SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-36-010389-222

DATE: November 16, 2022

PRESIDING: THE HONOURABLE MARC DAVID, J.S.C.

HIS MAJESTY THE KING
Prosecutor / Applicant
v.
ULTRA ELECTRONICS FORENSIC TECHNOLOGY INC. (UEFTI)
Accused / Respondent

-and-

ROBERT ANDREW WALSH
PHILIP TIMOTHY HEANEY
RENÉ BÉLANGER
MICHAEL MCLEAN
Accused (500-73-004814-220) / Mis-en-cause

LA PRESSE
MÉDIA QMI INC.
GROUPE TVA INC.
SOCIÉTÉ CBC AND RADIO CANADA
MONTREAL GAZETTE
BELL MÉDIA INC.
COGECO INC.
Third Parties

JUDGMENT ON A MOTION FOR CONFIDENTIALITY ORDER

JD2448

INTRODUCTION

[1] On October 4, 2022, the Applicant, the Public Prosecution Service of Canada ("**PPSC**"), filed an application seeking an approval order for a remediation agreement ("**RA**") negotiated pursuant to the provisions of Part XXII.1 of the *Criminal Code* (sections 715.3 to 715.43). These provisions are new to the criminal law landscape of our country and allow an organization to exceptionally avoid the disgrace of a possible criminal conviction in return for the implementation of a number of remedial measures, including acknowledging wrongdoings, collaborating with State authorities, indemnifying victims, paying a penalty and implementing measures to avoid the commission of further offences. The result of this process is a permanent stay of proceedings regarding the indicted crimes, meaning that the organization will never be convicted for these offences.

[2] This regime is not available to individuals, only to organizations.[1]

[3] Remediation agreements that ultimately shield an organization from being convicted of serious criminal offences must be sanctioned by a superior court of criminal jurisdiction. The proposers, i.e., the prosecutor and the accused organization, must convince a judge that the RA is in the public interest and that its terms are fair, reasonable and proportionate to the gravity of the offence.[2] This is the court approval stage of the RA.

[4] The principal question being raised here is whether the approval hearing can be held *in camera* or whether it must be held in public. The Applicant and Respondent both want an *in camera* hearing while certain media organizations object to this measure.

[5] Part XXII.1 of the *Criminal Code* is silent in this regard.

THE PROCEDURAL CONTEXT

[6] Part XXII.1 requires a prosecutor to apply to the court for an approval order once the terms of an RA have been agreed to with an accused organization.[3]

---

1 The term organization is defined in s. 715.3(1) of the *Criminal Code*:

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

Section 2 of the *Criminal Code*, as modified by s. 715.3, defines the term organization as:

(a) a [...] body corporate, society, company, firm, partnership, [...] or

(b) an association of persons that

(i) is created for a common purpose,

(ii) has an operational structure, and

(iii) holds itself out to the public as an association of persons;

2 s. 715.37(6) Cr. C.

3 s. 715.37(1) Cr. C.

[7] This was done on October 4, 2022 when the Applicant filed an *Application for an Order Approving a Remediation Agreement* (the "**Application**"). Annexed to it is the Applicant's invitation to the accused organization, Ultra Electronics Forensic Technology Inc. ("**UEFTI**" or "**the Respondent**"), to negotiate an RA and UEFTI's acceptance of this invitation[4]. These documents are public and reveal that the negotiation process between the parties began a year ago, in October of 2021.

[8] On July 27, 2022, the parties agreed to the terms of an RA.

[9] On October 12, 2022, the parties appeared before the Superior Court of Quebec to have this agreement ratified.[5]

[10] The Applicant then requested a pre-hearing conference "[...] to establish the order of proceedings and further filing of materials", as mentioned in paragraph 10 of the Application.

[11] It also specified that the approval hearing "[...] will comprise ancillary motions for temporary confidentiality orders, namely, for the sealing, redaction, non-publication and non-dissemination of part of the materials in support of the Application and to proceed *in camera*", at paragraph 11.

