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Canadian Remediation Agreements Also Known As Deferred Prosecution Agreement

Submitted by: Canada



**Workshop for Law Enforcement Agencies on
Effectively Using Corporate Compliance Programs
to Combat Domestic and Foreign Bribery
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Canadian Remediation Agreements a.k.a. DPA's

APEC - ACTWG

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Introduction

- Remediation Agreement (RA) regime introduced in the *Criminal Code* and came into force Sept. 19 2018, following public consultation in 2017
- Alternative to prosecution – suspends the prosecution pending performance of the agreement
- Only available to organizations, not individuals – for designated offences (corruption, fraud, breach of trust etc.)

Introduction

- Complete code - circumscribes the 3-phase regime
 - Qualifying provisions (section 715.32)
 - Negotiation, content of the agreement (sections 715.33-715.36)
 - Judicial approval and supervision (sections 715.37-715.41)

Objectives of Remediation Agreements

(s. 715.31 *Criminal Code*)

- Denunciation
- Accountability
- Respect for the law
- Voluntary disclosure
- Reparation
- Reduction of negative consequences on innocent stakeholders

Mandatory Qualifying Provisions

- 715.32 (1) – The Four Pillars
 1. Reasonable Prospect of Conviction
 2. Offence does not involve likely bodily harm or death – nor organised crime - nor terrorism
 3. Prosecutor's opinion RA is in public interest
 4. Attorney General consent to negotiate an RA

Mandatory Qualifying Provisions

- 715.32 (2) - factoring the public interest (mandatory)
 - A. Circumstances offence brought to the attention of authorities
 - B. Seriousness of the offence
 - C. Level of involvement of senior officers
 - D. Any disciplinary action taken against individuals
 - E. Restitution made to victims

Mandatory Qualifying Provisions

- 715.32 (2) - factoring the public interest (mandatory) continued...
 - F. Organisation has identified offenders or willingness to
 - G. Prior record – convictions, sanctions, or prior RA's in Canada or abroad
 - H. Other allegations of criminal conduct
 - I. Other factors deemed relevant by the prosecutor (basket clause)

Prosecutor's Invitation to Negotiate Remediation Agreement

The Notice (s. 715.33 *Criminal Code*)

- Once the Attorney General consents to the negotiation of a remediation agreement, the prosecutor sends a written notice to the organization indicating the terms of the offer to negotiate.
- The terms circumscribe the agreement that is contemplated and have important legal effects on the ongoing criminal proceedings against the organization.

Prosecutor's Invitation to Negotiate Remediation Agreement

The Notice (s. 715.33 *Criminal Code*)

- The statutory requirements are to provide notice of:
- Offense
 - For which the criminal proceedings will be stayed until terms of the agreement are met.
- Voluntariness
 - Voluntary negotiation, including the right to withdraw upon written notice.
- Legal Effects
 - Legal effects of the agreement.

Prosecutor's Invitation to Negotiate Remediation Agreement

The Notice (s. 715.33 *Criminal Code*)

- Suspension
 - Suspension of right to be tried within a reasonable time (para. 11(b) of the *Charter*)
- Good Faith
 - Good faith and full **cooperation** with authorities, including the **identification of victims**.
- The Use
 - Use of the information disclosed by the organization
- Warning Against Obstruction

Prosecutor's Invitation to Negotiate Remediation Agreement

The Notice (s. 715.33 *Criminal Code*)

- Deadline
 - The deadline to accept terms of offer to negotiate.
- Use Immunity
 - Admissions, confessions and statements made during negotiations, except those part of the final agreement, are not admissible in evidence in civil or criminal proceedings against the organization (para. 715.33 (2) *Criminal Code*).

Prosecutor's Invitation to Negotiate Remediation Agreement

The Notice (s. 715.36 *Criminal Code*)

- Entering Negotiations – Notice to Victims
 - Once the organization accepts the offer to negotiate a remediation agreement, the prosecutor must take reasonable steps to notify the victims or their representative of a possible agreement, taking into account the possible impact of such notice on the conduct of prosecutions and negotiations.

