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First Remediation Agreement under the Canadian *Criminal Code*: Key Takeaways

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The Superior Court of Québec recently published its reasons[1] approving Canada's first remediation agreement under the *Criminal Code*, which is Canada's version of a deferred prosecution agreement (DPA). In his reasons, the Honourable Justice Eric Downs provided an extensive overview of the principles applicable to remediation agreements, thus building the foundation for their future use.

The remediation agreement resolved allegations that SNC-Lavalin inappropriately paid C$2.3 million to obtain a C$128-million contract for the restoration of the Jacques Cartier Bridge in Montréal in 2002. The remediation agreement provided for a total payment by SNC-Lavalin of C$29.5 million, which was calculated on a formula broadly influenced by the U.K. sentencing guidelines and certain provisions of the *Criminal Code* governing remediation agreements.

Key Takeaways

Key takeaways include the following:

- Although the Court will not act as a "rubber stamp" in reviewing a proposed remediation agreement, public interest requires that these remediation agreements be afforded a high degree of deference, and the threshold for Court intervention is high.
- Self-reporting carries considerable weight in a Court's approval of a remediation agreement but is not a mandatory precondition; and strong cooperation, as in this case, can also play a role in favour of the Court approving a remediation agreement.
- In the Court's public interest analysis, it must give significant weight to limiting the impact of criminal acts on innocent third parties, such as stakeholders of corporations, who had no control over those criminal acts.
- Extensive and robust self-imposed corrective integrity measures will also carry significant weight in the Court's analysis.
- There is a noticeable trend in the use of the U.K. or U.S. sentencing guidelines in negotiating plea agreements; the result of these negotiations was found to be reasonable in four of the largest corporate criminal fines ordered in Canada. The increasing use of these guidelines, which typically provide for much higher fines than those historically imposed by Canadian courts, may have a significant and lasting impact on Canadian corporate criminal fines.

In a previous SNC-Lavalin proceeding, involving allegations of bribes to public office holders in Libya, the federal prosecution had refused to negotiate a remediation agreement, creating significant uncertainty regarding the circumstances in which such an agreement would be available in Canada.

A Primer on Remediation Agreements

Terms, Effect and Purpose of a Remediation Agreement

A remediation agreement is an agreement between an accused corporation and the responsible prosecuting authority. Under a remediation agreement, the prosecution agrees to grant the corporation amnesty in exchange for the corporation's adherence to certain terms and conditions. Upon fulfillment of such terms and expiry of the remediation agreement, the relevant charges will be withdrawn

(with no criminal conviction). If the corporation does not comply with the terms of the remediation agreement, the charges may be reinstated and the corporation may be prosecuted and ultimately convicted.

A remediation agreement aims not only to sanction criminal conduct and deter wrongdoing but also to create an incentive for corporations to self-disclose wrongdoing. Given that investigations of corporate crimes often require significant time and resources, remediation agreements provide an alternative means to address such conduct in an efficient and timely manner, and encourage remediation and compliance. Remediation agreements may also help mitigate unintended consequences for innocent parties, such as blameless employees, customers, suppliers, investors and other stakeholders. For example, these agreements can avoid disqualification in jurisdictions that prohibit corporations and their affiliates from participating in public procurement processes if they have been convicted of certain types of offences. These measures are particularly strict in Canada, as explained below.

The Adoption of Canada's Remediation Agreement Regime

In September 2018, the new Part XXII.1 of the *Criminal Code* came into force, allowing the prosecution to enter into a remediation agreement with an organization. A remediation agreement can be entered into for only certain offences that are listed in the schedule of Part XXII.1, which includes fraud and bribery of foreign officials. A remediation agreement is not available for *Competition Act* offences, for example.

The decision to enter into a remediation agreement is discretionary. The prosecution may enter into negotiations for a remediation agreement if it is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances.

A remediation agreement is subject to the approval of both the Attorney General and the court.

For the purposes of determining whether negotiating an agreement is in the public interest and appropriate in the circumstances, a prosecutor must consider the following factors:

- the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- the nature and gravity of the act or omission and its impact on any victim;
- the degree of involvement of the organization's senior officers in the act or omission;
- whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- 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;
- whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- whether the organization – or any of its representatives – was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
- whether the organization – or any of its representatives – is alleged to have committed any other offences, including those not listed in the schedule to Part XXII.1; and
- any other factor that the prosecutor considers relevant.

