GOWLING WLG

REMEDIATION AGREEMENTS AND OTHER RECENT DEVELOPMENTS IN WHITE COLLAR CRIME

20 February 2019

Recent events highlighted in the media have shone a spotlight on Canada's efforts to address white collar crime. These events are shaking our Federal Government to its core. The discussion has centered primarily on legislative amendments made to the Criminal Code in 2018, giving prosecutors the power to enter into remediation agreements. This new tool for corporate accused will continue to be in the spotlight as we all learn when prosecutors will be prepared to allow the use of remediation agreements and how their use will be received by the voting public.

The attention on remediation agreements has also generated heightened interest in white collar crime enforcement more generally. The past year has seen some noteworthy advancements in the white collar crime space. A number of important securities, corruption, and anti-money laundering cases were released in 2018, some of which are likely to have significant implications in their respective legal areas going forward. Amendments were proposed to Canada's anti-money laundering and terrorist financing regulations, and released for consultation. Notable policy changes, such as enhancements to Public Services and Procurement Canada's Integrity Regime and the Competition Bureau's Immunity and Leniency Programs were also implemented by the Canadian government over the past year. This article provides an overview of recent white collar crime developments.

1. New Remediation Agreement Regime

In September 2018, Canada introduced its long awaited remediation agreement regime through amendments to the Criminal Code. The regime will allow prosecutors to negotiate remediation agreements (better known as "deferred prosecution agreements") for certain

corporate criminal offences of an economic character, where it is in the public interest to do so. Applicable offences include, fraud, bribery, municipal corruption, secret commissions, fraudulent manipulation of stock exchange transactions, laundering the proceeds of crime, and certain offences under the Corruption of Foreign Public Officials Act. The purpose of the new remediation agreement regime is to:

- promote voluntary disclosure of corporate criminal wrongdoing;
- denounce wrongdoing and provide reparations to victims;
- impose proportionate penalties that deter further wrongdoing;
- ensure the implementation of corrective measures by the organization and the development of a culture of compliance; and
- minimize negative collateral consequences for innocent stakeholders, such as employees.

Where the accused organization enters into a remediation agreement with the Crown, and a judge approves the agreement, the organization will obtain a stay of charges in return for the fulfillment of its obligations under the agreement. Once an agreement has been reached between the accused and Crown, a judge will only be permitted to approve a remediation agreement where the terms are "fair, reasonable and proportionate to the gravity of the offence". The requirement of judicial approval will insert some uncertainty into the decision making matrix for organizations that are contemplating self-reporting.

Prosecutors in the U.S. have used their deferred prosecution agreement regime to great effect since it was instituted in the early 1990s, which has resulted in a substantial increase in revenue generation from financial penalties levied against accused who voluntarily self-report wrongdoing. Only time will tell how readily prosecutors in Canada will use this new tool and agree to enter into remediation agreements. Already in one high-profile white collar crime case, the Crown has refused to enter into a remediation agreement, which suggests prosecutors may be reluctant to enter into such agreements unless the accused has self-reported their wrongdoing, regardless of whether the accused has revamped its internal controls and implemented corrective measures. It will be some time before organizations have a clear understanding of how likely prosecutors are to use remediation agreements, and whether their voluntary disclosure of potential corporate criminal wrongdoing will actual result in a remediation agreement.

2. Corruption

Canada is returning to its roots and again being perceived as a laggard in its enforcement

against foreign corruption. Transparency International is an international organization that releases reports ranking countries for, among other things, their efforts to comply with the OECD Anti-Bribery Convention by cracking down on bribery of foreign public officials. In the last report from 2015, Canada ranked in the "Moderate" enforcement category, which is the second highest category (just behind "Active" enforcement) out of four. In the new 2018 report, Canada fell in its ranking to "Limited" enforcement, which is a category it now shares with France, Netherlands, Austria, Hungary, South Africa, Chile, Greece, Argentina, New Zealand, and Lithuania. The limited activity of note in the past year is as follows:

a. ***Corruption of Foreign Public Officials Act***

In 2018, the case of Barra and Govinda continued with a series of trial motions in an effort to end the prosecution. This case involves two co-accused who are alleged to have been involved in a scheme to bribe Indian public officials related to an Air India contract, which separately led to the conviction of Nazir Karigar.

***R. v. Barra and Govinda*, 2018 ONSC 2659 (Application for Directed Verdict)**

Counsel for Barra and Govinda brought an application for a directed verdict on March 29, 2018 and April 4, 2018. They argued that Canada did not have territorial jurisdiction over the charges because there was no real and substantial connection between Canada and the alleged agreement to pay bribes to Air India in order to obtain a contract on behalf of Cryptometrics Canada. It was argued that if any such transaction took place, it would have happened outside of Canada.

