

**DEFERRED PROSECUTION AGREEMENTS NOW PART OF CANADA'S
ANTI-CORRUPTION LANDSCAPE**

By Denis Chamberland

The global battle against corruption began to escalate in the mid-2000s in direct proportion to the rise of the emerging economies. With the United States' dramatically scaling enforcement of its own *Foreign Corrupt Practices Act*, the stage was set for what has become a global crusade against corruption. Regulatory authorities and enforcement agencies all over the world are now aggressively pursuing offenders, whether they be corporations, partnerships or any other form of business organization.

Canada is no exception. As of last September, Canada has adopted a new tool to more effectively regulate wrongdoing in a way that minimizes the harm suffered by the corporate offender while accessing and disciplining the individual bad apples. Deferred Prosecution Agreements (DPAs) — known as 'Remediation Agreements' in Canada — are now available under the *Criminal Code* and the federal *Corruption of Foreign Public Officials Act* (CFPOA).

DPAs have been available and used effectively in the United States for at least 15 years and are becoming increasingly common internationally in such places as France, the United Kingdom, Argentina and Singapore.

If wrongdoing is found by the RCMP under the CFPOA, criminal charges are typically laid against the offender. But if the newly-installed remediation process is successful these will be stayed, which means that a criminal conviction will not be registered against the company. This is a significant, as it will almost certainly contribute handsomely to preserving the company's goodwill in the market, shareholder value, individual reputations, and more. The potential benefits of Remediation Agreements are prized enough that pressure was brought to bear on the federal government by the corporate sector to legislate this new regulatory tool.

Importantly, Remediation Agreements are not entered into as of right. A company that has been charged criminally must show itself a good candidate for a Remediation Agreement. Among other things, it must demonstrate it is prepared to genuinely collaborate with the RCMP as investigators carry on their work. Collaboration may include turning over documents, facilitating search warrants, or simply being available to answer questions. The obligation to collaborate runs deep. Individuals at all levels within the company and across company offices — worldwide, if applicable — must be available to assist in the investigation.

Remediation Agreements are also subject to judicial approval, which is a public event, unless the court determines that partial or complete non-publication is necessary for the proper administration of justice.



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How Remediation Agreements Work

Remediation Agreements typically trigger the payment of penalties, restitution, the obligation to implement governance compliance measures, and other terms and conditions. A corporate monitor may also be appointed for a period of time to educate and to validate that the company's new start is staying on course.

In Canada, Remediation Agreements are not available for all offenses. The new regime only applies to offences listed in a schedule to the *Criminal Code*, which include bribery of public officials (domestic and foreign), fraud, insider trading, private bribery, money-laundering and other offenses. Offenses such as price fixing and bid rigging are regulated by the federal *Competition Act* and are not open to Remediation Agreements.

Even where an accused is eager to enter into a Remediation Agreement, under the CFPOA it is the RCMP that formally initiates the negotiations through a notice that formally summarizes the offense. The agreement sets out several mandatory terms, such as an admission of responsibility, and several optional terms, such as appointment of an independent monitor for example, if that is considered desirable.

Not all Remediation Agreements run their full course. The negotiations sometimes become difficult and the arrangement is terminated, but not the prosecution, which continues.

Benefits of Remediation Agreements

There are many reasons why companies like Remediation Agreements. As noted above, rather than be charged and take the consequences that a criminal finding of guilt inevitably triggers, businesses can now settle charges under the CFPOA in a way that minimizes such consequences to the business. In return, the business will need to play its part and help the RCMP bring to account those within the business who caused the mayhem in the first place and who could face jail time for up to 14 years.

One particularly noteworthy consequence of a criminal conviction is what is widely referred to as 'debarment', where a business is disqualified from bidding on public contracts for a fixed period of time. For Canadian businesses that trade or sell to foreign governments, the repercussions can be felt domestically. For example, many municipalities have passed so-called 'vendor debarment' or 'vendor disqualification' policies. These are typically triggered by incidents of serious non-performance and by integrity offenses, including running afoul of the CFPOA.

Along the same lines, at the Canadian national level there is the federal government's supplier suspension and debarment regime, which prescribes (at the time of writing) a ten-year suspension if convicted of a listed offense in Canada or abroad. As can be seen, successfully negotiating a Remediation Agreement can, in certain circumstances, make the difference in whether a company exits a market altogether or stays put and thrives.

By the same token, Remediation Agreements can be extremely helpful to prosecutors. They can provide a means to encourage cooperation and assist RCMP staff conduct their investigations, facilitate admissions of culpability and the payment of penalties and restitution. At the same time, the goals of judicial supervision, transparency and accountability are achieved.

Voluntary Disclosure

Business that want to be good citizens can also disclose their transgressions voluntarily. It is more likely, but not guaranteed, that where a company self-reports wrongful conduct under the CFPOA that the RCMP will look more favourably on entering into a Remediation Agreement. In such circumstances, the company will be required to enter into a Protocol Agreement, which is signed by both the company and the RCMP. Self-reporting may also encourage leniency at the sentencing stage.

At this early stage, there is no finding of criminality and therefore no accused. Here the company's leadership has become aware of events that it suspects may be tainted under the CFPOA and considers it good governance to shed light on the matter. Typically with the help of outside counsel, the company will conduct its own internal investigation and conclude (if it does) that wrongdoing probably occurred. There is no pre-determined threshold or legal test applicable at this stage. Voluntary disclosure turns on many considerations, including the comfort level of members of the Board of Directors, and key management personnel, relying on the specific facts at hand and the internal legal findings.

The Protocol sets the parameters and conditions of the investigation that the RCMP proposes to launch. Because the company initiated the investigatory process and presumably is not looking to keep secrets, there is little in the Protocol to negotiate. The company may even terminate the Protocol at any time.

Except that doing so is unlikely to terminate the investigation. If the RCMP concludes or is about to conclude that wrongdoing took place under the CFPOA, the relationship between the parties will simply evolve into a more conventional criminal investigation. One that is adversarial. Withdrawing from a Protocol arrangement will of course not help a company on its march towards a Remediation Agreement.

Overall, Remediation Agreements are a welcomed addition to the regulatory arsenal, but it's too early to know how they will evolve. It is to be hoped that when they are used they will achieve the right balance between the twin goals of preserving corporate assets and bringing to justice those whose conduct was found reprehensible by the standards of the CFPOA.

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