However, if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

The Canadian Remediation Agreement regime puts a particular emphasis on victims' involvement in the process:

- A victim surcharge of 30% of the penalty is payable is some circumstances.
- Participation in a remediation agreement process is conditional on the organization's best efforts in identifying potential victims. The prosecutor will take reasonable steps to inform the victims.
- The concept of "victim" is broadly interpreted and can include people outside the country.
- Accordingly, an organization contemplating possible resort to a remediation agreement should develop an action plan to locate or identify potential victims.

When the conditions of the agreement are met and the agreement expires, a court order is rendered, allowing the charges to be stayed without a guilty plea or conviction.

The Context for the SNC-Lavalin Remediation Agreement

The recently approved remediation agreement involved SNC-Lavalin, one of the world's leading engineering, procurement and construction companies. It is not, however, related to the criminal charges previously laid for alleged payments by SNC-Lavalin in Libya, which generated significant press coverage in 2019.

Inauspicious Beginning: The First SNC-Lavalin Case

The Canadian Remediation Agreement Regime experienced a difficult start. SNC-Lavalin Group Inc. and two of its subsidiaries had been charged in Canada under the *Corruption of Foreign Public Officials Act*. The prosecution asserted that SNC-Lavalin had paid approximately C$50 million to officials in Libya to influence the award of certain engineering and construction contracts between 2001 and 2011.

Before the introduction of remediation agreements in 2018, SNC-Lavalin had participated in public efforts to have such remediation agreements adopted as part of the *Criminal Code*. It was widely expected that SNC-Lavalin would become the first party to enter into a remediation agreement, and court records show that the federal prosecutor in charge of pursuing the Libya-related charges against SNC-Lavalin had recommended that a remediation agreement be negotiated. However, the Director of Public Prosecutions (DPP), who oversees the prosecution of all federal cases, overruled his recommendation. This matter generated significant press coverage in Canada and internationally in 2019 as SNC-Lavalin filed proceedings against the DPP seeking to overturn her decision. The matter thereafter involved allegations of inappropriate political interference by Canadian government representatives.

In court filings, the DPP justified her decision to refuse to negotiate a remediation agreement on the basis that (i) SNC-Lavalin had not self-disclosed the misconduct (the case was brought to the Canadian authorities' attention by Swiss authorities), (ii) the charges were extremely serious, and (iii) many members of SNC-Lavalin's senior management were involved.

However, such circumstances are hardly exceptional in the context of global corporate corruption cases. It is also worth noting that all the alleged participants in the offence had since left the company and, as acknowledged by an independent monitor, SNC-Lavalin had expended considerable efforts to implement an anti-corruption compliance program. It had taken significant steps to transform its culture to one of ethical behaviour and compliance, and develop one of Canada's leading anti-corruption compliance programs.

An affiliate of SNC-Lavalin ultimately pleaded guilty to a charge of fraud and paid a C$280-million fine. No remediation agreement was entered into.

The SNC-Lavalin case created significant uncertainty regarding the circumstances in which the federal prosecution may agree to engage in negotiations for a remediation agreement and likely had a chilling effect on organizations considering self-disclosure of misconduct.

The federal prosecutor in charge of negotiating remediation agreements in Canada has since made several public speeches intended to signal that the prosecution is open to negotiate remediation agreements. And the RCMP subsequently has stated that "several" Canadian companies have self-reported allegations of bribery and corruption to avoid criminal prosecution.

Take Two: The Second SNC-Lavalin Case

In August 2017, Michel Fournier, former president and CEO of The Federal Bridge Corporation, pleaded guilty to a *Criminal Code* charge of fraud against the government and was sentenced to 66 months of imprisonment. He acknowledged receiving payments totalling C$2.3 million to award a C$128 million contract for refurbishing the Jacques Cartier Bridge in Montréal in 2002. The contract was awarded to a consortium of which an affiliate of SNC-Lavalin was a 50% partner.

On September 23, 2021, the *Directeur des poursuites criminelles pénales* (DPCP), the Québec provincial prosecution, brought charges against SNC-Lavalin Inc., one of its affiliates and two former employees based on the same allegations. The charges included fraud against the government and fraud against Her Majesty.

One of the entities charged, SNC-Lavalin Inc., was the group's main operating entity. The *Criminal Code* provides that a person convicted of the foregoing offences loses the "capacity" to contract with the government for at least 10 years, without the possibility of any reduction. Other integrity measures, such as the *Ineligibility and Suspension Policy* of Public Services and Procurement Canada, also provide for a similar long-term debarment from government contracts. A guilty plea or conviction by SNC-Lavalin Inc. would likely have entailed severe consequences for the group and its stakeholders.