In considering the matter, the court concluded that the Corruption of Foreign Public Officials Act would be:

> …lame if it did not apply to a situation where members of senior management of a Canadian company could with impunity arrange to meet with others outside of Canada and agree to pay bribes to foreign officials to obtain a contract for the Canadian company. (para. 30).

Importantly, the court re-affirmed that the residency of the accused is not a definitive factor in evaluating the applicability of the real and substantial connection test. The fact that the evidence was seized in Canada, contract work would have been performed here and that a Canadian company would benefit from the bribery, were all relevant to Canada's territorial jurisdiction over the prosecution. Ultimately, the court dismissed the application for a directed verdict, finding there was evidence

capable of supporting the inference that there was a single and ongoing conspiracy involving the co-accused.

***R. v. Barra and Govinda*, 2019 ONSC 229 (Application for a mistrial)**

On September 5 and 7, 2018, after the close of the Crown's case, Barra and Govinda brought an application for a mistrial arguing that they were materially prejudiced by late disclosure. Specifically, the issue pertained to: (1) emails from a Crown witness, which contradicted his cross-examination and re-examination about an incriminating document in respect of Mr. Barra; and (2) an email from the witness' counsel confirming that the Crown agreed not to use statements from his preparation meeting against him in his upcoming criminal trial. The Court ultimately found that no prejudice was occasioned upon the accused by the late disclosure. This is the latest reported decision in the matter and it is unclear when it will conclude.

b. **Influence Peddling in Canada**

***R. v. Carson*, 2018 SCC 12**

Bruce Carson, formerly a senior advisor to Prime Minister Stephen Harper, was accused of using his government contacts to help H2O Professionals Inc. sell water treatment systems to First Nations communities in exchange for a commission being paid to his girlfriend. Following the agreement, he spoke to government officials at Indian and Northern Affairs in an effort to convince them to participate. He was subsequently charged for influence peddling under section 121(1)(a)(iii) and (d)(i) of the Criminal Code and acquitted on the basis that First Nations groups did not constitute a government and thus, his assistance was not "in connection with a matter of a business relating to the government".

The Court of Appeal for Ontario set aside his acquittal and entered convictions. In dismissing the appeal, the Supreme Court of Canada clarified the elements of the offence for influence peddling.

Briefly, the Court highlighted that the offence is made out when an accused "demands a benefit in exchange for a promise to exercise influence in connection with a matter of business that relates to government". Actual influence or success in doing so is not required.

However, there must be a nexus between the promise of influence and "a matter of business that relates to the government". The latter is interpreted broadly and captures items that depend on government action or could be facilitated by the

government given its mandate. This includes influence to ***change*** or ***expand*** government programs.

The takeaway from this decision is that the prohibited act need not rise to the level of actual influence for a successful charge or prosecution. Rather, it would seem that conduct appearing to be inchoate in nature is appropriately captured by the scope of the provision.

3. Integrity Regime

In March of 2018, the federal government announced an enhancement of the government-wide Integrity Regime. The revisions to the regime were implemented on January 1, 2019. The regime was designed to ensure that the government conducts business with ethical suppliers, incorporates stronger compliance frameworks into its business dealings and holds suppliers to account for any misconduct. The regime applies across the board federally to agreements that companies enter into with Public Services and Procurement Canada, as well as with federal departments and agencies. It applies to agreements with a transaction value over $10,000, specific contracts issued by a federal department or agency, and contracts that contain provisions of the Ineligibility and Suspension Policy, which is part and parcel of the regime. Suppliers should consider the three elements of the regime prior to contracting with the federal government: the ineligibility and suspension policy, integrity directives and integrity provisions.

4. Competition Law

The Competition Bureau (**"Bureau"**) invited further comment on its revised Immunity and Leniency Programs (the **"Programs"**) in May 2018, and released the finalized Programs – jointly with the Public Prosecution Service of Canada - in September 2018. The revised Programs incorporate the following changes:

- **Corporate Immunity:** Directors, officers, and employees will no longer be granted automatic immunity pursuant to a corporate immunity agreement. In order for individuals within an organization to qualify for a recommendation that they be granted immunity, they must first admit their own knowledge of, or participation in, a Competition Act offence, and then provide complete, timely, and ongoing cooperation.
- **Grant of Interim Immunity:** Evidence will now be provided by Immunity Program applicants under a "Grant of Interim Immunity" (**"GII"**), which is a conditional immunity agreement that formally outlines the applicant's obligations that must be fulfilled before

a final grant of immunity is recommended to the Director of Public Prosecutions (**"DPP"**). The final grant of immunity will not be made until the relevant appeal period in respect of the prosecution has expired, or when the Bureau and DPP have no reason to believe further assistance from the applicant is necessary. The GII stipulates who is covered by the agreement, how information disclosed by the applicant will be treated, and the circumstances in which the agreement may be revoked. Disclosure made by the applicant pursuant to the GII will not be used against the applicant unless they breach the terms of the agreement.

