

Legal update

Deferred prosecution agreements: coming to Canada shortly

March 2018

Arbitration and alternative dispute resolution

Litigation

White collar crime

The Canadian government, as part of Bill C-74-1 the *Budget Implementation Act* introduced on March 27, 2018, finally introduced a bill that would make deferred prosecution agreements (DPAs) part of the *Criminal Code*. This new prosecutorial tool would represent a significant shift in Canada's approach towards corporate wrongdoing – one that aligns Canada more closely with global trends. The introduction swiftly follows the consultation process, which wrapped up in December. DPAs will be available for certain not-yet-disclosed offences.

As in other jurisdictions that recently recommended DPAs, such as in [Singapore](#) and [Australia](#), Canada's remediation agreement framework is expected to encourage corporations to voluntarily disclose wrongdoing, implement remediation measures, and hold corporate entities accountable. In Canada, like the UK and unlike the US, the proposed remediation agreement framework would be subject to judicial approval.

The process at a glance

- The prosecutor must determine whether there are appropriate conditions for a remediation agreement, including whether there is a reasonable prospect of conviction, the offence did not cause death or serious bodily harm, whether the agreement is in the public interest, and that the Attorney General has consented to the negotiations;
- The prosecutor then gives a written notice to the organization inviting it to negotiate;
- The parties then negotiate a remediation agreement, which must include certain elements, including a statement of facts that contains an admission of responsibility, disgorgement of any benefit from the wrongdoing, a penalty, and the date by which the agreement terms must be met;
- Optional elements of the agreement include obligations to establish or enhance compliance measures, reimbursement for the costs of the prosecutor, and the imposition of an independent monitor;
- Then the prosecutor applies for court approval of the remediation agreement;
- The court implements a stay of proceedings shielding the company of further prosecution for the offence;
- Once approved, the prosecutor must direct the clerk of the court to stay the proceedings with respect to the charges that have been laid against the organization, and any relevant limitation period is tolled during the course of the remediation agreement;

- Any variation or termination of the remediation agreement is subject to court approval, and a court hearing will be set to consider various defined factors;
- Courts are then generally expected to order the remediation agreement to be published, but if publication is not appropriate the court must publish the reasons for non-publication; and
- The agreement can be terminated for breach, or once the agreement is successfully completed, and a court must approve such an application brought by the prosecutor.

A corporate entity entering into a remediation agreement will have to fully cooperate with the prosecution and be as transparent as possible. This means, among other things, that the organization will have to make an admission of responsibility, fully cooperate in any investigation or prosecution into the actions, forfeit any property or benefit derived from the offence, and report on the implementation of the agreement. The draft legislation also contemplates various types of financial obligations, including disgorgement of any property, benefit or advantage, penalties, reparations and restitution to victims, and a 30% victim surcharge except for some *Corruption of Foreign Public Officials Act* offences.

Of particular note are considerations regarding the interest of the victim(s) of the organization's crimes. Although this will depend on the nature of the crime, reparations to victims and communities are a stated purpose of the remediation agreements. Moreover, prosecutors will have to inform victims of any negotiations, and courts must consider reparations made to victims when approving a remediation agreement.

Next Steps

The introduction of this bill is an exciting step forward in Canada's alignment with other jurisdictions, most notably the US, which has had DPAs since 1992. The bill will work its way through Parliament and may be amended along the way.

One interesting point to watch in the bill is that the Attorney General, being the Minister of Justice, must give a prosecutor approval to negotiate a remediation agreement. This introduces a political element into what would otherwise be an independent decision of the Public Prosecution Service of Canada to enter into negotiations.

More to come!

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