In the wake of the charges, the Québec DPCP announced that it had extended to the SNC-Lavalin entities an invitation to negotiate a remediation agreement.

The Remediation Agreement

On May 11, 2022, SNC-Lavalin and the Québec DPCP announced that they had entered into a remediation agreement. The Court approved it on the same day, with reasons to follow. As explained below, a confidential court process had begun before this announcement.

In his reasons published on May 31, 2022, the Honourable Justice Eric Downs provided an extensive overview of the principles applicable to remediation agreements, building the foundation for their future use.

A Two-Step, U.K.-Inspired Court Approval Process

Before the remediation agreement was made public, the parties proposed to the Court a two-stage process – namely, a confidential stage followed by a public hearing (Such a two-stage process is not expressly provided for in the *Criminal Code*.) This process was broadly influenced by the U.K. DPA process, and the argument for confidentiality was grounded in the privilege of the settlement discussions. Being mindful that hearings are public, the Court provided a lengthy justification in support of this two-step process and held that "in the particular circumstances of this case," the two-stage process proposed by the parties was appropriate. It remains to be seen whether this process will become the norm in remediation agreement approvals, but it could very well be a precedent for future cases.

During the confidential stage, the Court rendered various procedural orders providing for the steps leading to the public hearing for approval. The Court also clarified that, unlike in the U.K. process, it did not consider the merits of the remediation agreement during the confidential phase.

The Court's Role in Approving a Proposed Remediation Agreement

Under the *Criminal Code*, the Court must approve the proposed remediation agreement if it is satisfied that

- the organization is charged with an offence to which the agreement applies;
- the agreement is in the public interest; and

- the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

Being mindful that it would render the first decision in Canada in which approval of a remediation agreement was sought, the Superior Court issued a comprehensive judgment dealing with many aspects of the framework. Most of the reasons dealt with the last two prongs of the test.

The Court noted, among other things, that, in drafting the provisions on remediation agreements, Parliament has come closer to the foundations of the British system than the U.S. system in that it has opted for judicial review and a desire for transparency.

The judgment also notes that the Court must perform a delicate balancing act. On the one hand, it reiterated that the Court's role extends beyond "rubber stamping" and that remediation agreements are not a "free pass" for large or public companies that would be "too big to fail." On the other hand, too much uncertainty could discourage companies from seeking remediation agreements in the future, especially in self-reporting scenarios. This would undermine a major objective of introducing remediation agreements into the legal arsenal combatting economic crime.

While it did not expressly quote the test, the Superior Court found that a parallel could be drawn with the recording of joint submissions on guilty pleas for which the Supreme Court adopted a strict test in *R v Anthony-Cook*.[2] In that case, the Supreme Court held that a court should reject "joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty."

In determining whether approving the agreement is in the public interest, the Court considered the following factors:

- **The impact that convictions would have on the organization's ability to contract with public companies in Canada and Québec.** Such an impact may include serious negative consequences for a large number of non-responsible third parties and, more broadly, the engineering industry in Québec and Canada. The Court held that limiting the impact of criminal acts on innocent third parties, who had no control over those acts was a key consideration for Parliament and must be given significant weight in its public interest analysis.
- **The organization had not self-reported.** (Here again, the facts were brought to the Canadian authorities' attention through a foreign investigation.) The Court stated that self-reporting would carry considerable weight in the approval of a remediation agreement, but was not a mandatory precondition, and that strong cooperation, as in this case, can also play a role in favour of approving a remediation agreement.
- **SNC-Lavalin had cooperated extensively with the authorities during the investigation.** SNC-Lavalin assisted the prosecution in identifying the individuals involved and gathering relevant evidence.
- **The extensive and robust self-imposed corrective integrity measures SNC-Lavalin implemented since its integrity issues came to light in 2012.**
- **SNC-Lavalin's prior legal history.** This history, which includes the guilty plea of one of its affiliated companies arising from the Libya-related charges, was also considered but appears to have been a neutral factor.
- **The significant financial penalties to be paid.** The Court found the penalties appropriate in the circumstances.
- **SNC-Lavalin had not, for the time being, taken any steps to repair the harm caused to the victim.** Doing so would have weighed in favour of approving the agreement, but was found not to prevent the approval since (i) it was the very purpose of the remediation agreement to provide for victim indemnification; and (ii) the victims had failed to take any steps to seek redress or quantify any losses.