- **Disclosure:** Program applicants are required to provide full, complete, and truthful disclosure on a timely and ongoing basis throughout the Bureau's investigation, and in any subsequent prosecution. Program applicants will have an opportunity to formally assert privilege over their records. Furthermore, interviews of witnesses may be audio or video recorded under oath to more strongly support a prosecution.
- **Credit for Cooperation:** Leniency Program applicants are entitled to a cooperation credit of up to 50% of the base financial penalty. The amount of credit awarded is dependent on the extent to which the cooperation contributed to advancing the Bureau's investigation. The Leniency Program was previously structured such that the largest credit was awarded to the first leniency applicant and a reduced credit was awarded to all subsequent leniency applicants. The Bureau will also consider the existence of a credible and effective compliance program, at the time the offence occurred, to be a mitigating factor when making its recommendation on sentence to the DPP.[1]

Highlights of the Bureau's enforcement of the criminal provisions of the Competition Act are as follows:

- In March 2018, the Bureau executed searches at three prominent news outlets in Toronto as part of an investigation into alleged violations of the conspiracy provisions of the Competition Act. No charges have been laid, and the investigation is currently ongoing.
- Four individuals in the Gatineau, QC, area were charged with bid-rigging in respect of public infrastructure contracts awarded by the City of Gatineau. One of the individuals has since pleaded guilty and received a reduced sentence for his cooperation pursuant to the Bureau's Leniency Program.
- A Japanese car parts manufacturer pleaded guilty for its role in an international bid-rigging conspiracy. Its negotiated plea agreement included the payment of a substantial fine, and represents the thirteenth such guilty plea arising from the Bureau's investigation.

2. Securities Law

R v Tiffin, 2018 ONCA 953

In November 2018, the Court of Appeal for Ontario granted leave to appeal from Daniel Tiffin's convictions under the Ontario Securities Act. The case will consider the meaning of "security" within section 1(1) of the Act, and whether the doctrine of "family resemblance" plays any role in this analysis. The "family resemblance" test deems a "note" to be a security, unless it bears a strong resemblance to certain categories of instrument that are judicially determined not to constitute securities.

Reference Re Pan-Canadian Securities Regulation*, *2019 SCC 48

On November 9, 2018, the Supreme Court of Canada released its landmark decision on the Cooperative System, a national system for the regulation of capital markets in Canada contemplated by legislation and a memorandum between the federal government, and the governments of Ontario, British Columbia, Prince Edward Island and the Yukon. In considering the matter, the Court considered two questions as proposed in reference by the Quebec government, namely:

> (1) Whether the Constitution of Canada authorizes the implementation of pan-Canadian securities regulation under the authority of a single regulator; and
>
> (2) Whether the most recent draft of the federal Capital Markets Stability Act was ultra vires with respect to the trade and commerce power of the federal government under section 91(2) of the Constitution of Canada.

With respect to the first question, the Court ultimately found that the Constitution authorizes the implementation of pan-Canadian securities regulation under the authority of a single regulator. The scheme proposed was not found to empower the federal government to unilaterally amend provincial securities authority or limit legislative authority in respect of securities legislation.

Finally, the Court determined that the proposed Capital Markets Stability Act, which would create a pan-Canadian securities regulator, was designed to avoid adverse effects on the Canadian economy, establish criminal offences within the financial market and establish a national securities regulator overseen by the Minister of Finance. The Capital Markets Stability Act speaks to a genuine matter of national importance and its scope relates to trade as a whole, thus falling within the sphere of general trade and commerce.

This decision follows the ***Reference Re Securities Act, 2011 SCC 66***, in which the Court struck down the proposed Canadian Securities Act because it did not constitute a valid exercise of authority by Parliament and sought to regulate all aspects of securities trading in Canada on an exclusive basis. It is apparent that the drafters of the Capital Markets Stability Act paid close attention to the 2011 Reference by avoiding language that might be construed as an encroachment on provincial power. While it is not clear how this decision will influence non-participating provinces, it provides a group of provinces and the federal government with an opportunity to establish a national securities regulator.

