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Coming in from the Cold of Digital Audits: The Need for Safe Harbours in the Sea of Misleading and Deceptive Marketing

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COMING IN FROM THE COLD OF DIGITAL AUDITS: THE NEED FOR SAFE HARBOURS IN THE SEA OF MISLEADING AND DECEPTIVE MARKETING

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INTRODUCTION

*"We have to live without sympathy, don't we? We can't do that forever. One can't stay out of doors all the time. One needs to come in from the cold."*¹

Deferred prosecution agreements ("DPAs") encourage companies to come in from the cold. The idea of "coming in from the cold" is linked to the "zone of non-discovery by government".² In this zone, as the result of an internal investigation a corporation becomes aware of evidence of regulatory violations or criminal conduct before the regulator has discovered it or even has reason to be suspicious. If the company comes in from the cold, the government gains evidence of a violation or crime that it might never have discovered. From the corporation's perspective, the DPA avoids the negative consequences of a formal conviction or the formal record of a violation.

DPAs offer a safe harbour in the form of a stay of proceedings if the organization complies with the terms of the agreement.³ The deferred concept relates to the deferral of the charges until the terms, often including payment of very large fines and compliance monitoring over a period of time, have been successfully completed. One of the objectives of deferred prosecution agreements is to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.⁴ For example, debarment from government tendering may be automatically triggered by a conviction but avoided by a DPA. Reputational damage that would be associated with a conviction may be lessened if the case is resolved by way of a DPA.

An example of a DPA in the telecommunications sector is the agreement by Ericsson to pay more than \$1 Billion to resolve a pending United States Foreign Corrupt Practices Act ("FCPA") case, in December of 2019. Ericsson is a multinational telecommunications company headquartered in Sweden. Ericsson and its subsidiary, Ericsson Egypt, conspired to violate the FCPA by bribing government officials, falsifying books and records, and failing to implement reasonable internal accounting controls. The resolutions cover criminal conduct in Djibouti, China, Vietnam, Indonesia, and Kuwait.⁵

¹ The Spy Who Came in from the Cold (1965), Quotes, <https://www.imdb.com/title/tt0059749/quotes>

² Kenneth Jull and Todd Archibald, "Coming In From The Cold: Deferred Prosecution (Remediation) Agreements In Canada" 17 September 2018 <https://www.mondaq.com/canada/corporate-crime/735734/coming-in-from-the-cold-deferred-prosecution-remediation-agreements-in-canada>

³ For example, see the Criminal Code, section 715.3(1)

⁴ For example, see the Criminal Code, section 715.31(f).

⁵ <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>



The Government of Canada made the decision to create a deferred prosecution programme following public consultations.⁶ The deferred agreements are termed "Remediation Agreements" which are defined as "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement".⁷

There is, however, no official deferred agreement program in Canada in relation to misleading advertising offences. Crimes of misleading advertising are policed in Canada at the federal level under the *Competition Act*. The deferred prosecution regime in the Canadian Criminal Code does not apply to the *Competition Act*.⁸ The Competition Bureau has a separate policy for immunity and leniency, but this only applies where there are multiple corporations involved in misleading advertising and the first to come in from the cold gives evidence against the others. Where the applicant is the only party involved in the offence it will not be eligible for immunity.⁹ For example, the offence of false or misleading representations may be committed by one organization and be intended for the sole benefit of that organization. Individuals employed by an organization are ineligible as a result of being the sole participant but may be separately eligible under the Immunity Program, as their admissions and evidence may further an investigation of the organization.

The curious result is that if an organization internally discovers that it, and it alone, has committed misleading advertising, there is no DPA or Immunity or Leniency programme that would encourage it to come in from the cold. Employees of that organization who are parties to the offence do have an incentive to come in from the cold under the immunity programme, but the organization itself has no similar incentive.

The exclusion of the misleading advertising crime from the deferred prosecution regime has some significant consequences. A conviction under section 52 of the *Competition Act* (false or misleading representation), or section 53 (deceptive notice of winning a prize) of the *Competition Act* is an offence that will lead to debarment from government contracting for a period of 10 years, which can only be

⁶ Public Services and Procurement Canada, "Results of public consultations on expanding Canada's toolkit to address corporate wrongdoing" *News Release* (February 22, 2018), at https://www.canada.ca/en/public-services-procurement/news/2018/02/results_of_publicconsultationsonexpandingcanadastoolkittoaddress.html.

