



November 19, 2019

Via email: kathleen.roussel@ppsc-sppc.gc.ca

Kathleen Roussel
Director of Public Prosecutions
Public Prosecution Service of Canada
160 Elgin Street – 12th Floor
Ottawa, ON K1A 0H8

Dear Ms. Roussel:

Re: Canada's Remediation Agreement Regime

The Canadian Bar Association's Anti-Corruption Team (CBA-ACT) believes it would helpful to receive guidance on how the Public Prosecution Service of Canada (PPSC) plans to apply Remediation Agreements now that they are available in Canada.

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day. The Anti-Corruption Team is a multi-Section committee comprised of members from the Business, Criminal Justice, Construction and Infrastructure, Charities and Not-for-Profit, Competition and International Law Sections, the Canadian Corporate Counsel Association and the Ethics and Professional Responsibility Subcommittee.

The CBA-ACT has previously commented on Deferred Prosecution Agreements in an earlier consultation on expanding Canada's toolkit to address corporate wrongdoing.¹ We also commented last year on a draft revised Ineligibility and Suspension Policy.²

International Best Practices and Guidance from OECD Member States

Remediation Agreements are consistent with international best practices and recognized as one of several tools to encourage self-reporting and settlements and to enhance enforcement. The Organisation for Economic Co-operation and Development's March 2019 report on *Resolving Foreign Bribery Cases with Non-Trial Resolutions* highlights the emergence of non-trial resolutions, including deferred prosecution agreements, as "the primary enforcement vehicle of anti-foreign

¹ See CBA Submission on Addressing Corporate Wrongdoing, December 2017, [online](#).

² See CBA Submission on Revised Draft Ineligibility and Suspension Policy (Integrity Regime), December 2018, [online](#).

bribery laws”.³ The OECD Report recognizes that the trend has allowed for coordinated, multi-jurisdictional resolutions of offences and has contributed to increased enforcement overall.⁴

To increase the effectiveness of non-trial resolution regimes, the OECD encourages Member States to give clear guidance on their availability and application.⁵ Guidance can increase consistency and transparency in the process and make an organization discovering that its representatives may have committed an offence more likely to self-report or settle an existing investigation.⁶

Some signatories to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* have issued guidance on their deferred prosecution regimes. For example, the UK’s *Deferred Prosecution Agreements Code of Practice* indicates that the timing and scope of voluntary disclosure will be considered in weighing the public interest against prosecution.⁷ The US Department of Justice’s *Principles of Federal Prosecution of Business Organizations* states that prosecutors should consider the “possibly substantial consequences to a corporation’s employees, investors, pensioners, and customers” when deciding whether to charge a natural or legal person.⁸ Where collateral consequences are significant, deferred prosecutions offer a means of maintaining the company’s financial viability while “preserving the government’s ability to prosecute a recalcitrant corporation that materially breaches the agreement”.⁹

In June 2019, France’s Anticorruption Agency and National Financial Prosecutor released joint guidelines for judicial public interest agreements (a French equivalent of Remediation Agreements).¹⁰ Among other things, the guidelines indicate that, to be eligible for these agreements, companies must promptly self-report wrongful acts and conduct thorough internal investigations.

While the UK, the US and France are examples of more formal guidelines, the OECD Report suggests that guidance can take other forms.¹¹ For example, less formal guidance, such as speeches, policy statements, press releases or interpretation notes assist organizations yet allow enforcers greater flexibility to respond to future events. In the US, the Department of Justice non-trial resolution documents include discussion of the factors and considerations relied upon to reach a decision.¹²

³ OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (March 20, 2019) at 13, [online](#) (pdf).

⁴ *Ibid* at 13-14. For example, non-trial resolutions resulted in approximately 95% of the aggregate fines paid by sanctioned legal persons, with deferred prosecution agreements (and similar resolutions) accounting for nearly 37% of the total. Non-trial resolutions have facilitated the highest criminal sanctions: eight of the top ten largest foreign bribery enforcement actions involved non-trial resolutions.

⁵ *Ibid* at 94.

⁶ *Ibid*.

⁷ United Kingdom, Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice*, [online](#) at 2.9.1 and 2.9.2.

⁸ United States Department of Justice, “Justice Manual” (2018) at s 9-28.1100, [online](#): *US Department of Justice*. See also: FCPA Guide, A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, [online](#), page 54.

⁹ *Ibid*.

¹⁰ See [online](#) in French.

¹¹ OECD, *supra* note 3 at 94.

¹² OECD, *United States: Follow-Up to the Phase 3 Report & Recommendations* (December 2012) at 11-12, [online](#) (pdf) For example, on accepting a deferred prosecution agreement with Heritage Pharmaceuticals Inc. in May 2019, the DOJ stated in a press release that: “a conviction (including a guilty plea) would likely result in the Office of the Inspector General of the Department of Health and

Resulting Guidance from PPSC's Recent Experience Would be Beneficial

Based on public reports it is apparent that the PPSC has gained some experience in considering the application of Remediation Agreements. It has been widely reported that in one case a Remediation Agreement was not offered on charges under the *Corruption of Foreign Public Officials Act*. On the other hand, earlier this year, the PPSC resolved two domestic bid rigging charges under the *Competition Act* with prohibition orders and financial payments, but no guilty pleas or convictions.¹³ Although these resolutions were not made under the Remediation Agreement Regime, they involved resolutions that did not require a corporate conviction. In other words, the PPSC used a different type of non-trial resolution to resolve those cases.

