TRANSPARENCY INTERNATIONAL CANADA

briefing note

Overview of Remediation Agreements in Canada

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ABOUT THIS BRIEFING

This briefing note was produced by volunteers in Transparency International Canada's (TI Canada) Legal Committee. The authors are Anthony Cole, Dr. Jennifer Quaid, Kenneth Jull, and Norm Keith. To learn more about TI Canada's Legal Committee, please visit our website at *transparencycanada.ca/standing-committees.*

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SUMMARY

By virtue of amendments introduced to the Criminal Code in 2018, prosecutors in Canada now have the ability to resolve economic crime cases against organizations through the use of a special type of negotiated agreement. Under the relevant Criminal Code provisions, these negotiated agreements are termed "remediation agreements", but they are also referred to by commentators more informally as "deferred prosecution Agreements" or "DPAs", reflecting the label used for equivalent regimes in other jurisdictions. DPA regimes are used extensively in some other jurisdictions, including in the US and the UK, often to resolve high profile cases of bribery involving foreign government officials.

Although remediation agreements have been available to prosecutors in Canada since the fall of 2018, to date no case has been resolved through the use of this new settlement mechanism. This document is intended to provide an overview of the main features of the remediation agreement regime, while identifying areas of continued uncertainty.

A. GENERAL OVERVIEW

1. WHAT IS A "REMEDIATION AGREEMENT"?

A remediation agreement (or RA) is a non-trial settlement mechanism, added to the Criminal Code in 2018, that allows prosecutors to resolve cases with a particular type of negotiated agreement rather than proceeding by a traditional prosecution. They are limited to cases involving organizations suspected of committing serious economic crimes, like fraud and corruption. The introduction of RAs brings Canada into the large and growing number of democracies that have some form of a deferred prosecution agreement (DPA) regime for corporate entities that have been charged with white collar crimes.

The Criminal Code prescribes the rules for RAs, and in particular requires prosecutors to consider specific criteria before they offer an RA to an organization as an alternative to a criminal prosecution. There is also a separate requirement that prosecutors must be of the opinion that it is appropriate and in the public interest to offer a RA to an organization, based on an assessment of the relevant circumstances. Though each case is evaluated on its individual merits, RAs are most likely to be considered where an organization is prepared to acknowledge its responsibility for serious economic crimes and the organization shows a clear willingness to take serious measures to make amends, to address the situation and to prevent future occurrences, as well as cooperate with authorities.

2. WHEN WERE REMEDIATION AGREEMENTS ADDED TO CANADIAN LAW?

Formally, RAs were added into a new section of the Criminal Code Part XXII.1 *Remediation Agreements*.[1] Part XXII.1 C.C. was enacted as part of the omnibus legislation to implement the 2018 federal budget (Bill C-74).[2] Bill C-74 received Royal Assent on June 21, 2018 and came into force on September 19, 2018.[3]

3. HAVE ANY REMEDIATION AGREEMENTS BEEN NEGOTIATED?

As of July 2020, no RA has been entered into in Canada. There are reports in the media that at least two may be under consideration,[4] although there has been no official confirmation or details provided.

4. IS A CANADIAN REMEDIATION AGREEMENT LIKE A DPA IN OTHER COUNTRIES?

The short answer is yes.

Like DPAs offered in other jurisdictions, Canadian RAs are intended as an alternative to public prosecution that allows for resolution of cases of corruption, fraud and other economic crimes in a way that balances the need for accountability with the often substantial reputational and economic consequences of a criminal trial and conviction on the organization, especially where these effects could negatively affect third parties uninvolved in the crime, like employees, pensioners, customers, local communities and shareholders.

Canada's RA regime is designed to fit within Canada's legal system. As a new enforcement tool designed to enhance organizational accountability, it is meant to complement existing Canadian criminal law as it applies to organizations.