⁷ Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 2018. The Bill passed the House of Commons (June 6, 2018), received approval in the Senate after third reading, and Royal Assent on June 21, 2018.

⁸ In the Canadian regime, offences in respect of which a deferred prosecution agreement (remediation agreement) may be entered into are set out in the legislation and encompass a wide range of *Criminal Code* offences in the area of financial crimes. The list is contained in a schedule to PART XXII.1 Remediation Agreements and includes a list of offences under the *Criminal Code* and the *Corruption of Foreign Public Officials Act*. No offences under the *Competition Act* are listed or subject to the deferred prosecution scheme. See Jull and Spadotto, client alert, "Compliance Now Counts in Antitrust" Gardiner Roberts July 12, 2019. Note that one technique to deal with this omission is the use of section 34 prohibition orders. This might be described as a deferred prosecution through the back door. See <https://www.canada.ca/en/competition-bureau/news/2020/03/third-engineering-firm-to-pay-750000-in-settlement-for-quebec-bid-rigging.html>

⁹ Immunity and Leniency Programs under the *Competition Act* (March 15, 2019) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html#sec02> paragraph 29 states: "Where the applicant is the only party involved in the offence it will not be eligible for immunity. For example, the offence of false or misleading representations may be committed by one organization and be intended for the sole benefit of that organization. Individuals employed by an organization ineligible as a result of being the sole participant may be separately eligible under the Immunity Program, as their admissions and evidence may further an investigation of the organization. Individuals are encouraged to apply for immunity through their own separate counsel."



reduced to 5 years pursuant to an administrative agreement.¹⁰ Despite this potentially very serious consequence, there is no deferred prosecution agreement available for a company acting alone that desires to come in from the cold and avoid a conviction accompanied by debarment.

In Canada, there is a separate administrative track which covers deceptive marketing. The potential exposure to the company is a \$10 million Administrative Monetary Penalty (“AMP”).¹¹ A similar AMP is found in the *Telecommunications Act*¹² section 72.001 which is a general AMP applying to most contraventions of the Act. In the case of an individual, the telecommunications AMP does not exceed \$25,000 for a first contravention and in the case of an organization the AMP does not exceed \$10,000,000 for a first contravention.

There is no formal programme for deferred administrative penalties in either the *Competition Act* or the *Telecommunications Act*. Administrative penalties do not generally qualify as offences.¹³ The deceptive marketing monetary penalties have been held to not qualify as offences which would attract constitutional procedural protections.¹⁴ The legislative framework governing these AMPs does not provide for deferred resolutions. The Competition Bureau’s Immunity and Leniency programme does not encompass the civil or administrative track as it applies only to the criminal provisions of the *Competition Act*.¹⁵

¹⁰The Ineligibility and Suspension Policy is part of the Government of Canada’s Integrity Regime. <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>

¹¹ *Competition Act* (R.S.C., 1985, c. C-34) section 74.1. The maximum AMP of \$10 million was imposed on Bell Canada in June 2011. Bell agreed to stop making what the Competition Bureau had concluded were misleading representations about the prices offered for its services. The Bureau determined that, since December 2007, Bell had charged higher prices than advertised for many of its services, including home phone, Internet, satellite TV and wireless. The advertised prices were not in fact available, as additional mandatory fees, such as those related to TouchTone, modem rental and digital television services, were hidden from consumers in fine-print disclaimers. See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html.

¹² *Telecommunications Act* (S.C. 1993, c. 38)

¹³ The Supreme Court of Canada has articulated the test to determine whether an AMP scheme strays across the constitutional line into offence territory (which then become subject to Charter rights) in the case of *Guindon v. Canada*, (2015), 2015 CarswellNat 3231, 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) (“*Guindon*”). The court held that AMPs under s. 163.2 of the *Income Tax Act*³ are not offences that trigger constitutional protections such as the right to be presumed innocent.

¹⁴ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315 [Chatr], at paragraph 575: The \$10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*. See also Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters) Chapter 16 “Competition Act Offences, Violations and Efficiency”.

