Cassels

Deferred No More: Deferred Prosecution Agreements Finally on Their Way to Canada

Kate Byers, John M. Picone

May 2, 2018

Following a recently completed public consultation, the federal government is proposing to amend the *Criminal Code* to provide for deferred prosecution agreements, a highly useful tool to address offences committed by corporations and their directors and officers without necessitating a full criminal trial.

Key Takeaways

- **This long-awaited announcement follows a formal public consultation**. Numerous constituents, corporations, professionals and other entities, including Cassels Brock, participated in the consultation process and were largely supportive of a deferred prosecution agreement regime.
- **The new regime mirrors existing regimes in other jurisdictions**. In a sense, Canada is playing "catch up" when it comes to deferred prosecution agreements.
- **This development is seen by many commentators as necessary and desirable**. The announcement of the new regime is an important step towards a more flexible and responsive criminal justice regime for organizations accused of criminal misconduct.

Summary and Background

The Government of Canada has proposed legislation that will add deferred prosecution agreements to the Government's "toolkit" to address corporate wrongdoing. This long-awaited announcement follows a formal public consultation which offered Canadians the opportunity to participate in the discussion and provide their views regarding whether the Government had the right tools in place to address corporate wrongdoing. The consultation concluded in December 2017, and the Government announced the results of that consultation in February 2018.

The new regime, referred to as the "Remediation Agreement Regime," will formally permit "remediation agreements" to be reached between an accused organization and a prosecutor under the *Criminal Code*. The decision whether to proceed with such an agreement will be subject to prosecutorial discretion as well as court approval.

The regime's policy aim is to incentivize self-reporting and rectification among organizations, facilitate compensation to victims, protect the interests of innocent employees and shareholders, and encourage cooperation in the prosecution of corporate malfeasance.

The Remediation Agreement Regime mirrors existing regimes in jurisdictions such as the United Kingdom, Australia, and the United States (although the American regime does not include the requirement for court approval).

The Proposed Remediation Agreement Regime in Brief

Under the proposed regime, which is expected to become law, in order to be eligible for a remediation agreement, the accused must:

- be an organization other than a public body, a trade union, or a municipality;
- be accused of an economic crime offence, and not an offence which has caused death or serious bodily harm, injured national defence or national security, or which was committed on the direction of, or on behalf of, a criminal organization or terrorist group; and
- be considered an appropriate candidate by the prosecutor, who may consider factors such as whether the organization has previous convictions, sanctions or settlements for similar offences in Canada or elsewhere, and by the Attorney General, who must consent to the negotiation of the agreement.

In considering whether the agreement is in the public interest, the prosecutor must consider factors such as the circumstances in which the crime in question was brought to the attention of the authorities, the gravity of the act, whether the organization has taken action against the individual perpetrators or otherwise attempted to remedy the harm done, the extent of the cooperation of the organization, and whether it has been accused of other crimes.

The remediation agreement must comply with certain regulated mandatory content and will be subject to court approval. The court must be satisfied that the agreement is in the public interest and the terms of the agreement are fair, reasonable and proportionate. Any criminal prosecution for conduct that is the subject of the agreement will be stayed for the duration of the agreement. While a remediation agreement may be varied or terminated, such changes or variations are also subject to court approval.

If there is no breach during the term of the agreement, the prosecutor will apply to the court for an “order of successful completion” and the charges will be stayed, with no criminal conviction. However, if the organization commits a breach the terms of the remediation agreement, the charges may be revived, and the organization could face prosecution and possible conviction.

An organization entering a remediation agreement will have an obligation to fully cooperate and be transparent with the prosecutor. More specifically, it must:

- come to an agreed statement of facts with the prosecutor;
- accept responsibility for, and ease, their wrongdoing;

- pay a financial penalty;
- relinquish any benefit gained from the wrongdoing;
- put in place or enhance compliance measures; and
- make reparation to victims, including overseas victims, as appropriate.

Terms of each remediation agreement will vary with the circumstances, and may involve the appointment of an independent monitor.

The Upshot

The announcement of the proposed Remediation Agreement Regime is a long awaited step towards a more flexible and responsive criminal justice regime for organizations accused of criminal misconduct, and puts Canada on an equal playing field with jurisdictions around the world. The scope of the proposed Remediation Agreement Regime is largely consistent with the results and findings of the formal consultation process, and are generally seen as a welcome development by many.

The Remediation Agreement Regime is expected to come into force 90 days after the *Budget Implementation Act* receives Royal Assent.

Wendy Berman, John M. Picone, and Kate Byers of Cassels Brock & Blackwell LLP partnered with Lawrence Ritchie and Sonja Pavic of Osler, Hoskin & Harcourt LLP to make joint submissions in respect of the public consultation.