[12] Due to possible restrictions to the open court principle, the Court required the Applicant to file a further motion outlining the specifics of the confidentiality orders that would be sought. This was done on October 12, 2022 in a motion entitled "*Motion for confidentiality orders in support of the Application by the Prosecutor/Applicant for an order approving a Remediation Agreement pursuant to Section 715.37 of the Criminal Code and at Common Law*" (the "**Motion**"). It was served on four individuals who were also accused of the same offences as the Respondent (the "**Mis-en-cause**"), as well as on several media organizations (the "**Third Parties**").

THE OFFENCES BEING PROSECUTED

[13] On September 20, 2022, the Respondent was charged with two counts of corruption, contrary to ss. 3(1)a), 3(1)b) and 3(2) of the *Corruption of Foreign Public Officials Act*, and one count of fraud, contrary to s. 380(1)(a) of the *Criminal Code*.[6] These are designated offences in respect of which a remediation agreement may be entered into.

[14] On the same date, in a separate file, the Mis-en-cause Robert Walsh, Philip Heaney, René Bélanger and Michael McLean were charged with the same offences.[7]

---

4 See Tabs 1 and 2.

5 In September 2022, the Respondent was also arraigned on criminal charges before the provincial court. The matter was postponed to January 17, 2023, following the declaration that an RA was reached between the PPSC and UEFTI.

6 Court file number 500-73-004815-227.

7 Court file number 500-73-004814-220.

[15] At this stage of the proceedings, little is known of the underlying factual allegations that have led to these charges. A glimpse is offered in Tab 1 of the Application in the following terms:

> The matter follows an investigation by the Royal Canadian Mounted Police into alleged conduct by UEFTI [the Respondent] to secure the procurement of ballistics software to law enforcement in the Republic of the Philippines.

[16] The alleged offences would have occurred between September 2006 and January 2018.

POSITION OF THE PARTIES

a) The Applicant and the Respondent

[17] The Applicant and the Respondent jointly request that the in-court approval hearing proceed *in camera*. They submit that this stage of the RA process is covered by the common law settlement privilege and that this is required to permit full and frank discussions of the RA proposal.

[18] They argue that proceeding in public would discourage other organizations from voluntarily disclosing their wrongdoings, one of the stated objectives of the RA legislative framework.[8] They point to the uncertainty of the result of the approval hearing, where the parties are required to disclose a significant amount of confidential information. In their submission, a public hearing in such circumstances would have a chilling effect on the decision to embark on this process.

[19] The parties argue that the contents of the *in camera* hearing will become public as soon as the Court approves the RA. In this regard, they undertake to voluntarily waive the benefits of the settlement privilege once the RA is court sanctioned, stating in the Motion that "[i]f the Application is granted [i.e. the RA is approved], the Applicant and the Respondent undertake to waive their settlement privilege and will apply to have the in camera proceedings be made public".

[20] Thus, they reason that an approved RA would result only in a brief and temporary breach to the open court principle.

[21] On the other hand, should the RA not be approved, then the settlement privilege ensures the confidentiality of all submissions presented at the approval stage. In effect, it is argued that the parties should be in the same respective positions that existed before their involvement in RA negotiations.

[22] Finally, these parties request a number of redactions, sealing orders and/or non-publication bans with regard to written submissions, to the RA and its contents and to an

---

[8] s. 715.31(d) Cr.C.

agreed statement of facts. These requests concern, at the very least, the fair trial rights of the Mis-en-cause, who are awaiting trial on the same charges.

b) The four accused Mis-en-cause

[23] All four chose not to comment the request to proceed *in camera*. However, two of them reserve their right to make representations upon the release of the Court's decision on the merits of the RA. They envisage that releasing information in the public domain may potentially impact their fair-trial rights.

c) QMI and TVA media Intervenors

[24] These media outlets made joint oral representations objecting to the *in camera* hearing. Nonetheless, they concede that a general publication ban should be in force during the entirety of the approval proceedings, which publication ban could be reviewed once the Court issued its decision on the merits of the RA.