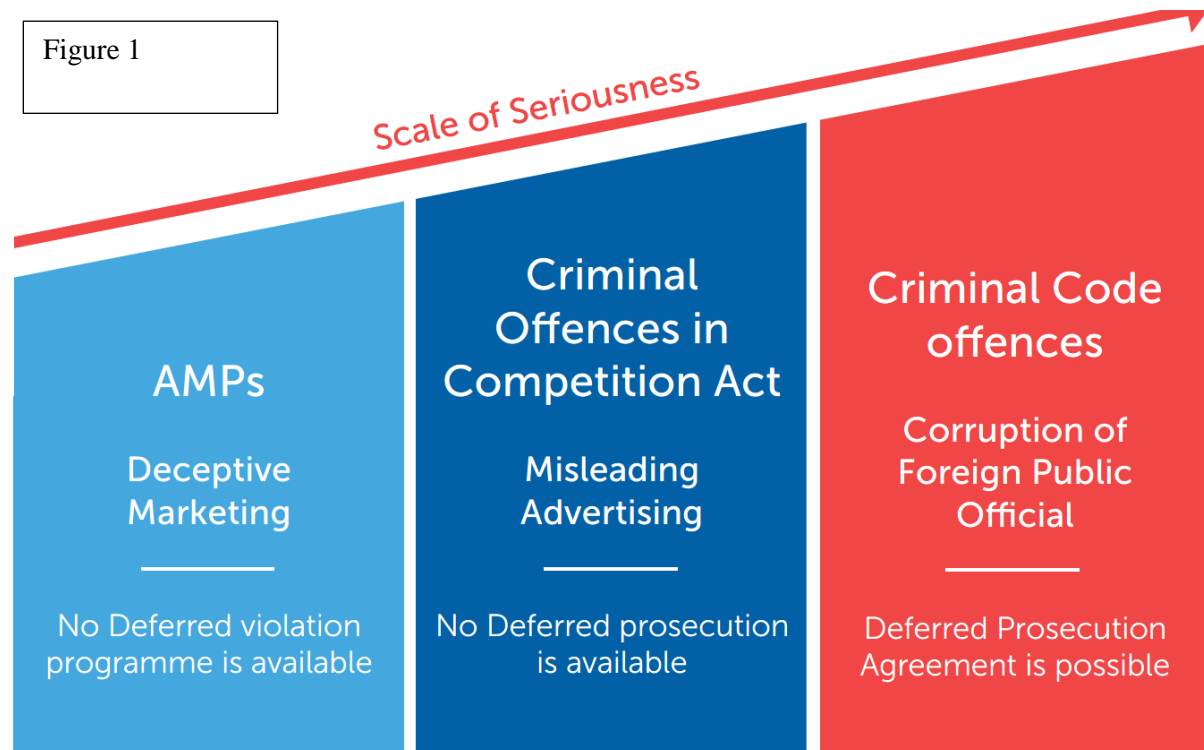
¹⁵ See Immunity and Leniency Programs under the *Competition Act* March 15, 2019

Appendix 1: Criminal provisions of the *Competition Act*

- Part VI of the Act prohibits under criminal sanction: bid rigging, agreements between competitors to fix prices, allocate markets or restrict production, false or misleading representations and deceptive marketing practices. For operational and statistical purposes, those offences found in sections 45 to 49 (Table 1) are treated separately from the criminal false or misleading representations and deceptive marketing practices provisions found in sections 52 through 55.1 (Table 2). Note that Section 52.1(1) with respect to telemarketing is a strict liability offence with a due diligence defence, with a potential penalty on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both. The other listed offences contain various permutations and combinations of liabilities and defences.

The Canadian landscape in relation to deferred prosecutions looks like an inverted pyramid whereby DPAs are not available for the least serious violations but are available for the most serious criminal offences. These dynamics are illustrated in Figure 1:

Figure 1



This article develops a dual thesis.