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[1] Budget Implementation Act No. 1, Division 20, ss 403-409. For ease of reference, we refer to the relevant section numbers of Part XXII.1 of the Criminal Code, rather than those of the original Bill.
[2] Bill C–74, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, 42nd Parliament, 1st session, House of Commons, 2018 ("Budget Implementation Act No. 1").
[3] Budget Implementation Act No.1, supra note 23, s 409.
[4] According to The Globe & Mail at the present time there are at least two alleged cases of foreign corruption that may be candidates for resolution by way of Remediation Agreement in the Canadian judicial system. *https://www.theglobeandmail.com/politics/article-current-rcmp-investigations-of-alleged-foreign-corruption-could-lead/*

The design of the Canadian RA regime was based on, but is not identical to, the DPA regime adopted by the United Kingdom in 2014. As in the UK, RAs are negotiated within a prescribed legal framework and are ultimately subject to court approval.

Unlike the UK, however, which has a two-stage judicial approval process, one to approve the start of negotiations and one to approve the final agreement, in Canada the decision to initiate RA negotiations lies with prosecutors, who must make the decision as an exercise of their discretion. Court approval in Canada is only required to approve the final agreement.

5. WHAT ARE THE EXPECTED BENEFITS OF AN RA?

RAs are designed to provide a more flexible enforcement response to wrongdoing by organizations, by allowing appropriate corporate prosecutions to be resolved without a guilty plea. They emphasize accountability of the organization, rehabilitation and prevention of future harm, while also mitigating some of the collateral effects of criminal proceedings on those innocent third parties who have a stake in the continued viability of the organization, such as employees, pensioners, customers and local communities.

The basic rationale for this kind of compromise arrangement is that organizations will be more willing to voluntarily disclose to, or share information and evidence with, the police and prosecutors concerning their involvement in crimes like fraud and corruption. Fraud and corruption can be hard for law enforcement to detect, and even where suspicions exist, it can take years and typically requires considerable resources to investigate, with no guarantee of conviction. The RA regime also incentivizes organizations to remediate deficiencies in their organizational ethics programs and enhance their compliance infrastructure going forward to prevent the risk of reoccurrence. In return for such voluntary co-operation and remediation, the organization avoids the uncertainty, stigma and financial implications of being subject to a criminal prosecution, as well as other collateral consequences of a conviction for fraud or corruption such as being debarred from bidding on public contracts.

6. WHAT ABOUT THE INDIVIDUALS WHO ARE INVOLVED IN THE ALLEGED WRONGDOING? ARE RAS A "GET OUT OF JAIL FREE CARD" FOR THEM?

RAs are only available to organizations, as defined in the Criminal Code. Unlike in some other countries, like the US, individuals are not eligible for RAs in Canada.

In some ways, RAs may actually increase the chances of individual perpetrators being prosecuted and ultimately convicted, because the criteria for eligibility for an RA include consideration of *"whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing"*.[5] In addition, the contents of an RA must include:[6]

- *"an indication of the obligation for the organization to provide any other information that will assist in identifying any person involved in the act or omission, or any wrongdoing related to that act or omission, that the organization becomes aware of, or can obtain through reasonable efforts, after the agreement has been entered into"*; and
- *"an indication of the obligation for the organization to cooperate in any investigation, prosecution or other proceeding in Canada — or elsewhere if the prosecutor considers it appropriate — resulting from the act or omission, including by providing information or testimony"*.

RAs are intended to encourage organizations to hold employees accountable from an employment perspective, by requiring prosecutors to consider as part of their decision to offer an RA to an organization: *"whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission"*.[7]

[5] S. 715.32(2)(f) C.C.
[6] S. 715.34 CrC.
[7] S. 715.32(2)(d) CrC.