The Terms of the Remediation Agreement

Some Mandatory, Some Optional

- Mandatory terms (para. 715.34 (1) *Criminal Code*)
 - **Agreed Statement of Facts (No Recanting!)**
 - **Admission of Wrongdoing**
 - **Ongoing Cooperation**
 - Ongoing cooperation with authorities during investigation and prosecution of others, including abroad and identification of persons involved in the offence or related conduct.
 - **Forfeiture**
 - The forfeiture of proceeds of the offence.

The Terms of the Remediation Agreement

Some Mandatory, Some Optional

- Mandatory terms (para. 715.34 (1) *Criminal Code*) cont...
 - **Penalty**
 - **Restitution to Victims**
 - Restitution to victims or other appropriate reparation.
 - **Victim Surcharge** – 30% of penalty
 - Does not apply to offence of corruption of foreign official.
 - **Reporting**
 - Reporting to the prosecutor on implementation of terms of agreement.

The Terms of the Remediation Agreement

Some Mandatory, Some Optional

- Mandatory terms (para. 715.34 (1) *Criminal Code*) cont...
 - **Legal Effects** of the agreement
 - **Acknowledgement**
 - Acknowledgement of good faith in entering the agreement and accuracy of cooperation.
 - **Use** of information provided by the organization
 - **Breach** = deal breaker

The Terms of the Remediation Agreement

Some Mandatory, Some Optional

- Mandatory Terms (para. 715.34 (1) *Criminal Code*) cont...
 - **No tax write off**
 - **Variation** clause
 - **Duration** of agreement
- Same **use immunity** for disclosures as during negotiations of agreement.

The Terms of the Remediation Agreement

Some Mandatory, Some Optional

- **Optional Content** of the agreement (para. 715.34 (3) *Criminal Code*)
 - **Compliance program**
 - From scratch or improved.
 - **Costs**
 - Costs of the prosecutor's administration and implementation of the agreement.
 - **Independent Monitor** (approved by the prosecutor)
 - Cooperation, reporting to the prosecutor and costs.

Gate Keeper Function of the Court

Judicial Approval of the Agreement and Stay of Criminal Proceedings by the Prosecutor (s. 715.37 *Criminal Code*)

- Once an agreement is reached, the prosecutor applies to the court in writing for an order approving the agreement.
- The court must approve if satisfied that:
 - Corresponding **charge is pending**
 - Agreement is in the **public interest**
 - The terms are **fair, reasonable** and **proportionate**

- AND -

 - **Considering any reparations made to victims, the surcharge and their impact statements**

Gate Keeper Function of the Court

Judicial Approval of the Agreement and Stay of Criminal Proceedings by the Prosecutor (s. 715.37 *Criminal Code*)

- Stay of the charges
 - Once the court approves the order, the prosecutor must enter a stay of the charges, which will be in effect, including suspension of the limitation where one applies, during the perfection of the agreement.

Remediation Phase

Publication, Variation, Perfection, Termination for Breach, and Completion of The Proceedings
(s. 715.38 – 715.42 *Criminal Code*)

- Once the court has approved the remediation agreement and the charges are stayed by the prosecutor, it is time for the organization to remediate in full, i.e. perfect the terms of the agreement.
 - Except in exigent circumstances, the **Court must publish the agreement** (or its refusal to approve it)
 - The prosecutor (**not the organization**) may apply for a **variation** of the order, which the court must approve if satisfied that it will continue to meet, as amended, the public interest and fairness criteria.
- The Remediation Phase – Publication, variation, perfection, termination for breach and completion of the proceedings (s. 715.38 – 715.42 *Criminal Code*)

Remediation Phase

Publication, Variation, Perfection, Termination for Breach, and Completion of The Proceedings

(s. 715.38 – 715.42 *Criminal Code*)

- On application by the prosecutor, the court must also **terminate** the agreement if satisfied that there was a breach – **prosecution then resumes** if prosecutor so directs within one year of the termination order
- Once all the terms of the agreement are met, the prosecutor applies to the court accordingly to obtain an **order of completion**, which **ends the criminal proceedings** as if there had been no charges laid.
- The prosecutor must apply for any of these orders **as soon as practicable**, so as to avoid unwarranted delays in the administration and implementation of the agreement.

Questions

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