First, the Canadian government should add the criminal offence of misleading advertising and its variants in the *Competition Act* to the list of eligible offences for which a remediation agreement is available. This would bring Canada into line with other jurisdictions. There are some comparative international precedents for the use of deferred prosecution agreements for misleading advertising, although generally these cases rise to the level of criminal fraud cases that involved an element of misleading acts. The same policy rationales that support DPAs for serious criminal offences apply to misleading advertising offences. In particular, reducing the negative consequences for innocent parties who would be impacted by a debarment is an important consideration. As noted above, the debarment for misleading advertising is a 10 year period, potentially reduced to 5 years, and automatically flows from a conviction. A deferred prosecution program would avoid debarment and be a true incentive to come in from the cold for those companies that do significant government work.

Secondly, deferred agreement programs should be developed for the administrative regime of monetary penalties. This proposal would not, strictly speaking, be deferred **prosecution** agreements, as the administrative monetary penalty does not involve the criminal justice prosecution apparatus. But, the same policy rationales that support DPAs for serious criminal offences apply to deceptive marketing. When a company discovers evidence of deceptive marketing in the “zone of non-discovery by government”, there needs to be an incentive to self-report.



Moreover, there are reform proposals in Canada to extend the debarment regime to cover AMPs that are serious, repetitive and/or otherwise egregious.¹⁶ If these proposals are enacted, there will be a very real risk of collateral damage resulting from the imposition of an AMP. A deferred program could offer the carrot or incentive of avoiding that debarment.

Civil penalties are used in a myriad of ways to enforce corporate responsibility by various countries around the world.¹⁷ The trend is for regulators to offer civil resolutions as the lesser evil compared to criminal convictions by way of deferred prosecution agreements. What is less developed, however, is the parallel use of deferred programs *within* civil and administrative regimes. Yet, there are valid policy rationales for creating incentives in these regimes to encourage corporations to come in from the cold.

I believe that my proposal to develop parallel deferred agreements to encourage corporations to come in from the cold in administrative proceedings is somewhat unique and is hopefully a contribution to the literature. The last section of this article grapples with the mechanical and procedural ways in which a deferred program could be adopted for AMPs. There are many creative permutations and combinations of remedies that would be an incentive to come in from the cold. For example, a regulator could offer to not issue a formal notice of violation, and monetary amounts would be significantly reduced if an organization voluntarily self-reported. The mechanism would be an “Alternate Case Resolution(“ACR’s”).¹⁸ Although ACRs have been used by regulators, they have been traditionally used in the context of resolving disputes and have not been offered as an incentive to self-report. Another creative idea would be the funding of an “imbedded auditor” that would report to the regulator for the deferral period. The auditor concept would proceed in the basis of an informal agreement rather than an order filed with the Tribunal.

I DEFERRED PROSECUTIONS ENCOURAGE SELF-DISCLOSURE FROM THE ZONE OF NON-DISCOVERY

The “zone of non-discovery by government”¹⁹ describes a concept whereby a corporation becomes aware of evidence of regulatory violations or criminal conduct before the regulator has discovered it or even has reason to be suspicious. The concept is illustrated in Figure II, which uses the U.S. policy on deferred prosecutions as an example. The United States is in the forefront of the use of non-prosecution and deferred prosecution agreements in areas such as foreign corruption and the U.K. has recently entered this field. A central concept in the United States programme is the zone of non-discovery.

¹⁶ <https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html>, Appendix 2, section 1. See Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters) at INT:120 — DEBARMENT PROPOSALS LOOSEN THEIR GRIP BUT REACH OUT FARTHER

