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Québec Court Tackles Novel Issues During Approval of the Second Remediation Agreement (a.k.a. Deferred Prosecution Agreement) Under the Canadian *Criminal Code*

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The Superior Court of Québec recently published its reasons[1] approving Canada's second remediation agreement under the *Criminal Code*, Canada's version of a deferred prosecution agreement (DPA). In his reasons, Justice Marc David expanded on the principles applicable to Canada's remediation agreement regime and adjudicated novel questions, including victims' standing to intervene in the proceedings and approval of agreements that neither identify nor compensate victims.

The remediation agreement resolved allegations that Ultra Electronics Forensic Technology Inc. (UEFTI) paid bribes to foreign government officials and falsified records to cover up those bribes in the course of its commercial relationship with the Philippine National Police (PNP). UEFTI owns an advanced ballistics recognition system used by law enforcement agencies to investigate crimes involving the use of firearms. Between 2006 and 2018, sales of UEFTI to the PNP amounted to C$17 million. Local intermediaries received C$4.4 million in commissions from the contract revenue amount.

Notably, the parties were unable to distinguish legitimate expenses from sums destined for bribes. The remediation agreement provided for a total payment by UEFTI of C$10 million in the form of forfeitures, penalties, a victim surcharge and reimbursement of expenses incurred by the Public Prosecution Service of Canada (PPSC) at the implementation stage of the agreement. Although the remediation agreement did not provide for victim reparations, the court held that this was reasonable and justified in the circumstances.

Key Takeaways

Key takeaways from the Court's decision include:

- Parties to a remediation agreement should expect that the approval hearing will be public. If the agreement is not approved, it will remain confidential and only the order and reasons for the order will be published. If the agreement is approved, it will become public subject to any confidentiality measures imposed. These measures may be necessary, for example, to protect the privacy or safety concerns of innocent third parties or victims, or the fair trial rights of other accused individuals.
- If the agreement meets the public interest and proportionality criteria, the court will apply a high measure of deference to its specific terms. The court's role in the approval process remains significant, however, and parties should be prepared to respond to any concerns expressed by the court, including by amending the remediation agreement or submitting an expanded record.
- If the remediation agreement does not propose reparations to a victim, after the parties have made reasonable efforts to identify any victims, the prosecutor must state the reasons why reparations are not appropriate. The court will then consider the validity of these reasons in deciding whether an agreement should be approved. As is the case in U.K. judgments regarding DPAs, the court may approve an agreement without reparations to victims where it is impossible to identify victims or to quantify bribes actually paid.
- Although victims are free to pursue their claims for relief in the civil courts, they will not be granted standing in remediation agreement proceedings. The approval process is designed to be an oversight review of the terms of the agreement, not a full-scale trial.

- An organization's collaboration with Canadian authorities will be viewed positively by the court during its analysis of the proposed agreement. Best practices in this regard may include the implementation of an assistance protocol to preserve the integrity of evidence, facilitate witness interviews and provide access to any internal investigations, or consenting to warrants to seize electronic data and resolution of potential privilege issues outside of court.

A Primer on Remediation Agreements

Terms, Effect and Purpose of a Remediation Agreement

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

A remediation agreement aims not only to sanction criminal conduct and deter wrongdoing but also to create an incentive for corporations to come forward and disclose wrongdoing. Given that investigations of corporate crimes often require significant time and resources, remediation agreements provide an alternative means to address such conduct in an efficient and timely manner, and encourage remediation and compliance. Remediation agreements may also help mitigate unintended consequences for innocent parties, such as blameless employees, customers, suppliers, investors and other stakeholders. For example, these agreements can avoid disqualification in jurisdictions that prohibit corporations and their affiliates from participating in public procurement processes if they have been convicted of certain types of offences, as with Canada's first remediation agreement involving SNC-Lavalin. In UEFTI's case, the court held that it was in the public interest that UEFTI's product remain available to law enforcement agencies throughout the world.

The Adoption of Canada's Remediation Agreement Regime

In September 2018, new Part XXII.1 of the *Criminal Code* came into force, allowing the prosecution to enter into a remediation agreement with an organization. A remediation agreement can be entered into only for those offences that are listed in the schedule of Part XXII.1, which include fraud and bribery of foreign officials. A remediation agreement is not available for *Competition Act* or *Income Tax Act* offences, for example.

The decision to enter into a remediation agreement is discretionary. The prosecution may enter into negotiations for a remediation agreement if it is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances.