Financial Penalty, Forfeiture and Reparation

The remediation agreement provided for a total payment of C$29,558,777, broken down as follows:

- A penalty of C$18,135,135, which corresponded to the projected profit of C$6,908,623 expected for the contract, multiplied by a 350% punitive coefficient – that is, C$24,180,181, from which was subtracted a 25% collaboration credit (C$6,045,046). The penalty was based on parameters broadly influenced by the U.K. sentencing guidelines.
- The forfeiture of C$2,490,721, which corresponded to the profit actually earned by the SNC-Lavalin entities from the contract (C$1,748,694, adjusted to reflect inflation between 2002 and 2021).
- The reparation of C$3,492,380 paid to The Jacques Cartier and Champlain Bridges Incorporated as a victim. The victim did not attempt to prove its damages and accepted that the prejudice was at least equal to the bribe paid to its former president (C$2,345,230, adjusted to reflect inflation between 2000 and 2021). The Court further indicated that had there been a serious dispute over the determination of the actual amount of the loss, restitution would not have be ordered, since the criminal courts should not substitute themselves for the civil courts.
- A "victim surcharge" of C$5,440,541 required by the *Criminal Code*, corresponding to 30% of the C$18,135,135 penalty.

In determining whether the proposed penalty was appropriate, the Court reiterated the well-established principle that the fine should be set at a level that made the costs of committing the offence exceed the potential benefits; that amount should provide an incentive for the organization not to commit the offence in the future and deter others from doing so. Noting that no precedent was available to assist the Court, since this was the first remediation agreement submitted to a Canadian court, the Court reverted to the principles applicable to corporate criminal fines. However, while the *Criminal Code* lists numerous factors to be taken into account in determining the sentence to be imposed on an organization, the cases dealing with corporate fines in Canada are very limited; they do not provide comprehensive guidelines, other than the fact that, in bribery cases, fines are substantially greater than the value of the bribes or quid pro quos.

Ultimately, although the Court was careful to mention that the U.K. sentencing guidelines, which guided the parties in negotiating the penalty, are not applicable in Canada, it found the result to be reasonable.

It cannot go unnoticed that this is the fourth case where one of the largest criminal corporate fines in Canada has been determined through plea agreements negotiated using either the U.S. or the U.K. guidelines. In each case, the resulting fine or penalty was found to be reasonable by the court sanctioning the agreements.[3] While in each case the Court was careful to mention that those guidelines do not apply in Canada, they are, in fact, increasingly used in negotiating fines. Those guidelines, which typically provide for much higher fines than those historically imposed by Canadian courts, may have a significant and lasting impact on Canadian corporate criminal fines.

Other Obligations in the Remediation Agreement

The Court was also satisfied that the proposed remediation agreement included all the requirements of the *Criminal Code*. Key elements include the following:

- a statement of facts related to the offence that the organization is alleged to have committed;
- an undertaking by the organization not to make or condone any public statement that contradicts those facts;
- the organization's admission of responsibility for the act or omission that forms the basis of the offence;
- the organization's obligation 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;
- an indication of the organization's obligation to cooperate in any investigation, prosecution or other proceeding in Canada (or elsewhere if the prosecutor considers it appropriate) resulting from the act constituting the offence, including by providing information or testimony;

- the forfeiture of any property, benefit or advantage identified in the agreement that was obtained or derived directly or indirectly from the offence;
- the obligation to pay the fines and other financial commitments set forth in the agreement; and
- various reporting obligations.

The Court also noted that the remediation agreement also required SNC-Lavalin to continue to maintain and improve its integrity measures, and appoint an independent monitor – measures that are considered optional under the *Criminal Code*.

What's Next?

The agreement provides that various obligations must be fulfilled within three years. Upon expiration of this term, the prosecution will make a written application to the Court confirming whether the terms of the remediation agreement have been complied with. If the Court is satisfied that the terms of the agreement have been complied with, the criminal charges will be deemed never to have been commenced and no further proceedings may be taken in respect of the relevant offences.

Conclusion

The conclusion of the first remediation agreement and the Court's detailed reasons for approving it provide much-needed guidance to prosecutors and organizations considering self-disclosing potentially criminal conduct. The reasons also add a welcome degree of certainty to the process. While there remains uncertainty regarding the circumstances in which the federal prosecution will agree to engage in negotiations for a remediation agreement, there is hope that this first step will create momentum to allow other cases to move forward.

[1] *R v SNC-Lavalin* Inc., 2022 QCCS 1967

[2] *R c Anthony-Cook*, 2016 CSC 43, paras. 35-45.

[3] *R v Griffiths Energy International*, [2013] A.J. n°412 (Alta. QB); *R v Niko Resources Ltd*, (2011) 101 WCB (2d) 118 (Alta. QB); *R c SNC LC*, 500-73-004261-158.

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