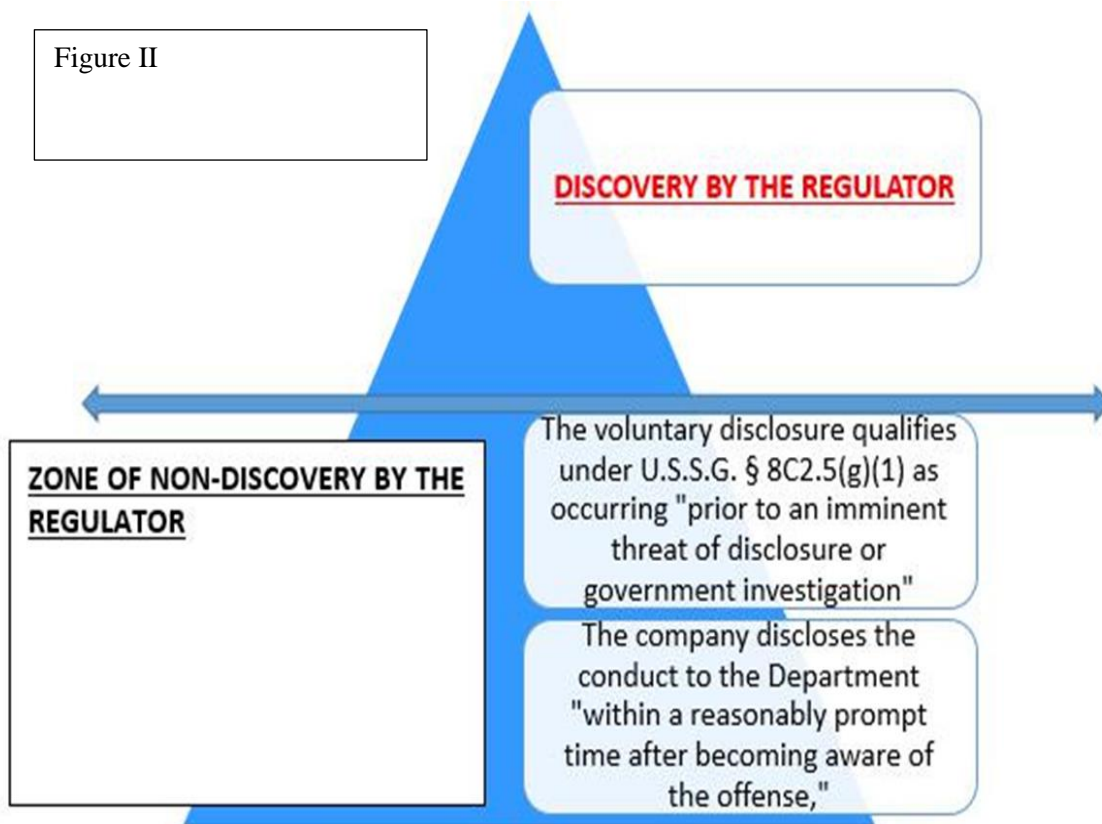
¹⁷ Brandon L. Garrett “The Public Interest in Corporate Settlements” 58 *Boston College Law Review* 1483 (2017); David Rosenfeld, “CIVIL PENALTIES AGAINST PUBLIC COMPANIES IN SEC ENFORCEMENT ACTIONS: AN EMPIRICAL ANALYSIS” 22 *U. OF PENNSYLVANIA JOURNAL OF BUSINESS LAW* 136 (2019); Marco Ventoruzzo “Do Market Abuse Rules Violate Human Rights? The *Grande Stevens v. Italy* Case” <http://ssrn.com/abstract=2517760>; MARINA NEHME “Financial Markets Authority and Administrative Monetary Penalties” 18 *NEW ZEALAND BUSINESS LAW QUARTERLY* 2; V Comino, ‘James Hardie and the Problems of the Australian Civil Penalties Regime’ (2014) 37 (1) *University of New South Wales Law Journal* 195-230

¹⁸ For example, the CRTC uses “Alternative Case Resolutions (ACR) - Telemarketing Compliance and Enforcement”. For example, see https://crtc.gc.ca/eng/dnc/dncib.htm?_ga=2.194028137.53248018.1592075922-1470883755.1592075922

¹⁹ Kenneth Jull and Todd Archibald, “Coming In From The Cold: Deferred Prosecution (Remediation) Agreements In Canada” September 2018 <https://www.mondaq.com/canada/corporate-crime/735734/coming-in-from-the-cold-deferred-prosecution-remediation-agreements-in-canada>



Figure II



Former Deputy Attorney General Rosenstein has described the deferred prosecution policy as centering on the concept of voluntary self-disclosure:

First, the FCPA Corporate Enforcement Policy states that when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.²⁰

The policy, revised in November of 2017, defines voluntary self-disclosure in the following terms (reflected in the chart above):

²⁰ Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (November 29, 2017). In May of 2018 Rosenstein announced that he had established a new Working Group on Corporate Enforcement and Accountability within the Justice Department, to make internal recommendations about white collar crime, corporate compliance, and related issues. See "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act New York" (May 9, 2018).



