons in or outside Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence." *Code, ibid.,* s-s 467.1(1).
[27] See, for example, *Code*, *ibid.*, para. 715.32(1)(c).
[28] See, for example, *Code*, *ibid.*, para. 715.32(1)(d).

in his or her hands by the choice of Parliament. Respecting the choice of Parliament is simply respect for the legislative sovereignty of the legislative branch (subject, of course, to any express constitutional considerations, which will not be addressed here).[29]

But the second category represents a qualitative difference that we need to address. In my view, the SNC scandal puts into relatively sharp relief the importance of the rule of law in this context. I begin with two important statements from the judgment of Justice Rand in *Roncarelli v. Duplessis*:[30]

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

Later in the same case, Justice Rand continues:[31]

> It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.
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> "Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; …

It is worth noting that in this case, the question was not one of criminal law at all. In fact, it was a question of whether or not an ordinary citizen could maintain against the Premier of a province (in this case, Québec), who also served as the provincial Attorney General, a civil suit for the loss of a liquor license, after the Premier (the Respondent) had ordered that an administrative tribunal cancel such a license "forever".[32] There was only tangential relevance to criminal law.[33]

The words of Justice Rand could not be more apposite to the case of SNC. First, there is an argument in statutory interpretation that suggests that, in fact, until a prosecutor came to the Attorney

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[29] I recognize that I have indicated earlier that the rule of law is a constitutional principle. When I refer to "express constitutional considerations", I am referring to the division of legislative powers provided for in ss. 91 and 92 of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*], as well as the provisions of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[30] *Roncarelli, supra* note 18 at 140.

[31] *Ibid* at 142-143,

[32] *Ibid* at 141.

[33] In the case, the actions taken by Mr. Roncarrelli that had so angered the respondent Premier was the posting of bail for Jehovah's Witnesses. See *ibid*, at 131-132.

General seeking permission to enter into negotiations with respect to a remediation agreement with SNC, there was no decision for the Attorney General to make. The statute makes a clear distinction between the considerations to which a prosecutor must addressed him- or herself in deciding whether the conditions are appropriate for negotiations of a remediation agreement. Only once the prosecutor is made the decision that the conditions are appropriate should a request be made to the Attorney General for his or her consent. Viewed in this way, the political aspect of the decision-making involved with the decision to enter into a remediation agreement is significantly reduced.

Of course, a careful reader may point out that the Attorney General is, him-or herself, a "prosecutor" within the meaning of that term as defined under the *Code*.[34] While this is true, it is only true where the Attorney General has clearly chosen to "intervene" in the case. In circumstances such as the ones which appear to be present in the case of SNC, it would seem to me only available to the Attorney General to "intervene" by taking the case away from the prosecutor who had previously had carriage of the file. Put another way, it seems doubtful that the Attorney General would "intervene" simply to instruct a prosecutor to enter into a remediation agreement with SNC, and then not instruct the prosecutor as to what the terms of such a remediation agreement should be. Therefore, effectively, the Attorney General will have become the "prosecutor" until the file was complete. Unless and until one of these two things happens, (that is, (i) the prosecutor requests permission from the Attorney General to negotiate a remediation agreement with an organizational offender, such as SNC; or (ii) the Attorney General decides to "intervene" by taking over carriage of the file), there is simply no other decision for the Attorney General to make. To be clear, in all of the media coverage of the SNC affair, there is no indication that the Attorney General had made any step which made it clear had in fact chosen to "intervene" in the prosecution of SNC.

It is also worth noting that if the Attorney General does decide to "intervene", it seems to me that he or she would be subject to the ethical rules of all prosecutors. As explained by Justice Rand in *Boucher v The Queen*:[35]

> The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

In making his or her decision whether or not commence negotiations with respect to a remediation agreement (whether this decision arises by virtue of his or her role as Attorney General, as "prosecutor", or both), it follows, at least in my view, that the discretion granted to the Attorney General can only be exercised by reference to both the criminal law and the public interest.

In terms of the criminal law, it seems to me that the criminal law represents the closest our law comes to an overt statement about our collective, national morality. As the moral consensus which binds Canadians together changes, the criminal law must be prepared to either lead us to a different collective morality, or to reflect changes in our moral compact. There are examples of each of these in the history of our criminal law. There can be little doubt that when the impaired driving provisions were added to the *Code*, not everyone agreed that impaired driving was in fact a serious moral and social issue that needed to be dealt with through the criminal law. Nonetheless, as scientific information became more settled, our legislative leadership decided to protect public safety and

[34] *Code*, *supra* note 3, s 2 *sv* "prosecutor".
[35] [1955] SCR 16, at 24.

welfare by making impaired driving a criminal offence. Similarly, the recent decriminalization of cannabis for many purposes reflects that our legislators have accepted that the moral consensus that used to exist with respect to this particular drug is no longer sufficiently strong to warrant its continued criminalization, and that social welfare is better served by not criminalizing the possession of cannabis in many circumstances.

