Remediation agreement guideline for Canadian prosecutors

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The Public Prosecution Service of Canada (PPSC) has issued a Guideline for deferred prosecution agreements, referred to as “Remediation Agreements” (RA) under Part XXII.1 of the *Criminal Code*. Under the RA regime, the Attorney General can approve the negotiation of a remediation agreement between a prosecutor and an organization accused of a listed offence. Our prior publication provides an in-depth analysis of the regime.

The Guideline establishes criteria that the PPSC will apply to determine whether to initiate the negotiation of a RA and sheds light on the PPSC’s internal procedure for recommending and negotiating a RA. The final decision whether to invite an organization to negotiate a RA is made by the Director of Public Prosecutions (DPP) on behalf of the Attorney General.

Key takeaways

- A full law enforcement investigation must be undertaken before a RA is recommended, even in the case of a voluntary disclosure;
- A recommendation to negotiate a RA will be subject to a rigorous internal vetting process within the PPSC, with the Deputy DPP playing a key challenge function to test the rationale for negotiating a RA; and
- If approved, the RA negotiation is undertaken by Crown counsel designated by the DPP.

Initiating an invitation to enter into a RA

The Guideline notes that a RA will only be considered where a determination is made that there is a reasonable prospect of conviction and it is in the public interest. The *Criminal Code* sets out the factors that must be considered in determining whether a RA is in the public interest. All the factors must be considered, although the weight assigned to each factor will be determined by the PPSC on a case by case basis. The factors are as follows:

- the circumstances that brought the act or omission to the attention of investigative authorities;
- the nature/gravity of the act or omission;
- the level of involvement of senior officers;
- whether the organization has taken disciplinary action;
- whether the organization has made reparation or taken measures to remedy the harm;
- whether the organization has identified or is willing to identify any person involved in the act or omission;
- whether the organization is subject to prior convictions or sanctions;
- whether the organization or its representatives have committed other offences; and
- a broad catch-all – “any other factor” considered relevant.

Navigating the RA process

The Guideline emphasizes that a full law enforcement investigation must be undertaken in all cases before an invitation to negotiate a RA can be made, and that internal investigations are not a substitute for a law enforcement investigation. The Guideline also states that Crown must refrain from offering any opinion on the likelihood of an invitation to negotiate a RA in the context of a voluntary disclosure, during the course of an investigation or following charges. The expectation is that the PPSC’s internal process will run its course before a negotiation is initiated. That does mean, however, that company counsel cannot take proactive steps to encourage the initiation of the process in discussions with the Crown prosecutor and investigators.

It also remains to be seen whether and to what extent investigators will be expected to independently validate evidence tendered by company counsel following an internal investigation to satisfy the Guideline’s “full investigation” requirement. An overly strict application may well make a RA impractical in many instances where it would otherwise be a responsible outcome in the public interest. Our experience to date suggests that law enforcement agencies can and will be reasonable and pragmatic in their reliance on evidence obtained through an internal corporate investigation.

If Crown counsel finds that there is a reasonable prospect of conviction and a RA is in the public interest and reasonable in the circumstances, Crown counsel initiates a three-step internal review to obtain the concurrence of the Chief Federal Prosecutor, the Deputy DPP and the DPP. During that process, the Deputy DPP plays an important “challenge” function to test the rationale for a RA. If satisfied, the Deputy DPP must provide to the DPP a detailed memorandum demonstrating how the evidence results in a reasonable prospect of conviction and how the public interest is met by proceeding to RA negotiations in lieu of prosecution.

If the DPP approves an invitation to negotiate a RA, the negotiation will be conducted by designated Crown counsel who will issue a written invitation to negotiate.

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