

## Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada

By Justice Todd Archibald and Kenneth Jull<sup>1</sup>

We have to live without sympathy, don't we? We can't do that forever. One can't stay out of doors all the time. One needs to come in from the cold.<sup>1</sup>

Deferred Prosecution agreements have arrived in Canada under the form of “Remediation Agreements”.<sup>2</sup> The availability of Remediation Agreements will be a “game changer” in creating incentives for corporations to conduct internal investigations and to self-report. The incentive held out by the prospect of these agreements is the absence of a conviction against corporations for serious *Criminal Code* offences such as foreign corruption, bribery, fraud, and insider trading.

An important objective of remediation agreements is “to encourage voluntary disclosure of the wrongdoing”.<sup>3</sup> Organizations are encouraged to voluntarily come in from the zone of non-discovery: this is a zone where the government may never find out about serious criminal activity by corporate organizations in the absence of such disclosure. These are circumstances where the government ought to have sympathy for those organizations that “come in from the cold”.

We have previously written in support of bringing deferred prosecution agreements to Canada.<sup>4</sup> The new Canadian framework is built on a “factor based” model which leaves significant discretion to prosecutors and to our Courts who must ultimately approve the agreements. It is the thesis of this short commentary that the central organizing theme in the exercise of that discretion should be the concept of coming in from the cold. From the zone of non-discovery by government regulators, organizations should be encouraged to conduct robust internal investigations and then self-report the results to the authorities. This theme would be consistent with the United States extensive experience in this area and would best promote compliance in Canada.

A controversial question is whether or not a company that is caught by authorities (and does not therefore voluntarily disclose) ought to be able to qualify for a remediation agreement.

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<sup>1</sup> The Spy Who Came in from the Cold (1965), Quotes, <https://www.imdb.com/title/tt0059749/quotes>

<sup>2</sup> The legislative framework for deferred prosecution (remediation) agreements received Royal Assent on June 21, 2018.<sup>2</sup> <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-74/royal-assent>. The Act amends the *Criminal Code* by adding Part XXII.1, “Remediation Agreements”, which comes into force on September 21, 2018. (Section 409 states This Division comes into force on the 90th day after the day on which this Act receives royal assent.”

<sup>3</sup> Purpose section 715.31 (d).

<sup>4</sup> Archibald, Jull and Roach, *Regulatory and Corporation Liability: From Due Diligence to Risk Management* (Thomson Reuters).

This question arises in the high-profile case of SNC-Lavalin.<sup>5</sup> RCMP investigators executed a search warrant in April of 2012 at the Montreal headquarters of engineering firm SNC-Lavalin, as part of a probe into millions of dollars of mysterious payments.<sup>6</sup> SNC was subsequently charged with corruption charges by the RCMP.<sup>7</sup>

Neil Bruce, SNC-Lavalin's chief executive officer, has asserted that the company would be keen to strike a formal DPA settlement with the government to resolve the outstanding charges against it. Mr. Bruce views a DPA for SNC-Lavalin as a way of levelling the playing field with international rivals.<sup>8</sup> SNC has recently resolved a class action lawsuit brought against it by shareholders in relation to an alleged failure to disclose the corruption details to the market.<sup>9</sup>

We cannot comment on the specifics of SNC-Lavalin as it is presently before the Courts. We can, however, comment on the general principles raised by the possibility of an organization qualifying for a remediation agreement, when it has not voluntarily disclosed. To be blunt, if a corporation can get a deferred prosecution agreement *after* being caught, this may create its own risk dynamic. Other corporations who become aware of this result, and who then uncover future misconduct, may run a cost-benefit calculation to not self-report and hope that they will not be caught. If they are caught, they may reason that they can then come in and seek a deferred prosecution agreement on the basis of the other factors listed.

If the legislation is interpreted to allow for companies to come in *after* being caught (in the zone of discovery as contrasted to the zone of non-discovery), we argue in this comment that the “gold standard” of post discovery remediation should be the threshold requirement. If that organization’s post discovery remediation programme reaches a gold standard (beyond minimal statutory requirements and industry standards), a deferred prosecution agreement could be offered in those rare cases where that company has not come in from the cold.

### (i) *Remediation Agreements*

A new part of the *Criminal Code*, Part XXII.1 is titled “Remediation Agreements”. The Government of Canada made the decision to create this deferred prosecution programme following public consultations.<sup>10</sup> The deferred agreements are termed “Remediation Agreements” which are defined as “an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the

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<sup>5</sup> The timeline of events concerning allegations against SNC-Lavalin are set out at <https://www.680news.com/2015/02/19/timeline-key-dates-for-snc-lavalin/>

<sup>6</sup> <https://www.cbc.ca/news/canada/montreal/snc-lavalin-s-montreal-offices-raided-by-rcmp-1.1170982>

<sup>7</sup> <https://www.canadianlawyermag.com/legalfeeds/rcmp-lays-corruption-charges-against-snc-lavalin-6195/>

<sup>8</sup> <https://www.theglobeandmail.com/report-on-business/snc-lavalin-shares-rise-as-ottawa-moves-ahead-on-deferred-prosecutions/article38085435/>