A remediation agreement is subject to the approval of both the Attorney General and the court.

For the purposes of determining whether negotiating an agreement is in the public interest and appropriate in the circumstances, a prosecutor must consider:

- the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- the nature and gravity of the act or omission and its impact on any victim;
- the degree of involvement of the organization's senior officers in the act or omission;
- whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;

- whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- whether the organization – or any of its representatives – was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
- whether the organization – or any of its representatives – is alleged to have committed any other offences, including those not listed in the schedule to Part XXII.1; and
- any other factor that the prosecutor considers relevant.

If the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, which addresses bribery of a foreign public official and accounting practices relating to such bribery, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

In these circumstances, the court suggested that the prosecutor might consider the fact that corruption of foreign public officials is a complex crime, covert by its very nature, and that bribery schemes often involve a series of offshore transactions, multiple intermediaries and complex corporate structures, making them difficult to detect. The Canadian remediation agreement regime places particular emphasis on victims' involvement in the process:

- A victim surcharge of 30% of the penalty is payable is some circumstances.
- Participation in a remediation agreement process is conditional on the organization making its best efforts to identify potential victims. The prosecutor will take reasonable steps to inform the victims.
- The concept of "victim" is broadly interpreted and can include people outside the country.
- Accordingly, an organization contemplating a remediation agreement should develop an action plan to locate or identify potential victims.

Importantly, if the parties put forward an agreement that does not propose reparations to a victim, the prosecutor must state the reasons why reparations are not appropriate. The parties must have made reasonable efforts to identify any potential victims. A court will then consider the validity of these reasons in deciding whether an agreement should be approved.

Canada's Second Remediation Agreement, and Novel Procedural Rulings

Canada's first remediation agreement between SNC-Lavalin and Québec's *Directeur des poursuites criminelles pénales*, the provincial prosecutor, was announced on May 11, 2022. The Superior Court approved the agreement on the same day, followed by reasons dated May 31, 2022 providing an extensive overview of the principles applicable to remediation agreements. For a more detailed discussion of the remediation agreement with SNC-Lavalin, see our 2022 bulletin.

On October 4, 2022, the PPSC filed an application with the Superior Court for an order approving Canada's second remediation agreement. The application was the result of nine months of negotiations between the PPSC and UEFTI to resolve charges against UEFTI for the payment of bribes to government officials and the falsification of records to cover up those bribes in respect of its commercial relationship with the PNP. These charges were laid under Canada's *Corruption of Foreign Public Officials Act and Criminal Code*.

The PPSC's application resulted in two unique procedural issues—a motion by the parties to proceed in camera at the merits stage of the hearing and an application by Concept Dynamics Enterprise (CDE) to intervene in the proceedings to be recognized as a victim and to be compensated for losses suffered as a result of UEFTI's actions. The question of standing before the court in the context of remediation agreement proceedings was a novel and important question to be determined by the court.

Canada's remediation agreement regime involves three distinct stages, as set out in Part XXII.1 of Canada's *Criminal Code*: (i) negotiation; (ii) approval; and (iii) implementation. The negotiation stage involves only the prosecutor and the organization and is carried out in private. The parties' motion pertained to the approval stage, which involves the parties and the court. The parties reasoned that this stage should only become public if the agreement is approved to avoid a chilling effect on the decision to embark on the process.

The court dismissed the parties' motion to hold the approval hearing *in camera* in a preliminary judgment dated November 16, 2022.[2] In the SNC-Lavalin matter, the parties were allowed to follow a two-step approval process, including confidential hearings in camera to ready the public presentation of the approval hearing, followed by a public hearing. This is because the court had held that this process was appropriate in the particular circumstances of the SNC-Lavalin case, even though Canada's *Criminal Code* is silent on the issue, and U.K. legislation specifically provides for such a process. However, the process in the SNC-Lavalin matter differed from U.K. law in that the court reserved its consideration of the merits for the public hearing.

In the UEFTI case, the parties went a step further by requesting that the approval hearing proceed in camera and remain confidential if the agreement was not approved. In the course of rejecting this argument, the court cited Canada's fundamental open court principle, annunciated by the Supreme Court in *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*.[3] Exceptions to the rule exist but were not applicable in UEFTI's case, including for example the necessity to prevent injury to international relations, national defence or national security.

The court noted that if the agreement is not approved, the organization continues to benefit from the publication ban over its contents. In such a case, only the order and the reasons for the order would be published, which would address any concerns regarding potential chilling effects.