7. WHAT MATTERS DOES AN RA ADDRESS?

There are 10 mandatory elements that must be included in an RA agreement. Some of the key elements include (not exhaustively):

- a statement of the facts underlying the offence,
- including an undertaking by the organization not to publicly contradict those facts,
- an admission of responsibility for the acts that comprise the offence,
- the details of any financial penalties, including forfeiture of illegal gains, victim surcharge and other amounts,
- the expected ongoing and future cooperation of the organization with authorities,
- A provision that addresses whether victims were identified and whether any restitution will be paid and reporting obligations.

In addition to the 10 mandatory elements, there are also several optional elements that the prosecutor can add to a RA, such as compliance or corrective measures and the appointment of a monitor, where appropriate.

8. CAN AN RA BE USED TO SETTLE ANY AND ALL KINDS OF CRIMINAL CHARGES AGAINST AN ORGANIZATION?

No.

RAs are available only for the crimes specifically listed in Schedule 1.1 of Part XXII.1 C.C.[8] New offences can be added by order of Cabinet, on recommendation of the Minister of Justice.[9] Offences can be deleted, but the deletions apply only prospectively.[10]

[8] *https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html*
[9] S. 715.43(2) CrC.
[10] S. 715.43(3) CrC.

At present the list contains 32 offences of economic crimes of fraud, domestic and foreign corruption, bribery, and other related offences. The list also extends to offences more typically associated with organized crime, such as money laundering and possession of illegal property, even though criminal organizations are not eligible for RAs. Conspiracies and attempts to commit any of the offences are also included on the list as are being an accessory after the fact or counselling the commission of any of the offences in the list.

The list does not include offences under the *Competition Act*, such as price-fixing, market allocation or supply restriction agreements or bid-rigging. [11] The exclusion of competition offences was not officially explained at the time of enactment, but in competition law circles it is understood that the exclusion was deliberate so as not to undermine the Immunity and Leniency Program, a specially-tailored resolution mechanism long used by the Competition Bureau in cartel cases.[12]

Even if the offence is among those listed in Schedule 1.1, the organization may be ineligible for an RA if the prosecutor in charge of the case is of the opinion that the underlying facts of the offence involve bodily harm or death, injury to national defence or national security or conduct done by or for the benefit of a criminal organization. [13]

[11] *Competition Act*, RSC, c C-34, ss 45-47.
[12] This model, designed to encourage cartel members to break ranks and denounce their co-conspirators, begins with an informal approach to Competition Bureau officials and is then followed by a proffer of evidence that provides detailed information about the nature and duration of the conspiracy, the organization's involvement, the identities of co-conspirators. The first to make a proffer is eligible for immunity; the second and sometimes third offenders to come forward must plead guilty but receive a more lenient sentence. The Immunity and Leniency Program was last updated on March 15, 2019: Canada, Competition Bureau. *Immunity and Leniency Program Under the Competition Act*. (Ottawa: Competition Bureau, 15 March 2019) online: *https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html*
[13] S. 715.32(1)(b) CrC.

9. HOW IS A DECISION TO NEGOTIATE AN RA REACHED?

Under the Canadian regime, the decision to negotiate a RA lies with a "prosecutor", which could mean the line Crown prosecutor with carriage of the matter, the Director of Public Prosecutions or, in some circumstances, the Attorney General of Canada.

In essence, the decision-making process to proceed with a RA would likely develop in the following sequential steps:

STEP 1: A threshold determination is made by the prosecutor as to the eligibility of the organization for an RA (specifically, that it meets the definition of "organization" and has admitted to/is suspected of/charged with one of the offences in Schedule 1.1);

STEP 2: The prosecutor will undertake an evaluation of conditions for eligibility, on the basis of the specific facts of the case. The conditions that must be satisfied include:

a. there is a reasonable prospect of conviction;
b. the underlying facts of the offence do not involve bodily harm or death, national security issues or conduct done by or for the benefit of a criminal organization;
c. negotiating the RA is in the public interest and appropriate in the circumstances; and
d. the Attorney General has consented to the negotiation of the RA.