As such, the question that need be asked of any prosecutor in assessing the appropriateness of the use of a remediation agreement is at least in part the following: "Does the punishment of the organizational offender in the circumstances strengthen our collective moral statement as to the wrongfulness of the activity? Conversely, does the punishment of the organizational offender do so much collateral damage to innocent parties that the moral statement is lost in a sea of harm to innocent individuals who had no reasonable connection or ability to prevent the criminal wrongdoing?" If the answer to the second question is far more compelling the answer to the first question, is there another way to denounce the behaviour of the organizational offender and ensure ongoing compliance with the criminal law that does not engender these negative collateral consequences? The third question should provide not only at least a starting point for a discussion of a potential remediation agreement, but also some of its contents.

Furthermore, in my view, the criminal law also represents the most frequent time when the state itself is placed in diametric opposition to one or more of its citizens. The state is generally more powerful than any one citizen, given its access to police forces and other investigatory techniques that are not available to others, it follows the rule of law must be observed more strictly than in many other contexts. The Legislature that writes the criminal law (namely, Parliament) is itself part of that state. The idea that the state must follow the laws passed by the legislature is a main postulate of the rule of law. Given that the state gets to set "the rules of the game", and is then a participant therein, it also follows that the criminal law is generally read restrictively vis-à-vis the state. Thus, the rule of law is especially important in the criminal law. Although written in a somewhat different context, I find the words of Chief Justice Dickson very apt here

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.[36]

I would argue that, similarly, the rule of law is damaged if and when political figures decide, on a partisan political basis, who shall be held to account by the criminal law, not on the basis of morality, but what may appear to a reasonable observer to be political favouritism. The discretion of the Attorney General is simply not this broad, based on the words of Justice Rand in *Roncarelli*.[37] Although the term "public interest" is very broad, even it contains significant limitations. First, the interests of the Liberal Party of Canada to assist one of its major donors is not a relevant consideration. The political consequences to an election to be held this fall of a prosecution of a major employer in Québec is equally irrelevant. Neither of these is particularly relevant to the public interest, though it may be highly relevant to the private interest of a particular party that happens to be in power at any given time.

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[36] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214 at 230 para 25, *per* Chief Justice Dickson, for the majority.
[37] *Supra* note 31and related text.

The effect on the overall economy of the country may be a matter of the public-interest, as that term is used in the *Code*.[38] It is also of relevance that in fact SNC has publicly campaigned for the application of the remediation agreement provisions of the *Code*. The public-interest may demand that in fact any defendant who publicly seeks to undermine the perception of the quality of justice received in the Canadian courts does damage to the reputation of those courts. The protection of the reputation of the Canadian courts as places where justice cannot be bought or sold may in fact demand that the public campaign of SNC not be successful. I am not suggesting that this is necessarily determinative of whether a remediation agreement ought to be made available, but rather, suggesting that there are many factors to be taken into account in determining the public interest in this case. The effect of the nation what economy is certainly a factor that might militate in favour of the granting of a remediation agreement, whereas, on the other hand, not encouraging organizational offenders to press publicly for the negotiation of a remediation agreement might militate against the negotiation of such an agreement on these facts. Avoiding the public perception that the government may be using discretionary powers provided under the criminal law as a means of protecting one's friends may be another such reason.

Of course, it may be argued that we do not know that the then-Attorney General and the Prime Minister discussed any of these matters. We know, for certain, that the then-Attorney General had a conversation with the Prime Minister about the SNC prosecution. We know this because the Prime Minister admitted it publicly.[39] We also know that the then-Attorney General has subsequently resigned from the federal Cabinet.[40] Furthermore, we know that the now-former- Attorney General has retained counsel to assist her in determining what can validly be said on the subject without violating solicitor-client privilege.[41] None of these actions would appear consistent with the assertion that the Prime Minister was simply seeking advice on the legal requirements of any particular course of action, even though the second quotation of Justice Rand from *Roncarelli*[42] would seem to indicate quite clearly that the role of the Attorney General is not to take a partisan position on issues being decided by others. In my view, I would actually say that partisan considerations have no role whatsoever in any decision made by the Attorney General pursuant to the criminal law.

Thus, by restricting the role of the Attorney General to only consenting to the negotiation of the remediation agreement once prosecutor in charge of the cases has already decided that the other elements necessary for such an agreement are present furthers the rule of law. It reduces the likelihood of partisan political decision-making, or choices made on the basis of anything other than the genuine public interest.

One last matter needs to be addressed. Some readers may suggest that I have "convicted" the Prime Minister of malfeasance, at least in a political sense. On the contrary, I have, in my own view at least, simply laid out the standards to which I expect government officials who are making discretionary decisions with respect to the application of the criminal law should be held. From the facts as described in available accounts, it would appear as though the standards described here may not have been met. In my view, the criminal law is one area where we should genuinely take to heart

[38] *Code*, *supra* note 3.
[39] Gollom, *supra* note 7.
[40] *Ibid.*
[41] *Ibid.*
[42] *Supra* note 31, and related text.

the words of the Lord Chief Justice Hewart in *R. v. Sussex Justices ex parte McCarthy*[43]: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."[44] in my view, there is no place in the law where this is more important than with respect to the actions of public officials in carrying out an inherently public duty in applying the criminal law, particularly where they are deciding to give beneficial treatment (through a decision not to charge a potential defendant, where reasonable grounds nonetheless to exist to do so[45]).

[43] [1924] 1 KB 256.
[44] *Ibid* at 259.
[45] A remediation agreement cannot be offered to an organizational defendant unless there is a reasonable prospect of conviction.