[25] It was argued that Part XXII.1 of the *Criminal Code* affords no role to the settlement privilege at the approval stage. This is evidenced by the fact that Parliament was well aware of its existence, yet the *Criminal Code* remains silent as to its application. The open court principle thus trumps the effects of the settlement privilege at the approval stage.

d) Other Media Intervenors

[26] Of the five remaining media organizations served with the Motion, only two responded in writing: La Presse and Radio-Canada/CBC. Both chose not to intervene as concerns the request to proceed *in camera* and possible confidentiality orders (exhibit I-1).

[27] The remaining organizations (Montreal Gazette, Bell Media Inc. and Cogeco Inc.) never responded to the Motion.

ANALYSIS

i) Opposing interests

[28] The incentives for an *in camera* proceeding are numerous and mostly concern the Respondent. These include:

- A desire to remain out of the public spotlight for as long as possible;
- The uncertainty of the final outcome, both in terms of the agreement's approval and a definite stay of proceedings;
- The extensive disclosure obligations required to obtain the Court's approval, as specified in ss. 715.34(1) and (3) Cr.C.;

- In the case of a publicly-traded company, a possible negative impact on its share price or its net worth;

- The detrimental impact of incriminating information on innocent third parties;

- A disincentive to fully share incriminating information;

- The irrelevance of certain information shared with the prosecutor during the negotiation stage of an RA that could end up in the public domain; and

- The less complicated management of sensitive information.

[29] The incentives to proceed *in camera* collide directly with the open court principle, which is a hallmark of a democratic justice system. The teachings of the Supreme Court of Canada in this regard are constant and numerous. For instance, in 1996, La Forest J. wrote:

> 20. It cannot be disputed that the courts, and particularly the criminal courts, play a critical role in any democracy. It is in this forum that the rights of the powerful state are tested against those of the individual. As noted by Cory J. in *Edmonton Journal*, courts represent the forum for the resolution of disputes between the citizens and the state, and so must be open to public scrutiny and to public criticism of their operations.
>
> 21. The concept of open courts is deeply embedded in the common law tradition. The principle was described in the early English case of *Scott v. Scott*, [1913] A.C. 419 (H.L.). A passage from the reasons given by Lord Shaw of Dunfermline is worthy of reproduction for its precise articulation of what underlies the principle. He stated at p. 477:
>
> > It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

> 22. The importance of ensuring that justice be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; (see *Re Southam Inc. and The Queen* (No.1) (1983), 41 O.R. (2d) 113 (C.A.), at p. 119). The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.
>
> (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, paras. 20-22)

[30] There is no doubt that the open court principle is a constitutionally-protected value.

[31] As stated previously, Part XXII.1 of the *Criminal Code* is silent as to whether the approval hearing can be held *in camera*.

[32] The Applicant and Respondent rely exclusively on the settlement privilege to request an *in camera* hearing at the approval stage.

ii) The stages of an RA and the role played by the Court in the approval process

[33] To determine if the settlement privilege can enable an *in camera* hearing at the approval stage, it is necessary to understand the court's role in the RA process and to determine whether it participates in any negotiations.

[34] The provisions of Part XXII.1 of the *Criminal Code* delineate three distinct stages in the RA process: The negotiation stage, the approval stage and the implementation stage.

[35] The **negotiation stage** only involves the prosecutor and the accused organization. By its very definition, an RA means "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement."[9]

[36] The Court plays no role in the negotiation process, which is carried out between the parties in private. If no agreement is reached, the RA proposal is never submitted to a court for approval and its contents never become public. The result of a failed negotiation is the continuation of the criminal prosecution.

[37] The starting point is the Attorney General's consent to implementing the RA procedure and, consequently, the prosecutor plays a predominant role at the negotiation stage.

---

9 s. 715.3(1) Cr. C.; see also s. 715.37(1) Cr. C.

[38] It is the prosecutor who invites the organization to the negotiation table.[10] If the invitation is accepted, it is the prosecutor who must inform potential victims that an RA may be concluded[11] and, if an agreement is reached, it is the prosecutor who submits the RA proposal to the court.[12]

* * * * * * *

[39] The **approval stage** necessarily involves proceedings before the court. If the statutory criteria are met, the court sanctions the proposed RA. Here, the court plays a predominant role. It must ensure the existence of three conditions before approving an RA:

- That the offences being prosecuted are listed as eligible offences under Part XXII.1 of the *Criminal Code*: s. 715.37(6)(a) Cr. C.;

- That the agreement is in the public interest: s. 715.27(6)(b) Cr. C.;

- That the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence: s. 715.37(6)(c) Cr. C.

