

DEFERRED PROSECUTION AGREEMENTS - A NEW CANADIAN REGIME

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With the growing sophistication and globalization of corporations, countries are increasingly looking for new methods to combat and prosecute corporate crime. Pioneered by the United States and United Kingdom, deferred prosecution agreements, or DPAs, are quickly becoming a popular method through which countries can hold corporations accountable for their actions.

After a public consultation process during the fall of 2017, the Canadian government tabled legislation in the spring of 2018 leading the way to the implementation of a DPA regime in Canada. [\[1\]](#) Bill C-74 amends the *Criminal Code*, establishing a framework for the use of DPAs, called “remediation agreements”, where prosecutors may offer them as an alternative to prosecution in specific circumstances. The Bill received Royal Assent on June 21, 2018 and the relevant provisions will take effect 90 days thereafter. As such, it is possible that prosecutors will begin to offer remediation agreements as early as September 2018.

Context

DPAs, or remediation agreements, are formal agreements entered into between prosecutors and offending parties, normally corporations, whereby charges are laid against the party but subsequently stayed until the end of an agreed upon term. If at the conclusion of the term of the DPA, the party has met the agreed upon conditions, the charges will be dropped altogether. On the other hand, if the party is in breach of the agreement, prosecutors have the option to proceed with prosecution. DPAs are most commonly employed as a response to corporate crimes; namely, crimes committed either by corporations or by individuals acting on behalf of corporations and may include offences such as fraud, bribery, and anti-competitive behaviour.

DPAs are an exciting alternative prosecution tool in Canada for many reasons. Investigations into corporate wrongdoings are time consuming, incredibly costly and rarely result in guilty verdicts. In contrast, DPAs encourage corporations to self-report saving valuable time and money and freeing up court resources. The information received from corporations allows prosecutors to target the individuals who engaged in illegal behaviour without punishing the corporation as a whole. DPAs can also benefit the victims of corporate crimes, allowing victims to receive restitution much sooner than if the case had proceeded through more traditional

criminal court processes.

New Canadian Regime

Under the new Canadian regime, prosecutors may enter into negotiations for a remediation agreement (i.e. DPA) with an organization that is alleged to have committed a prescribed offence. The regime has borrowed significantly from the UK's DPA model which is similarly regulated and controlled. In Canada, remediation agreements will only be available for organizations (as defined in the *Criminal Code* but excluding public bodies, trade unions and municipalities), must adhere to the comprehensive regulatory framework and must be approved by the court before they can come into effect.

Prosecutors may only offer remediation agreements if they are of the opinion that there is a reasonable prospect of conviction, that the alleged act or omission was not likely to have caused certain serious results, including bodily harm and death, that negotiating the agreement is in the public interest and if the Attorney General has consented to the negotiations. When determining whether or not an agreement would be in the public interest prosecutors must take into account specific factors, such as the nature and gravity of the offence and whether the organization has taken any measures to remedy the harm. However, they are prohibited from taking into account other things, including national economic interest concerns with regards to offences under the *Corruption of Foreign Public Officials Act*.

The regime provides for a highly regulated process by setting out mandatory elements that must be present in each remediation agreement. While prosecutors have discretion to include other terms, agreements must contain the following non-exhaustive list of things:

- An agreed upon statement of facts related to the offence the organization is alleged to have committed;
- The organization's admission of responsibility for the offence;
- A commitment by the organization that it will assist in identifying persons involved and a commitment to cooperate in any investigations;
- Any obligations of the organization to pay a penalty for the offence that the agreement applies to and the amount that is to be payable;
- Any obligation of the organization to forfeit any property, benefit or advantage received as a result of offence committed;
- Any reparations that the organization must make to victims of the offence; and
- The deadline by which the organization must meet the terms of the agreement.

Remediation agreements will only be available for a prescribed list of offences and include, for example, economic crimes such as bribery, fraud, theft, forgery and money laundering, as well as certain crimes under

the *Corruption of Foreign Public Officials Act*. Interestingly, competition related offences, such as those under the *Competition Act*, are not currently included as prescribed offences and thus would not be the subject of remediation agreements.

Conclusion

The introduction of remediation agreements in Canada is an important step forward in combating corporate crime. However, the current Canadian legislation is not without issues. The wording of the legislation is unclear at times and this may lead to confusion and hesitation among companies who may otherwise participate in negotiations. For example, as competition related offences have been left out of the regime, it is uncertain whether or not companies who negotiate remediation agreements for certain offences could still be charged with a competition offence for the same conduct. If that is the case, this may significantly reduce the incentive for organizations to self-report. Ultimately, only time will tell if Canada's current approach will prove successful at addressing corporate crime or if changes to the remediation agreement regime will be necessary in the future.

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[1] Click [here](#) for more information.[ps2id id='1' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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