6. Anti-Money Laundering and Terrorist Financing

2018 was a relatively active year in the anti-money laundering and terrorist financing space. The Department of Finance released its proposed Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act in June 2018 for a 90 day consultation. The amendments include much needed regulatory updates to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act. The proposed changes will address vulnerabilities in the Canadian legislation. As a result, it will also bring Canada more in line with the standards established by the Financial Action Task Force, which is an inter-governmental body (of which Canada is a member) that is responsible for generating policy to fight money laundering and terrorist financing. The proposed regulatory changes include the following:

- Pre-paid open-loop cards (e.g. pre-paid credit cards) will be treated as bank accounts. As a result, reporting entities that issue these cards would be subject to customer due diligence requirements. This amendment will not apply to pre-paid closed-loop cards (e.g. gift cards for a particular retailer or group of retailers).
- Foreign money services businesses (**"MSB"**) will be subject to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, and will have all the obligations of other reporting entities. This change would capture all businesses that have no actual place of business in Canada, but provide money services to customers in Canada over the internet.
- MSBs will include persons or entities dealing in virtual currencies. Although the Proceeds of Crime (Money Laundering) and Terrorist Financing Act was originally amended in 2014 to apply to persons or entities dealing in virtual currencies, the change never came into force because the necessary amendments to the regulations had not been made. The pseudo-anonymous and decentralized nature of virtual currencies, and

the capacity to conduct near instantaneous cross-border transactions, has made certain virtual currencies, such as Bitcoin, a preferred currency of criminals (including money launderers and terrorists). The failure of the Canadian government to properly address this loop hole has deprived law enforcement of an important tool in detecting money launderers, terrorist financiers, and other criminals.
- A number of other amendments were also made to reduce the increasingly onerous regulatory burden on reporting entities. These amendments include: customer due diligence exemptions for certain low risk customers; the ability of reporting entities to rely on customer identification performed by other entities and to rely on identity verification done by a foreign affiliate; and removing the prohibition on scanned or photocopied customer verification documents.

The colossal failure in British Columbia of one of the largest money laundering cases in Canadian history (the so called "Project E-Pirate" case) has focused attention on the seeming inability of law enforcement and the Crown to successfully prosecute complex financial crimes. The accused were two individuals, Jain Jun Zhu and Caixuan Qin, and the company they operated, Silver International Investments Inc. It was alleged that the two individual laundered over $200 million a year through their business for various domestic and international criminals. At the end of November 2018, all charges were stayed against the individuals and their business. As a last resort to salvage the investigation and prosecution, the individuals are being subjected to a civil forfeiture proceeding to seize their real estate and cash. It is unclear precisely what went wrong with the prosecution that led to its collapse on the eve of trial.

The public, particularly in British Columbia, is keenly aware that Canada is a haven for money launderers who abuse lax Canadian anti-money laundering and terrorist financing controls. The stay of charges in the Project E-Pirate case is likely to result in even more attention on the problem. On May 31, 2018, Peter German, a former RCMP officer, released a report detailing the extent of rampant money laundering happening in British Columbia's Lower Mainland casinos. Following the release of that study, media outlets reported that access to information requests revealed that the scale of the problem is actually much larger than originally thought. Confidential reports obtained by the media indicate that money laundering in British Columbia exceeds $1 billion per year, and that a substantial number of Vancouver real estate transactions were related to laundering the proceeds of crime.

It is expected that all the media scrutiny over the past year on the magnitude of the problem, compounded by the failure of authorities to enforce existing laws, will create a

political problem that the Canadian government cannot ignore, and will result in more rapid implementation of the proposed regulatory changes to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

There have been a number of notable white collar crime developments in the past year that we have highlighted in this article. One of the more prominent developments is amendments to the Criminal Code that provide prosecutors with the ability to enter into remediation agreements with corporate accused. These amendments have been the subject of heightened public interest as a result of recent events outlined in the media. This new tool for corporate accused will continue to be in the spotlight as we gain a better understanding of the circumstances in which prosecutors will be prepared to negotiate remediation agreements. We are hopeful that the increased public scrutiny and political ramifications associated with remediation agreements, and the perceived inability of authorities to successfully enforce our existing laws against white collar criminals, will result in more enforcement activity by authorities and a faster pace of legislative change by the Federal Government than we have seen in the past.

The contents of this article should not be construed as legal advice. Should you require legal advice specific to your matter, we invite you to consult with counsel in the White Collar Defence and Investigations Group.

---

[1] A more comprehensive overview of the revised Programs can be found here.

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

Related White Collar Defence & Investigations

Authors

Glen Jennings

Partner - Leader - White Collar Defence and Investigations Group, Toronto

glen.jennings@gowlingwlg.com

+1 416-862-3537

Glen Jennings

Reem Zaia

Associate - Ottawa

reem.zaia@gowlingwlg.com

+1 613-786-0232

Reem Zaia