[40] This role is important and significant. It ensures transparency to the process. It makes the prosecutor and the organization accountable for the terms of the agreement. The court's approval of the agreement confers legitimacy to this exceptional management of a criminal prosecution whereby, instead of a conviction, an organization benefits from a stay of proceedings.

[41] Because a conviction is avoided, the organization remains an active player in a society's economy and is not disqualified from public contracts.[13] This explains why the regime is not available to individuals accused of the exact same crimes. This also explains why the treatment of victims is critical to approving an agreement.[14]

[42] The administration of criminal law is a matter of public order. As such, courts play a key role in the administration of the criminal justice system. By approving an RA, the court lends its credibility to the process. This is meant to reassure the public that the negotiated agreement is not the result of the undue influence or weight of "big business" and that wealth does not automatically command a favourable result. As well, considering that the illegal behaviour is almost always motivated by avarice, the RA regime is

---

10 s. 715.33(1) Cr. C.
11 s. 715.36(1) Cr. C.
12 s. 715.37(1) Cr. C.
13 See GOVERNMENT OF CANADA, *Expanding Canada's Toolkit to Address Corporate Wrongdoing – Discussion Paper for Public Consultation: The deferred prosecution agreement stream discussion guide,* 2017, Gatineau, Public Services and Procurement Canada at 6, cited by Downs J. in *R. v. SNC-Lavalin Inc.*, 2022 QCCS 1967, at para. 100).
14 s. 715.37(3) and (4) Cr. C.

designed to ensure that an organization understands the seriousness of the breach to public order and to the rule of law that its actions represent.

[43] Undeniably, the monetary compensation of victims and society weighs in the approval process. Such measures redress past wrongs, but the RA regime also looks to the future and imposes measures to prevent further transgressions of the law. An organization is thus offered the chance of rebecoming a responsible corporate citizen and a positive contributor to our national economy.

[44] Thus, the court's role is crucial to maintaining the public's confidence in the process and in the administration of justice. The RA regime must never be perceived as a mere "cost of doing business". This concern was also iterated by my colleague Downs J. in *R. v. SNC-Lavalin Inc.*, when he said "[...] under no circumstances should remediation agreements constitute a [translation] "free pass" for large or public companies that would be, as the well-known expression goes, "too big to fail" ".[15]

[45] As important as the court's role may be in terms of examining the public interest criteria, the court is limited to either approving or refusing a proposal. This limitation is evidenced by the wording of several provisions of Part XXII.1 of the *Criminal Code*, namely, sections 715.37(1) and (3), 715.37(4)(a), 715.37(6), 715.38 and 715.42(1)(a). These sections only refer to the possibility of approving an agreement.

[46] Though Part XXII.1 is silent in this regard, it is reasonable to assume that, if the RA is not approved, the parties can resume negotiations and submit a modified proposal to the court.

[47] In conclusion, a court never participates in the informal negotiation of the RA. This process is entirely within the purview of the prosecutor and the accused organization and either party may unilaterally withdraw from negotiations.[16] In that sense, negotiations occur "under the radar" as evidenced by the fact that, in this case, they were ongoing for nearly a year before the matter was brought to the Court's attention.

[48] Thus, the approval proceedings occur in a formal court setting, after negotiations have resulted in a finalized agreement. At this point, the parties have the burden of convincing the court of the merits of their agreement.

* * * * * * *

[49] The prosecutor also plays a pre-eminent role in the **implementation stage** of an approved RA, though sometimes with the necessity of obtaining the court's approval.

[50] Examples of the unfettered role of the prosecutor at the implementation stage of an approved agreement are found in:

---

15 2022 QCCS 1967, at para. 164; to a similar effect, see paras. 115 and 156 of that judgment.
16 s. 715.33(1)(h) Cr. C.