<sup>9</sup> <https://www.thestar.com/business/2018/05/22/snc-lavalin-settles-shareholder-class-actions-in-ontario-and-quebec-for-110-million.html>

<sup>10</sup> Results of public consultations on expanding Canada's toolkit to address corporate wrongdoing, News Release From Public Services and Procurement Canada, February 22, 2018 [https://www.canada.ca/en/public-services-procurement/news/2018/02/results\\_of\\_publicconsultationsonexpandingcanadastoolkittoaddress.html](https://www.canada.ca/en/public-services-procurement/news/2018/02/results_of_publicconsultationsonexpandingcanadastoolkittoaddress.html)

organization complies with the terms of the agreement.”<sup>11</sup> The term “remediation agreements” can be traced to a roundtable on white collar crime hosted by the Institute for Research on Public Policy.<sup>12</sup>

*(ii) Purpose of remediation agreements*

The purpose of the remediation agreements is set out in the legislation. The purpose clause is an interesting amalgam of sentencing principles (such as denunciation), incentives to cooperate (encouraging voluntary disclosure) and economic principles (reduce the negative consequences for persons who did not engage in the wrongdoing). The Purpose clause is as follows:

**Purpose**

**715.31** The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:

- (a) to denounce an organization’s wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
- (b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
- (c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
- (d) to encourage voluntary disclosure of the wrongdoing;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

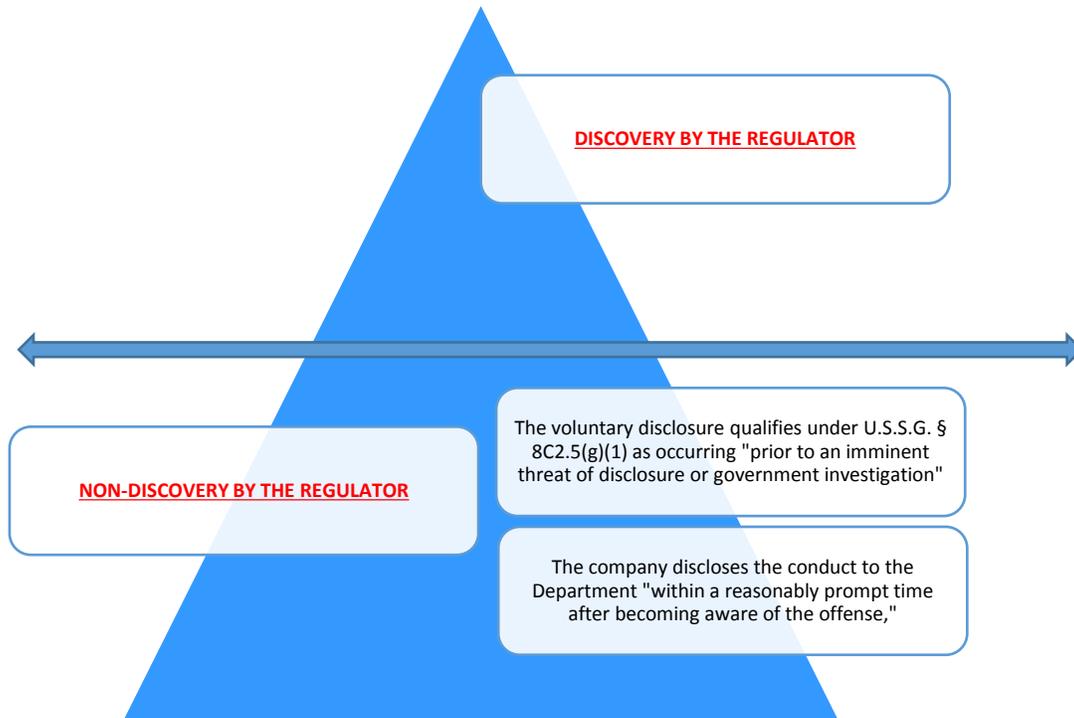
The purpose section will no doubt be the subject of judicial comment. In this comment, we will focus on factor (d) “to encourage voluntary disclosure of the wrongdoing”.

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<sup>11</sup> PART XXII.1 Remediation Agreements, Definitions 715.3(1).

<sup>12</sup> <http://irpp.org/wp-content/uploads/2016/03/roundtable-report-2016-03-10.pdf>. “Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement IRPP Round Table Report March 2016, As an alternative, it was suggested that a more appropriate term might be “Structured Remediation Agreement” to emphasize that a significant penalty has been imposed, reforms have been agreed to and a robust monitoring mechanism has been put in place. See page 12-13. Kenneth Jull was one of the participants in the Round Table.