In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";

The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and

The company discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.²¹

DPAs offer a safe harbour in the form of a stay of proceedings if the organization complies with the terms of the agreement.²² The deferred concept relates to the deferral of the charges until the terms, often including payment of very large fines and compliance monitoring over a period of time, have been successfully completed.

II GLOBAL APPLICATION OF DEFERRED PROSECUTION AGREEMENTS

In March of 2019, the OECD released a very comprehensive report entitled "Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention".²³ The OECD found that non-trial resolutions have been the predominant means of enforcing foreign bribery and other related offences. For all 44 Parties to the Anti-Bribery Convention, non-trial resolution instruments have become the primary enforcement vehicle of anti-foreign bribery laws. Moreover, the last decade has seen a steady increase in the use of coordinated multi-jurisdictional non-trial resolutions.

In the UK, the Serious Fraud Office has entered into a record-breaking Deferred Prosecution Agreement (DPA) with the global aerospace company Airbus SE following its approval on January 31, 2020 by Dame Victoria Sharp, President of the Queen's Bench Division.²⁴

Under the terms of the DPA, Airbus SE agreed to pay a fine and costs amounting to €991m in the UK, and in total, €3.6 billion as part the world's largest global resolution for bribery, involving authorities in France and the United States.

The announcement comes a little under four years after the SFO began investigating the company over allegations that it had used external consultants to bribe customers to buy its civilian and military aircrafts. The indictment, which has been suspended for the term of the DPA, covers five counts of failure

²¹ 9-47.120 — FCPA Corporate Enforcement Policy, available at <https://www.justice.gov/criminal-fraud/file/838416/download>

²² For example, see the Criminal Code, section 715.3(1) states: **remediation agreement** means an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.

²³ www.oecd.org/corruption/resolving-foreign-bribery-cases-with-non-trial-resolutions.htm (OECD Resolutions Report).

²⁴ <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/>



to prevent bribery. The conduct involves Airbus' Commercial and Defence & Space divisions. The conduct covered by the UK DPA took place across five jurisdictions: Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana between 2011 and 2015.

The Judge ruled on January 31, 2020 at the Royal Courts of Justice that the total sum (€983.97m plus the SFO's costs of €6.9m) reflected the gravity of the conduct, the full cooperation of Airbus SE in the investigation, and the programme of corporate reform and compliance put in place by new leadership at the top of the company.

As part of the DPA, the company agreed to fully cooperate with the SFO and its law enforcement partners in any future investigations and prosecutions, and to provide disclosure of any subsequent wrongdoing by the company or its employees, subject to applicable laws. If the company does not honour the conditions of the DPA, the prosecution may resume.

Airbus SE has also reached a Convention Judiciaire d'Intérêt Public with the Parquet National Financier (PNF) and a Deferred Prosecution Agreement with the US Department of Justice and US Department of State. In total, these agreements together with the SFO DPA require Airbus SE to pay approximately €3.6 billion (including €2,083,137,455 to the PNF and €525,655,000 to the US authorities) at the exchange rate at time of payment.

In her judgment, Dame Victoria Sharp asserted:

"The seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave. The conduct took place over many years. It is no exaggeration to describe the investigation it gave rise to as worldwide, extending into every continent in which Airbus operates. The number of countries subject to intense criminal investigation by the various agencies, and the scale and scope of the wrongdoing disclosed in the Statement of Facts demonstrate that bribery was to the extent indicated, endemic in two core business areas within Airbus."²⁵

Lisa Osofsky, Director of the SFO, underscored that

"Airbus paid bribes through agents around the world to stack the decks in its favour and win contracts around the globe. Corruption like this undermines free trade and fair development and it is to Airbus's credit that it has admitted its culpability, cleaned its house and come forward to put this conduct to bed."²⁶

In the same league of the Airbus DPA is the agreement in the United States by Ericsson mentioned earlier, to pay more than \$1 Billion to resolve a pending Foreign Corrupt Practices Act case. Ericsson is a multinational telecommunications company headquartered in Sweden. Ericsson and its subsidiary, Ericsson Egypt, conspired to violate the Foreign Corrupt Practices Act ("FCPA") by bribing government