- the obligation of an organization to report to the prosecutor on the implementation of the agreement and an indication of the manner in which the report is made and any other terms respecting reporting: s. 715.34(1)(i) Cr. C.;

- the obligation for the organization to reimburse the prosecutor for any costs identified in the agreement that are related to its administration and that have or will be incurred by the prosecutor: s. 715.34(3)(b) Cr. C.;

- the appointment of an independent monitor, selected with the prosecutor's approval, to verify and report to the prosecutor on the organization's compliance obligations, or any other obligation in the agreement identified by the prosecutor, as well as on its compliance with its obligations toward the monitor, including the obligations to cooperate with the monitor and pay his costs: s. 715.34(3)(c) Cr. C.; and

- the obligation of a candidate for appointment as an independent monitor to notify the prosecutor in writing of any previous or ongoing relationship with the organization or any of its representatives that might have a real or perceived impact on the candidate's ability to provide an independent verification: s.715.35 Cr. C.

[51] Examples of the prosecutor's role at the implementation stage that are subject to judicial oversight can be found in:

- The prosecutor's right to vary or terminate an agreement with the approval of the court: s. 715.34(1)(o) and s. 715.38 Cr. C.; and

- The termination of an agreement if the court is satisfied that the organization has breached a term of the agreement: s. 715.39(1) Cr. C.

iii) The possibility for an RA to proceed *in camera*

[52] The answer to this question lies both in understanding the raison d'être and the scope of the settlement privilege and in the interpretation of Part XXII.1 of the *Criminal Code*.

[53] As discussed below, both these considerations lead to the conclusion that the approval hearing must unfold in public proceedings.

[54] Exceptions to this rule exist but are not applicable in this case. An *in camera* hearing is only possible pursuant to s. 486(1) of the *Criminal Code*, which is the general rule applicable to all criminal proceedings. No such application was made in this file and the criteria specified in s. 486(1) and (3) do not, at first glance, entitle the parties to an *in camera* hearing. These criteria include accounting for public morals, the maintenance of order or the proper administration of justice or the necessity to prevent injury to international relations, national defence or national security.

a) The settlement privilege does not entitle the parties to an *in camera* approval hearing

[55] The Applicant and Respondent argued that the settlement privilege applies at the approval stage until the court decides whether to sanction the agreement. They submit that their burden to convince the court that the agreement meets the public interest criteria and that it is fair, reasonable and proportionate requires them to refer to private discussions held during the negotiation phase. Since such discussions are protected by the privilege, which the parties have not waived, they submit that the in-court approval discussions must be held *in camera*.

[56] The settlement privilege is a common law privilege recognized as a class privilege. This means that it presumptively applies when a prosecutor and an organization negotiate the terms of an agreement. Wagner J. (as he then was) stated the rule in these terms: [17]

> Settlement privilege is a common law evidentiary rule that applies to settlement negotiations regardless of whether the parties have expressly invoked it.

[57] Qualifying the privilege as an evidentiary rule means that communications made during negotiations are inadmissible:[18]

> The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

[58] In essence, the settlement privilege protects the participants from having their admissions used against them in any related litigation. It is an exclusionary rule of evidence. Wagner J. explained the function of the privilege in this way: [19]

> [...] it [the settlement privilege] enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).
>
> (Emphasis added)

---

17 *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, at para. 1.

18 *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, para. 2.

19 *Op. cit.,* Note 17, at para. 31. See also: *The Law of Evidence*, David PACIOCCO, seventh edition, at page 269.

[59] In the remediation agreement context, this self-incrimination concern is directly addressed in sections 715.33(2) and 715.34(2) of the *Criminal Code*, with the former reading:

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

[60] The latter applies once an agreement has been approved, and it reads as follows:

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

[61] As we shall see, these two provisions impose admissibility rules that go counter to the settlement privilege where an RA is approved. Moreover, the language of the provisions makes it clear that Parliament intended to create this exception.

[62] In general terms, these two provisions render inadmissible communications made in the context of negotiations whereby an organization accepts responsibility for an act or an omission, so long as the agreement is ratified by the court.

[63] This makes sense, given that, if the agreement is not ratified, discussions remain subject to the settlement privilege. The contents of unsuccessful settlement negotiations could never be relied upon as an admission against its maker.