Of these four elements, it is the weighing of the public interest factors that are likely to be the most complex and potentially unpredictable element; S. 715.32 sets out nine specific public interest factors that must be considered. The law does not require an organization to satisfy all nine public interest factors to be eligible, and the weighing of the relevant factors by prosecutors is part of their normal prosecutorial discretion. The prosecutor's decision will be definitive and unappealable, unless there is proof of abuse of process. It should be noted that nowhere in the law is it stated that an organization is entitled to an RA even if they meet all nine public interest factors.

STEP 3: If the prosecutor decides to invite an organization to negotiate an RA, they will issue the organization a formal written invitation outlining the terms under which the negotiation must proceed. As with any settlement negotiation, information and discussions are confidential and may not be used in subsequent proceedings in the event the negotiations fail. That said, as a practical matter, the co-operation required to get to the point of being recognized as an appropriate candidate for an RA is likely to entail divulging a significant amount of information to the RCMP, which would not be subject to the explicit restriction on use in the event an RA invitation is not issued. In this sense, an organization may be taking a leap of faith in disclosing information and/or co-operating extensively with the RCMP's investigation, prior to a determination by the prosecutor as to whether to extend an invitation to negotiate an RA. This uncertainty is a risk factor that organizations will have to consider, and it may provide a disincentive to 'rolling the dice' by pursuing eligibility for an RA.

STEP 4: If an agreement is reached by negotiations, the prosecutor has the duty to present the agreement to the court for approval. There are three conditions for court approval:

1. That the organization is charged with an offence eligible for an RA;
2. That the agreement is in the public interest; and
3. The terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

The Canadian regime also requires the prosecutor to notify any identifiable victim of the fact that an RA may be concluded, or else advise the court why such notification was not appropriate in the circumstances. In deciding whether to approve the RA, the court must consider any victim impact statement that has been properly submitted, as well as whether reparations have been paid by the organization to a particular victim(s). Where applicable (which is not the case where the RA involves an offence under the *Corruption of Foreign Public Officials Act*), the court must also consider any victim surcharge included under the terms of the RA.

[14] *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FC 28, par 117, 140 and 180.par 180.

These requirements respecting victim impacts and restitution are a notable feature of the Canadian regime, and are more extensive than the victim provisions under DPA regimes in other jurisdictions; it remains to be seen how these provisions will be applied in practice by Canadian prosecutors and courts.

The Public Prosecution Service of Canada (PPSC) has added a chapter to its Deskbook for Federal Crown Prosecutors, which contains guidelines for Federal Prosecutors to follow when making decisions concerning RAs – see: *https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html*. However, the guidelines are focused primarily on the process and procedure to be followed, rather than on how the facts and circumstances should be weighted or evaluated in a given case. As such, the Deskbook chapter may be of limited value to organizations seeking to evaluate the risks in self-disclosing wrongdoing, or in providing a high degree of cooperation in connection with an existing investigation, in pursuit of a RA.

10. WHAT HAPPENS IF A COURT APPROVES AN RA?

If the court approves the RA, charges pending against the organization are then judicially stayed. In the event there is a breach of the agreement that cannot be remedied or otherwise addressed (for example through a modification of the terms of the agreement [15]), the prosecutor may recommence the proceedings against the organization.[16]

The RA regime does not provide for any other sanction in the event of breach of the agreement.

[15] S. 715.38 CrC.
[16] Ss. 715.39(2) CrC.

B. TRANSPARENCY AND PUBLICATION

11. ARE REMEDIATION AGREEMENTS PUBLIC DOCUMENTS? HOW CAN I GET A COPY OF ONE?

Under the RA regime, the basic principle is that all agreements, court orders and reasons for orders are to be published as soon as practicable.

The Criminal Code does provide for the possibility of not publishing the RA, the court order and the reasons for approving it, if a court considers it necessary for the administration of justice. Moreover, where a court orders non-publication, in whole or in part, its non-publication order and the reasons in support of it, must be made public. The non-publication order is also subject to review upon application to the court.