The court also held that the provisions of the Criminal Code require a public hearing. In particular, the public interest concerns of Part XXII.1 of the *Criminal Code* must be publicly debated and cannot be assessed out of the public's view. Although the applicable U.K. legislation contains provisions that specifically allow for in camera proceedings at two different stages, the court noted that Canada's legislation does not. For all these reasons, the court dismissed the parties' motion.

On February 28, 2023, the court released its second judgment approving a remediation agreement in Canada. As part of this judgment, it elaborated on its reasons for dismissing CDE's application to intervene. CDE argued that, rather than being a participant in the scheme (as alleged in the parties' Agreed Statement of Facts), it had been coerced into disbursing bribes by UEFTI. It sought compensation and an apology from the prosecutor, or alternatively the rejection of the remediation agreement.

In dismissing CDE's application, the court held that the remediation agreement framework does not allow for victims to participate in the process. The court's role is to accept the facts as provided by the prosecutor and the organization and conduct an oversight review of the terms of the agreement, not to assess the probative weight of contradictory evidence in a full-scale trial. The CDE was not precluded from bringing a claim in the civil court system.

Although the judgment is dated February 28, 2023, it was not released until May 2023, after the parties had a chance to make representations regarding confidentiality measures. In order to maintain the fair trial rights of four accused individuals awaiting related trials by judge and jury, extracts from the Agreed Statement of Facts will remain confidential until the juries are sequestered or until final resolution of the files.[4]

The Court's Role in Approving a Proposed Remediation Agreement

Under the *Criminal Code*, the court must approve the proposed remediation agreement if it is satisfied that

- the organization is charged with an offence to which the agreement applies;
- the agreement is in the public interest; and
- the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

In the second remediation agreement judgment in Canada, the court agreed with its earlier reasons that it must follow a deferential approach. It also confirmed that the principles set forth by the Supreme Court of Canada in *Anthony-Cook* and *Nahanee*,[5] in the context of joint submissions on sentence following a guilty plea, apply to the remediation agreement regime.

Insofar as a remediation agreement meets the public interest and proportionality criteria, the court discussed several reasons why it should show deference to an agreement's specific terms:

- The terms result from resolution discussions between the parties, which can be lengthy and arduous.
- Deference is consistent with achieving the purpose of encouraging the voluntary disclosure of wrongdoing.
- Deference is appropriate considering the court's limited role to independently ascertain facts.
- There are limited options available to the court other than approving or rejecting an agreement, as opposed to the sentencing context where it can impose terms different from those proposed by the parties.
- Remediation agreements carry many advantages in the certainties they provide, including, among others, the compensation of victims, rehabilitation of organizations, payment of penalties to the government and avoidance of lengthy litigation.

Finally, the court noted that deference to the agreement should be measured against the extent of the collaboration offered by the organization, which would further encourage self-disclosure and extensive collaboration by organizations.

Despite this, the court reiterated that its role during the approval stage is important and significant. It holds the prosecutor and the organization accountable for the terms of the agreement. Accordingly, parties should be attuned to any concerns expressed by the court and adequately respond to those concerns, including by potentially amending the remediation agreement or submitting an expanded record.

UEFTI's Monetary Undertakings

Between 2006 and 2018, sales by UEFTI to the PNP amounted to C$17 million. These were largely secured through local intermediaries, who received C$4.4 million in commissions. This amount included both legitimate business expenses and sums destined for bribes, and it was not possible for the parties to isolate the legitimate expenses incurred nor to determine the net profits generated by the procurement contracts with the PNP. As a result, the amount disbursed as bribes was fixed at C$4.4 million to ensure that UEFTI did not benefit from deficient accounting practices.

The remediation agreement provided for a total payment of C$10 million, approximately 60% of the value of gross sales in the Philippines, broken down as follows:

- The forfeiture of C$3.3 million, which corresponded to 75% of the C$4.4 million of disbursed commissions, recognizing that a portion of the commissions was for legitimate services rendered.
- A penalty of C$6.6 million, which corresponded to more than 30% of UEFTI's sales to PNP, recognizing that those sales involved authentic and legitimate technology that served the purpose of investigating gun-related crime. The court viewed this as an amount that met the objectives of the remediation agreement regime, and was substantially more than the commissions paid to local intermediaries and the ordinary cost of doing business.
- A victim surcharge of C$660,000, which corresponded to 10% of the suggested penalty. Although the *Criminal Code* sets the victim surcharge at 30% of the penalty imposed (or any other amount the prosecutor deems appropriate in the circumstances), victim surcharges are only applicable to *Criminal Code* offences. Given that two of UEFTI's three charges were brought under the *Corruption of Foreign Public Officials Act*, the PPSC deemed it appropriate to revise this amount accordingly.