[64] The rule of inadmissibility enacted in sections 715.33(2) and 715.34(2) for agreements applies to any related civil or criminal proceedings and only concerns admitted acts or omissions.

[65] However, these sections also foresee that an organization's communications accepting responsibility for acts or omissions are admissible in related civil or criminal proceedings if those incriminating communications are contained in the statement of facts or the admission of responsibility, both being part of the mandatory components of an approved remediation agreement: s. 715.34(1)(a) and (b) Cr. C.

[66] In other words, a third-party litigant can use an organization's statement of facts or admission of responsibility contained in an approved RA against it in civil or penal proceedings.

[67] This is consistent with the obligation to publish the contents of an approved agreement[20] and clearly indicates that Parliament envisaged a public approval hearing.

[68] Accordingly, section 715.34(2) of the *Criminal Code* sometimes removes the benefits of the settlement privilege for approved agreements. An organization is no longer shielded from the incriminating contents of an approved agreement when it comes to the statement of facts and the admission of responsibility. Simply put, certain admissions are no longer protected when an agreement is approved.

[69] In summary, the settlement privilege cannot justify an *in camera* proceeding at the approval stage for the purpose of avoiding liability in other proceedings, one of the fundamental protections afforded by the settlement privilege.

[70] If the agreement is not approved, the organization continues to benefit from the protections afforded by the settlement privilege as a result of the publication ban, which is discussed below.

[71] If the agreement is approved, admissions not contained in the statement of facts and the admission of responsibility are inadmissible pursuant to section 715.34(2) of the *Criminal Code.* On the other hand, admissions contained in the statement of facts and the admission of responsibility can be used against their maker, thereby overriding any protections afforded by the settlement privilege.

* * * * * * *

[72] Other reasons justify the conclusion that the settlement privilege cannot authorize an *in camera* approval hearing.

[73] It is generally recognized that three conditions must exist for the settlement privilege to apply: [21]

> Settlement privilege applies only if the following conditions are met (A.W. Bryant, S.N. Lederman and M.K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada, 2014), at p. 1039:
>
> (1) A litigious dispute must be in existence or within contemplation.
>
> (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.
>
> (3) The purpose of the communication must be to attempt to effect a settlement."

---

[20] s. 715.42(1) Cr. C.

[21] *R v. Delchev*, 2015 ONCA 381, para 24.

[74] The second criterion, an intention to maintain confidentiality, is inconsistent with the RA regime of Part XXII.1 of the *Criminal Code*. Where parties embark in negotiations, this intention is abandoned at the approval stage.

[75] Unlike negotiations occurring in civil litigation, where an agreement is usually not subject to judicial control, courts play an unavoidable role at the approval stage. Knowing this, there can be no express or implied intention that the contents of their negotiations would not be disclosed to the court. The settlement privilege cannot justify an *in camera* approval hearing because the parties know in advance that they will have to disclose at least part of the contents of their negotiations to the court in order to convince it that their agreement merits ratification.

[76] The Court also notes that the proposition that the settlement privilege can justify an *in camera* hearing is not supported by any authority, at least, none that was brought to the Court's attention.

[77] In conclusion, the Court holds that the settlement privilege cannot justify an *in camera* approval hearing in the circumstances of this case. Such an exceptional measure is beyond the scope of this common law privilege.

b) The provisions of Part XXII.1 of the *Criminal Code* do not entitle the parties to an *in camera* approval hearing

[78] The provisions of Part XXII.1 of the *Criminal Code* also command a public approval hearing.

[79] First, public scrutiny is essential at this stage to preserve the public's confidence in the process. There are too many risks associated with closed-door proceedings to achieving the objectives of the legislation, namely, denunciation, accountability, ensuring respect for the law, encouraging voluntary disclosure of wrongdoings, repairing harm to victims and sparing innocent third parties from the consequences of the wrongdoing: s. 715.31(a) to (f) Cr. C. With the possible exception of encouraging voluntary disclosure, these objectives cannot be met in an *in camera* setting.

