APRIL 11, 2018

Canada Proposes Regime for Deferred Prosecution Agreements

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The Canadian government recently tabled legislation to implement a regime for deferred prosecution agreements (DPAs) for corporations accused of certain types of federal offences for which conviction would disqualify the corporation from federal government contracts. This proposal follows public consultations last year and consideration of DPAs used in various international jurisdictions with a view to better deterring and addressing the consequences of corporate crimes (see our 2017 bulletin titled *Government of Canada Consults on Tools to Address Corporate Wrongdoing*).

Terms, Effect and Purpose of a DPA

A DPA is an agreement between an accused corporation and the responsible prosecuting authority. Under a DPA, the prosecution agrees to grant the corporation amnesty in exchange for the corporation's adherence to certain terms and conditions. Upon fulfilment of such terms and expiry of the DPA, the relevant charges will be withdrawn (with no criminal conviction). If the corporation does not comply with the terms of the DPA, the charges may be reinstated and the corporation may be prosecuted and ultimately convicted.

A DPA regime aims not only to sanction criminal conduct and deter wrongdoing, but also to create an incentive for corporations to self-disclose wrongdoing and encourage remediation and compliance. Given that investigations of corporate crimes often require significant time and resources, DPAs provide an alternative means to address such conduct in an efficient and timely manner. DPAs may also help mitigate unintended consequences for innocent parties, such as blameless employees, customers, suppliers, investors and other stakeholders. For example, DPAs can avoid disqualifications in jurisdictions that prohibit corporations and their affiliates from participating in public procurement processes if they have been convicted of certain types of offences.

Canada's Proposed DPA Regime

Focusing on the obligations of, rather than the benefit to, a corporation, the government is describing the proposed new prosecutorial tool as a "Remediation Agreement Regime"; Bill C-74, which includes legislative amendments to implement the regime, refers to "remediation agreements." Assuming Parliament passes the legislation, the Remediation Agreement Regime will come into effect 90 days after proclamation. Given that the government concurrently announced that it will be releasing enhancements to its Integrity Regime (under which corporations convicted of certain offences may be debarred from government contracts) on November 15, 2018, which will not come into effect until January 1, 2019, it is not clear whether the government intends to bring the Remediation Agreement Regime into effect before that date.

Key elements of the Remediation Agreement Regime as set out in detail in Bill C-74 include the following:

- Prosecutors will have the discretion to enter into negotiations for a remediation agreement if the statutory criteria are satisfied, but they will not be obliged to offer remediation agreements.
- Remediation agreements will be available only for specified offences in the *Criminal Code* and the *Corruption of Foreign Public Officials Act* (CFPOA) generally relating to fraud and government bribery. Notably, remediation agreements would not be available for *Competition Act* offences, even though certain of these offences can result in debarment under the Integrity Regime. However, the federal Cabinet will be able to amend the list of specified offences eligible for remediation agreements.

- Remediation agreements must include a statement of facts, an admission of responsibility by the corporation, a continuing commitment to cooperate and provide information to assist in identifying and prosecuting others involved in the relevant conduct, a financial penalty, forfeiture or other dealing with property obtained from the relevant conduct and, where appropriate, reparations. For CFPOA offences, remediation to victims outside Canada may be required.
- Other than the statement of facts and admission in the remediation agreement, no admission by the corporation is admissible in evidence against the corporation in any related civil or criminal proceedings.
- Remediation agreements may provide for the appointment of an independent monitor at the corporation's expense and require the corporation to establish or enhance compliance policies. The corporation may also be required to pay a portion of the prosecutor's costs of administering the remediation agreement.
- For so long as the remediation agreement is in effect, the relevant charges against the corporation will be stayed. If the corporation fully complies with the remediation agreement, upon completion of the agreement, the charges will be dropped and no other proceedings may be commenced against the corporation for the same offence. However, breach of a remediation agreement could result in its termination and a recommencement of the charges against the corporation.
- Remediation agreements must be approved by a court before becoming effective. The court must approve the remediation agreement if it finds the agreement is in the public interest and its terms are fair, reasonable and proportionate to the gravity of the offence.
- Unless otherwise ordered by the court, victims of an offence will receive notice of (i) negotiations regarding a remediation agreement and (ii) any remediation agreement for which court approval will be sought.