The proposed remediation agreement was unique in that it did not identify or compensate any victims, despite the fact that a stated purpose of the regime is to provide reparations for harm done to victims or the community. Although the court confirmed that the treatment of victims is a central component of the remediation agreement framework, it nonetheless acknowledged that circumstances may exist where reparations are not appropriate. The parties must make reasonable efforts to identify any victims. Thereafter, if the proposed agreement does not provide for reparations to a victim, the prosecutor is required to state the reasons why reparations are not appropriate. The court will then consider the validity of these reasons in deciding whether an agreement should be approved.

In the UEFTI matter, the parties stated that the victims were not identifiable due to, among other reasons, the lack of evidence as to what amounts were disbursed as bribes or the identity of recipients of bribes, the complex structure of the entities under the Philippines Government potentially impacted by the scheme and the impracticability of identifying a qualified competitor of UEFTI who may have suffered economic loss. The court held that these reasons appeared reasonable in the circumstances of UEFTI's case. In accordance with the principles laid out in *Anthony-Cook* and *Nahanee*, they were found to be deserving of a measure of deference by the court.

Additionally, the court cited a number of U.K. judgments to support the appropriateness of excluding reparations to victims. These judgments approved DPAs in the transnational corruption context where: (i) it was impossible to identify entities as victims based on a number of factors; or (ii) it was impossible to quantify the bribes paid and loss arising from the criminal conduct. The court held that these considerations were relevant and applicable to its analysis of the proposed agreement.

Finally, the court noted that the proposed agreement did not preclude aggrieved parties from seeking compensation in the Philippines.

UEFTI's Compliance Undertakings

The court was also satisfied that the proposed remediation agreement would ensure that UEFTI will no longer commit crime in carrying out its commercial activities, whether domestically or abroad. Key elements of UEFTI's compliance undertakings include:

- the appointment of an external auditor for a period of three to four years to conduct testing and report to the PPSC on the operational effectiveness of UEFTI's Anti-Bribery and Corruption Program;
- full cooperation with the auditor and the PPSC throughout the compliance audit period;
- payment of the costs of the compliance program;
- reporting to the PPSC, in a timely fashion, on the implementation of each term of the agreement; and
- reimbursement to the PPSC of the costs of forensic accounting assistance incurred for the implementation of the agreement.

The court also noted that UEFTI had begun to reform its delinquent corporate culture even before the RCMP's investigation in this matter, as well as UEFTI's exemplary collaboration with the RCMP once it became involved. This included the implementation of an assistance protocol that allowed the police to secure and preserve the integrity of key evidence, to facilitate witness interviews and to access the work product of UEFTI's internal investigation. UEFTI also consented to the execution of warrants to seize electronic data and resolved potential privilege issues out of court, saving the authorities both time and money. These factors were viewed favourably by the court in its analysis of whether to approve the proposed agreement.

What's Next?

The agreement provides that various obligations must be fulfilled within the prescribed timeframes and within no longer than four years. The prosecution can apply to the court for a declaration of completion at any time before expiry of the agreement if it deems that UEFTI has met all its terms. If the court is satisfied that the terms of the agreement have been complied with, the criminal charges will be deemed never to have been commenced and no further proceedings may be taken in respect of the relevant offences.

Conclusion

In the second judgment to apply Canada's remediation agreement regime, the Superior Court of Québec provides further clarity to prosecutors and organizations considering self-disclosing potentially criminal conduct. While there remains uncertainty regarding the circumstances in which the federal prosecution will agree to engage in negotiations for a remediation agreement, there is hope that this recent momentum will allow other cases to come forward.

[1] *R v Ultra Electronics Forensic Technology Inc.*, QCCS #500-36-010389-222, February 28, 2023 and May 16, 2023.

[2] 2022 QCCS 4401.

[3] [1996] 3 SCR 480, paras. 20-22.

[4] *R v Ultra Electronics Forensic Technology Inc.*, QCCS #500-36-010389-222, February 28, 2023 and May 16, 2023.

[5] *R v Anthony-Cook*, 2016 SCC 43, paras. 5 and 32; and *R v Nahanee*, 2022 SCC 37, para. 25.

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