[80] Notably, the RA regime exists within the confines of the *Criminal Code*. As previously mentioned, criminal law in this country is public law and, as such, unfolds in the public domain. That is the general rule. The Court of Appeal of Quebec recently reiterated this rule in the following noteworthy passage: [22]

> The importance of the open court principle in this country cannot be overstated. As the Supreme Court has noted, this principle "encompasses more than a singular requirement that justice not be carried out in secrecy" since the openness of the courts is especially important so that the public is "convinced of the probity of the actions of judges": *Endean v. British Columbia*, [2016] 2

---

22 *Personne désignée c. R.*, 2022 QCCA 406, para. 9.

> S.C.R. 162 at paras. 83–84. These observations are just as applicable in the context of criminal trials, if not more so.

[81] Parliament, in adopting the RA provisions, chose not to create an exception to this general rule. This supports the conclusion that an approval hearing unfolds in public proceedings.

[82] Second, before embarking in the negotiation process, both the prosecutor and the accused organization understand that their privately-negotiated agreement must be court sanctioned. The court has oversight over the acceptability of the agreement and this is beyond the control of the parties. The parties must convince the court that the legal requirements of their agreement are met. If they fail in this endeavour, the agreement does not come into force.[23]

[83] Nothing obliges the parties to negotiate an agreement. Their participation throughout the process is based on their will to do so. As previously noted, either party may unilaterally withdraw from the process. By accepting to embark in the process, they implicitly accept that certain information shared at the negotiation stage will become public at the approval stage. At a minimum, this includes the mandatory and optional contents of a remediation agreement[24].

[84] Nevertheless, and notwithstanding the public nature of the approval hearing, it may be necessary to impose confidentiality measures on certain information divulged at this stage of the process. For instance, privacy or safety concerns may exist for innocent third parties or victims, requiring the concealment of their identity. The fair trial rights of other accused individuals may also be at play in the public dissemination of certain information. Each situation is unique and confidentially orders must be adapted to specific circumstances.

[85] Third, public interest is central to the prosecutor's and the court's role in the administration of this regime.

[86] The prosecutor must be "of the opinion that the agreement is in the public interest and appropriate in the circumstances": (s. 715.32(1)(c) Cr. C.). In this regard, Parliament dictates certain factors that measure the public interest criteria, as seen in sections 715.32(2)(a) to (i) and 715.32(3) Cr. C.

[87] As well, the court must conclude independently that an agreement is in the public interest before it can approve it: s. 715.37(6)(b) Cr. C.

[88] The public interest concerns of Part XXII.1 must be publicly debated at the approval stage. This fundamental concern cannot be assessed out of the public's view. The court and the prosecutor are the guardians of the public interest criteria. Their accountability in this regard dictates a public approval hearing.

---

[23] s. 715.37(2) Cr. C.
[24] s. 715.34(1) and (3) Cr. C.

[89] Fourth, there is no provision in Part XXII.1 of the *Criminal Code* that enables an *in camera* hearing. Parliament's silence in this regard is a determining factor to conclude that *in camera* hearings are generally not possible at the approval stage.

[90] Part XXII.1 was adopted in 2018. At that time, the United Kingdom had a regime in place that offers to a repenting organization an alternate path to that of a trial with the risk of a criminal conviction. This path is known as the Deferred Prosecution Agreements program. In *SNC-Lavalin Inc.*, Downs J. offers an excellent historical review of the Canadian legislation, sometimes comparing it to the U.K. regime, which, in part, inspired ours[25]. This comparative analysis reveals that the U.K. legislation contains provisions that allow for *in camera* proceedings at two different stages.[26] Canada's does not.

[91] This legislative silence resonates loudly. It leads the Court to conclude that Parliament specifically chose to exclude *in camera* proceedings at the approval stage.

[92] Fifth, the obligation to publish the RA upon approval is also a clear indication of Parliament's desire to make the regime as transparent as possible. *In camera* proceedings are the antithesis of such a requirement.

[93] Section 715.42(1)(a) Cr. C. requires that the contents of the approved RA be published and, according to sections 715.34(1) and (3), they include a statement of facts, an admission of responsibility and a statement enumerating any applicable penalties, forfeitures, reparations, restitutions and surcharges.