The United States is in the forefront of the use of non-prosecution and deferred prosecution agreements. A central concept in the United States programme is voluntary reporting in a timely manner, as illustrated by the following diagram:



In the United States, Deputy Attorney General Rosenstein has described the deferred prosecution policy as centering on the concept of voluntary self-disclosure:

First, the FCPA Corporate Enforcement Policy states that when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.<sup>13</sup>

The policy, revised in November of 2017, defines voluntary self-disclosure in the following terms (reflected in the chart above):

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following

<sup>13</sup> Remarks at the 34th International Conference on the Foreign Corrupt Practices Act Wednesday, November 29, 2017. In May of 2018, Rosenstein announced that he has established a new Working Group on Corporate Enforcement and Accountability within the Justice Department, to make internal recommendations about white collar crime, corporate compliance, and related issues. See Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act New York, NY United States Wednesday, May 9, 2018.

items for a company to receive credit for voluntary self-disclosure of wrongdoing:

The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring “prior to an imminent threat of disclosure or government investigation”;

The company discloses the conduct to the Department “within a reasonably prompt time after becoming aware of the offense,” with the burden being on the company to demonstrate timeliness; and

The company discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.<sup>14</sup>

*(iii) Factors considered in the public interest*

The remedial agreement scheme structures the discretion to be exercised by the prosecutor. The legislation sets out factors to consider in the assessment of the public interest as follows:

**Factors to consider**

(2) For the purposes of paragraph (1)(c), the prosecutor must consider the following factors:

- (a) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- (b) the nature and gravity of the act or omission and its impact on any victim;
- (c) the degree of involvement of senior officers of the organization in the act or omission;
- (d) whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- (e) 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;
- (f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- (g) whether the organization – or any of its representatives – was convicted of an offence or sanctioned by a regulatory body, or whether it entered

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<sup>14</sup> 9-47.120 - FCPA Corporate Enforcement Policy.

into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;

- (h) whether the organization – or any of its representatives – is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
- (i) any other factor that the prosecutor considers relevant.

This commentary will focus on factor (a), “the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities”.

The zone of non-discovery is a central concept, in our view, with respect to the concept of deferred prosecutions. The zone of non-discovery is recognized in the purpose section that states that a remediation agreement should have an objective of “(d) to encourage voluntary disclosure of the wrongdoing.” A primary benefit to the government is when organizations voluntarily disclose in circumstances where the government may never find out about the misconduct, and they provide details of an internal investigation into those matters. The primary benefit for the organization is the absence of a criminal conviction and its implications.

It would appear that factor (a) (“the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities”) is not a condition precedent. This conclusion is derived from the placement of this consideration in the factors section as contrasted to the conditions section (section 715.32 (1)).

The listing of “the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities” as only one factor would appear to make a remedial agreement potentially available to an organization that discloses wrongdoing *after being discovered by the government*. An organization that is caught could potentially argue that it is not precluded from applying for a remediation agreement, as there is no condition precedent that such agreements are only available to those who report “prior to an imminent threat of disclosure or government investigation”.

We prefer the interpretation of this factor requiring that in general, a remediation agreement will only be available from the zone of non-discovery. Under this interpretation, the reference to “the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities” would refer to the length and breadth of the zone of non-discovery. In other words, there might be a difference between a company that self-reported in the first weeks after discovery compared to a company that waited several months before self-reporting, both from the zone of non-discovery. This follows the United States model where the company must disclose the conduct to the Department “within a reasonably prompt time after becoming aware of the offense.”

If the legislation is interpreted to allow for companies to come in after being caught (the zone of discovery as contrasted to the zone of non-discovery), a very useful parallel would be to the

treatment of post offence remediation in regulatory sentencing. In the regulatory context, the Ontario Court of Appeal has stated in the *Flex-N-Gate* decision<sup>15</sup> that post offence remediation that only complies with minimal requirements should not be treated as a mitigating factor on sentencing, as such compliance is required by law in any event. The possibility still exists that remediation levels that exceed the legal minimum might qualify as mitigating circumstances. For example, if the legal minimum requires a "bronze" standard, remediation that reaches a "gold" standard might qualify to have such efforts treated as mitigating a sentence as such steps exceed the statutory minimum requirements.<sup>16</sup>

Applying this test to deferred prosecutions, if an organization's post discovery remediation programme reaches a gold standard beyond minimal statutory requirements and industry standards, it might qualify for a deferred prosecution agreement in those rare cases and with strict conditions.

#### *(iv) Application for Court Approval*

Following the UK model, the remediation scheme requires Court approval. Section 715.37(6) states:

##### **Approval order**

- (6) The court must, by order, approve the agreement if it is satisfied that
- (a) the organization is charged with an offence to which the agreement applies;
  - (b) the agreement is in the public interest; and
  - (c) the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

It will be very interesting times ahead in the compliance field, as organizations come in from the cold seeking the approval of government regulators and our Courts for the consideration of deferred prosecutions.

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<sup>i</sup> Justice Todd Archibald of the Ontario Superior Court. Kenneth Jull, Counsel at Gardiner Roberts LLP; on interchange with the Competition Bureau Legal Services in the position of General Counsel until October 2018; the views in this article are the authors own and are not meant to represent the views of either the Superior Court, Gardiner Roberts or the Competition Bureau. This article is based on a July 2018 release of Archibald and Jull, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters).

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<sup>15</sup> *Ontario (Ministry of Labour) v. Flex-N-Gate Canada Co.* (2014), 2014 CarswellOnt 673, 119 O.R. (3d) 1, 315 O.A.C. 66 (Ont. C.A.).

<sup>16</sup> *Ibid.*, at paras. 29-30.