At the present time, there is no indication of how RAs will be published or made available to the media and the public, aside from obtaining a paper copy from the registry office of the court which approved the agreement.

12. IS INFORMATION ABOUT REMEDIATION AGREEMENTS PUBLISHED ONLINE?

At the present time, there is no central agency responsible for collecting and publishing RAs and the court orders approving them.

It is not clear if these agreements will be made public through existing open access on-line legal databases such CanLII.

13. HOW DO I FIND OUT IF A CASE IS BEING CONSIDERED FOR A REMEDIATION AGREEMENT?

At the present time, there is no mechanism by which enforcement authorities provide information about cases under investigation or cases being considered for RAs.

Historically, police services and prosecution services do not comment on on-going cases.

The Public Prosecution Service of Canada, which handles foreign corruption cases, has a formal policy not to comment on on-going cases.

C. MISCELLANEOUS ISSUES

14. ARE ORGANIZATIONS WHO HAVE HAD AN RA IN THE PAST INELIGIBLE FOR ANOTHER ONE?

Though the law does not explicitly bar an organization from seeking a second RA, in a media interview the current Director of Public Prosecutions, Kathleen Roussel has expressed the view that normally an organization would not benefit from a second RA (absent special circumstances).[17]

[17] *https://www.theglobeandmail.com/politics/article-politics-briefing-prosecutor-kathleen-roussel-on-her-reasoning-for-no/*

15. WHAT IS THE DIFFERENCE BETWEEN AN RA AND THE PLEA AGREEMENT REACHED WITH SNC LAVALIN IN DECEMBER 2019?

RAs are similar to a plea bargain, in so far as the prosecutor and the accused agree on the criminal sanctions to be imposed to settle the charges. However, there is one significant difference: in a RA, there is no formal plea of guilt; under the plea deal with SNC-Lavalin, an SNC-Lavalin Group entity (SNC-Lavalin Construction, Inc.) pleaded guilty to a charge of fraud.

The plea deal with SNC-Lavalin involved the payment of a fine amounting to $280 million. It is unclear whether the penalty would have been less if SNC-Lavalin had been considered eligible for an RA, but generally speaking, organizations might reasonably hope for a lower penalty under an RA than under a guilty plea, as eligibility for an RA entails the existence of significant mitigating factors and/or extensive co-operation.

The SNC Lavalin plea resolution and final sentencing decision of the court required the appointment of an independent monitor to observe and report to the court on SNC-Lavalin's corporate compliance and ethics programs over a period of three years. The appointment of corporate monitors is a potential, but not a mandatory, component of an RA.

16. WHERE MAY I FIND THE LEGAL RULES THAT APPLY TO RAS?

The RA regime was added to Canadian law as Part XXII.1 of the Criminal Code. Part XXII.1 sets out definitions, governing principles, the conditions to be met to set negotiations in motion, the steps to be followed in the negotiation process, the mandatory and optional content of an agreement, the court approval process, and enforcement of the agreement. There are also provisions governing subsequent use of information from the negotiations and from the agreement as well as rules for ensuring the agreement and court

decisions are made public as soon as practicable.

The RA regime also provides for the enactment of regulations (in s. 715.43 C.C.), both generally for the purposes of implementing the regime and to address the following specific matters:

- the form of RAs;
- the verification of compliance by an independent monitor, including the qualifications to be a monitor, the selection process, the form and content of conflict of interest notifications and reporting requirements.

At the current time no regulations have been enacted.

ABOUT TI CANADA

Transparency International Canada (TI Canada) is the Canadian chapter of Transparency International. Since its foundation in 1996, TI Canada has been at the forefront of the national anti-corruption agenda. In addition to advocating legal and policy reform on issues such as whistleblower protection, public procurement and corporate disclosure, we design practical tools for Canadian businesses and institutions looking to manage corruption risks, and serve as an anti-corruption resource for organizations across Canada.

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