We believe it would be beneficial for the PPSC to issue guidance on its approach to Remediation Agreements. Guidance could include comment on the following:

- PPSC's interpretation of the statutory conditions for negotiating a Remediation Agreement under *Criminal Code* section 715.32(1), including that the agreement be "in the public interest and appropriate in the circumstances";
- relative weighting of the nine factors in *Criminal Code* section 715.32(2), including the importance of the circumstances and timing in which the offence was brought to the attention of relevant authorities and any reimbursements or reparations made by the accused;
- PPSC's interpretation of *Criminal Code* section 715.32(3), with specific reference to how the exclusion of *national economic interests* from consideration for Remediation Agreements for offences under the *Corruption of Foreign Public Officials Act* interacts with the stated purpose of reducing the negative consequences of the organization's wrongdoing for persons who did not participate in or have knowledge of the wrongdoing; and
- the extent (if any) to which the potential for debarment in Canada (and elsewhere) in relation to a conviction may factor into the PPSC's decision to negotiate a Remediation Agreement.¹⁴

It would also be helpful if the PPSC could comment on other forms of resolution without a conviction that are potentially available outside the Remediation Agreement Regime.

Human Services imposing mandatory exclusion of Heritage from all federal health care programs ... for a period of at least five years, which would result in substantial consequences, including to American consumers". See [online](#).

¹³ See the publicly filed documents in *R. v. Genivar Inc.* (now WSP Canada Inc.), March 13, 2019, and *R. v. Dessau Inc.*, Feb. 19, 2019, Quebec Superior Court. The agreed statement of facts for each company noted: (1) relevant employees were fired or were no longer with the company; (2) each company paid back the entirety of any overcharge through participation in the provincial voluntary reimbursement program and entered into settlements with the relevant municipalities and public agencies, and the PPSC viewed this reimbursement as an important factor justifying resolution of the matter by prohibition order only; (3) each company offered to cooperate with the PPSC "early in the process" in order to reach settlements; and (4) for all these reasons, the prohibition order was considered an effective and appropriate remedy that avoided incurring additional costs to the justice system. See also Competition Bureau press releases: [Engineering firm to pay \\$4 million in Quebec bid-rigging settlement](#) and [Dessau to pay \\$1.9 million in settlement over bid-rigging on public contracts in Quebec](#).

¹⁴ Government debarment policies (domestic and international) may have varying degrees of flexibility or automatic debarment from government contracts as sanctions for convictions. These sanctions may, in turn, have varying degrees of impacts on innocent third parties such as other employees, shareholders, suppliers and pensioners – potentially greater adverse consequences relative to the consequences under a Remediation Agreement.

Guidance could reinforce the intended benefits of Remediation Agreements, including increased and more expeditious enforcement and payment of reparations to injured persons. For example, guidance on the likely content of the mandatory conditions could demonstrate how the PPSC intends to fulfil the purpose of “[providing] reparations for harm done to victims or to the community”,¹⁵ and may be helpful to counter possible public perception that Remediation Agreements benefit only the organization that admits to an offence.¹⁶

Guidance could resolve inconsistencies in media coverage (and resulting public opinion) of Remediation Agreements.

For example, media comments on the meaning of the *national economic interest* exclusion in section *Criminal Code* 715.32(3) have varied widely. Some media coverage has suggested that job losses and other economic impacts are part of the national economic interest and therefore excluded from consideration.¹⁷ On the other hand, a past-Secretary General of the OECD suggested that the national economic interest exclusion was imported from the *Convention* and was intended to apply more narrowly to prevent businesses arguing that exports were necessary to the national economic interest so that bribery in support of exports should not be subject to prosecution.¹⁸ Knowledge of PPSC’s view on this issue (one way or the other) would give greater certainty to Canadian businesses.

We trust our comments are helpful. Given our expertise, the CBA-ACT would be pleased to help the PPSC develop guidance on Remediation Agreements.

Yours truly,

(original letter signed by Marc-André O’Rourke)

Marc-André O’Rourke
Staff lawyer to the Anti-Corruption Team

¹⁵ See *Criminal Code*, *supra* note 4 at s 715.31.

¹⁶ We note, for example, that during debates on Bill C-74 in the House of Commons Finance Committee, Member of Parliament Greg Fergus raised concerns that Remediation Agreements would amount to “a little slap on the wrist”, and that it was unfair to offer more lenient penalties to those who commit “a very serious economic crime” compared to other offences. MP Dan Albas similarly stated that the types of crimes eligible for Remediation Agreements were likely to be committed by persons who are “politically connected or at a very high level in business”, and worried that “some people will view this as a way to remediate your way out of jail if you are connected”. “Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures”, referral to committee, House of Commons, Standing Committee on Finance, 42-1, No 154 (May 8, 2018).

¹⁷ See Andrew Coyne, “Andrew Coyne: What Could Trudeau Properly Have Discussed with Wilson-Raybould About SNC-Lavalin” (February 15, 2019), [online](#): *National Post*.

¹⁸ See Donald Johnston, “Was SNC-Lavalin Denied a Deal All Because of Three Simple But Misunderstood Words?” (March 22, 2019), [online](#): *Financial Post*.