[94] The requirement to publish also applies to the approval order *per se* and to the court's reasons for so ordering.[27]

[95] This requirement is unique in the *Criminal Code*, which does not impose the publication of reasons in other sections that require a court to give reasons.[28]

[96] Transparency concerns permeate the RA regime. The obligation to publish an RA along with the accompanying order and the court's reasons responds to these concerns. This obligation is one more strong indication of Parliament's intention that the approval hearing be as transparent as possible and, consequently, that it be held in public.

[97] Finally, by imposing a non-publication ban on the RA (including its contents), Part XXII.1 dissipates any concerns about the possible chilling effects of a public approval hearing should the court not approve the agreement. In the case of a refusal, only the order and the reasons for the order are published, in accordance with s. 715.42(1)(b) Cr. C.

---

25 See paras. 97 to 111 of the *SNC-Lavalin Inc.* decision: 2022 QCCS 1967.

26 The relevant U.K. provisions are reproduced in para. 61 of the *SNC-Lavalin Inc.* decision: 2022 QCCS 1967.

27 The obligation to publish reasons also applies to a decision refusing an approval request: s. 715.42(1)(b) Cr.C.

28 For example, see s. 278.98 and s. 737.1(5) Cr. C.

[98] Section 715.42(2) also allows for the non-publication of any disposition under Part XXII.1 when it is necessary to do so for the proper administration of justice. Of note, is that the proper administration of justice can include a consideration of "society's interest in encouraging the reporting of offences": s. 715.42(3)(a) Cr. C. This is a different consideration than the stated objective of encouraging "voluntary disclosure" of wrongdoings (s. 715.31(d) Cr. C.). The former aims to encourage whistleblowers whereas the latter concerns self-denunciation by an organization. Once again, this is an indication that the approval hearing must proceed in public as the requirement to publish is not concerned with chilling effects of a public process on organizations.

[99] For all these reasons, the Court will dismiss the Motion and order a non-publication ban on the contents of the approval hearing until the release of the Court's decision on the merits of the Application.

CONCLUSION

[100] This judgment stipulates that, as a general practice, the court approval stage of an RA must take place in a public forum. For the reasons already discussed, this public hearing is subject to a general publication ban applicable to all filed exhibits supporting the position of the parties in their quest to have the RA approved and to any discussions held in the courtroom as concerns the merits of the application.

[101] This does not mean that some portion of the approval hearing cannot be the subject of various confidentiality orders, such as redactions, sealing orders, confidentiality undertakings and even *in camera* proceedings. The process needs to be flexible and adapted to the specific context of an RA application. The overarching concern is the proper administration of justice.

[102] A party seeking a confidentiality measure bears the onus of convincing the court that such a measure is warranted. The role of counsel is critical in this process as they are ablest to understand and explain the stakes at play.

[103] The comprehensive publication ban in force during the approval hearing is generally extinguished once a court approves an RA (s. 715.42 Cr. C.). Again, any number of confidentiality orders may be appropriate at this later stage, including focussed publication bans and/or redactions. For instance, it may be in the interest of justice to preserve the anonymity of certain victims for safety reasons or to protect the fair trial rights of other individual accused who are awaiting trial on similar charges to those filed against an organization. For this reason, it is advisable to poll all counsel as to the possible continued appropriateness of confidentiality measures before lifting the general publication ban in force during the approval stage.

[104] Finally, in accordance with the open court principle, any restrictions limiting access to the contents or limiting publication must be in place for the shortest period possible, which measures can be periodically reviewed.

FOR THESE REASONS, THE COURT:

[105] **DISMISSES** the Motion;

[106] **ORDERS** a non-publication ban on the contents of the approval hearing until the release of the Court's decision on the merits of the Application.

HONOURABLE MARC DAVID, J.S.C.

Mtres. Stéphane Hould, Marie-Ève Moore and Natalie Fong;
Counsels for the Applicant:

Mtres. Paul Lalonde and Steven Slimovitch;
Counsels for the Respondent

Mtre. Louis Belleau, Ad.E.
Counsel for the accused Michael McLean

Mtre. Mark Bantey
Counsel for Média QMI Inc. and Groupe TVA Inc.

Hearing date: October 17 2022