The legislation contemplates that the Minister of Justice will propose regulations setting out the form for a remediation agreement and addressing verification of compliance.

Potential Issues with the Remediation Agreement Regime

While a DPA regime is a welcome addition to the tools available to Canadian prosecutors, Bill C-74 raises a number of issues that may affect the practical utility and use of the Remediation Agreement Regime.

- Bill C-74 indicates that in order to negotiate a remediation agreement, a corporation must provide all the information requested by the prosecutor. Bill C-74 does not make express exemption for privileged information, such as solicitor-client communications. If prosecutors seek disclosure of privileged information, corporations may face numerous practical difficulties and hard choices in conducting internal investigations and electing whether to pursue a remediation agreement.
- Corporations would need to carefully consider the prospect of advising victims of the fact that a corporation intends to negotiate a remediation agreement, particularly having regard to potential exposure to damage claims related to the alleged offence. In this connection, a corporation can be liable for conduct by its officers or, in certain circumstances, its representatives, including employees, partners and contractors.
- Bill C-74 would require a court to modify a remediation agreement on application by the prosecutor if the agreement would continue to meet the statutory criteria. The absence of an express requirement that the corporation consent to any amendments to a remediation agreement creates uncertainty about what additional obligations or terms could be imposed on the corporation.
- Bill C-74 would also enable the prosecutor to obtain an order to terminate a remediation agreement if the prosecutor can demonstrate to the court that the corporation has breached a term of the agreement. The bill does not give the court discretion on such an application and does not expressly provide that only a material breach may warrant termination or require an overall assessment that termination must be in the public interest and be fair and reasonable (which the court must determine before ordering a variation to a remediation agreement).

- Bill C-74 suggests that the prosecutor could require that a remediation agreement stipulate that the corporation cooperate with foreign investigations or proceedings. On its face, such a requirement could impose very open-ended obligations and effectively give foreign authorities the right to determine the scope of the corporation's obligations under the remediation agreement. Such an obligation may be particularly problematic in the context of some jurisdictions that lack adequate legal protections for a cooperating organization and its employees.
- Currently Bill C-74 provides that no proceedings may be initiated against the organization "for the *same offence*" while the remediation agreement is in force. Similarly, it provides that on successful completion of a remediation agreement, no other proceedings may be commenced against the corporation for the same offence. In each case, it would provide greater comfort if no other proceedings could be commenced against the corporation for the *same conduct*. Often the same conduct could be subject to charges under different provisions of the *Criminal Code* or the *Competition Act*, for example. Leaving open the possibility of other charges under different statutory provisions for the same conduct could be a significant disincentive to entering into a remediation agreement.

The omission of *Competition Act* offences from the remediation agreement regime can be a significant consideration for corporations accused of offences such as conspiracy, bid rigging or misleading advertising under the *Competition Act*. Each of these offences is automatically disqualifying under the federal government's current Integrity Regime. The Canadian Competition Bureau has adopted immunity and leniency policies that, in certain circumstances, provide immunity for corporations that are first to report an antitrust offence to the Bureau and more lenient treatment for corporations that subsequently agree to plead guilty and cooperate with the Bureau. However, without the option of a remediation agreement, subsequent leniency applicants may face debarment under the Integrity Policy even if they agree to remediation and other measures under the Bureau's leniency policy. Nevertheless, it is possible that this disincentive could be addressed in the revised Integrity Policy to be released in November. (The government has stated generally that it plans to introduce greater flexibility and consideration of proportionality in its debarment decisions.)

On the other hand, the government has indicated that it intends to expand the list of offences that can trigger debarment to include, among other things, certain violations of the *Canada Labour Code* or being named to the Environmental Offenders Registry as a result of a conviction under specified federal environmental laws. It remains to be seen whether these offences will be added as eligible offences for the Remediation Agreement Regime to provide incentives for corporations to self-disclose such offences and make remediation.

Ultimately, the utility and effectiveness of the Canadian Remediation Agreement Regime will depend on the final version of the implementing legislation, the terms of remediation agreements and how they are used by prosecutors and interpreted by the courts.

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