²⁵ <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/>

²⁶ <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/>



officials, falsifying books and records, and failing to implement reasonable internal accounting controls. The resolutions cover criminal conduct in Djibouti, China, Vietnam, Indonesia, and Kuwait.²⁷

In connection with the filed charges, Ericsson Egypt pled guilty before United States District Judge Alison J. Nathan. The Southern District of New York (“SDNY”), and the Criminal Division of the Department of Justice (“DOJ”), entered into a deferred prosecution agreement (“DPA”) with Ericsson. Pursuant to the DPA, Ericsson admitted to participating in the charged conspiracy. Ericsson will pay a total criminal penalty of \$520,650,432 to the United States, which includes a \$9,520,000 criminal fine that Ericsson agreed to pay on behalf of Ericsson Egypt. Ericsson also agreed to implement rigorous internal controls, retain an independent compliance monitor for a term of three years, and cooperate fully with the Government in any ongoing investigations.²⁸

In related proceedings, Ericsson reached a settlement with the U.S. Securities and Exchange Commission (“SEC”). Under the terms of its civil resolution with the SEC, Ericsson agreed to pay \$539,920,000 in disgorgement of profits and prejudgment interest, which, together with the criminal penalty paid to the United States, yields total criminal and regulatory penalties to be paid by Ericsson of \$1,060,570,432.

U.S. Attorney Geoffrey S. Berman poignantly stated the following: “Today Swedish telecom giant Ericsson has admitted to a years-long campaign of corruption in five countries to solidify its grip on telecommunications business. Through slush funds, bribes, gifts, and graft, Ericsson conducted telecom business with the guiding principle that ‘money talks.’ Today’s guilty plea and surrender of over a billion dollars in combined penalties should communicate clearly to all corporate actors that doing business this way will not be tolerated.”²⁹

Assistant Attorney General Brian A. Benczkowski emphasized that “Ericsson’s corrupt conduct involved high-level executives and spanned 17 years and at least five countries, all in a misguided effort to increase profits. Such wrongdoing called for a strong response from law enforcement, and through a tenacious effort with our partners in the Southern District of New York, the SEC, and the IRS, today’s action not only holds Ericsson accountable for these schemes, but should deter other companies from engaging in similar criminal conduct.”³⁰

Criminal Investigation Division, Internal Revenue Service (“IRS-CI”), Chief Don Fort underlined that “Implementing strong compliance systems and internal controls are basic principles that international companies must follow to steer clear of illegal activity. Ericsson’s shortcomings in these areas made it easier for its executives and employees to pay bribes and falsify its books and records. We will continue to pursue cases such as these in order to preserve a global commerce system free of corruption.”

According to the allegations contained in the criminal Informations, which were filed in Manhattan federal court, the statement of facts in the DPA set out that from approximately 2000 to 2016, Ericsson, through various executives, employees, and affiliated entities, used third-party agents and consultants to bribe foreign government officials and/or manage off-the-books slush funds in countries where it pursued contracts to conduct telecommunications business. The agents were often engaged through sham

²⁷ <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>

²⁸ <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>

²⁹ <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>

³⁰ <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>



contracts and paid pursuant to false invoices, with those payments accounted for improperly in Ericsson's books and records.

For an example of one jurisdiction, in China, from approximately 2000 to 2016 Ericsson, via subsidiaries, paid various agents, consultants, and service providers tens of millions of dollars, a portion of which was used to fund an expense account that covered gifts, travel, and entertainment for foreign officials. Ericsson used the expense account to win business with Chinese state-owned customers. In addition, from approximately 2013 to 2016, Ericsson subsidiaries paid third-party service providers approximately \$31.5 million pursuant to sham contracts for services that were never performed. The payments were intended to allow Ericsson's subsidiaries to continue to use and pay third-party agents in China in contravention of Ericsson's policies and procedures. Ericsson knowingly mischaracterized the payments and improperly recorded them in its books and records.

The above high profile DPAs illustrate some important general themes. The amounts in issue and the size of the penalties that formed part of the agreements are staggering. These agreements counter any suggestion that DPAs are a "free pass" for corporations. The breadth and length of the conduct in issue is very extensive. These agreements continue the trend identified by the OECD that non-trial resolutions have been the predominant means of enforcing foreign bribery and other related offences.

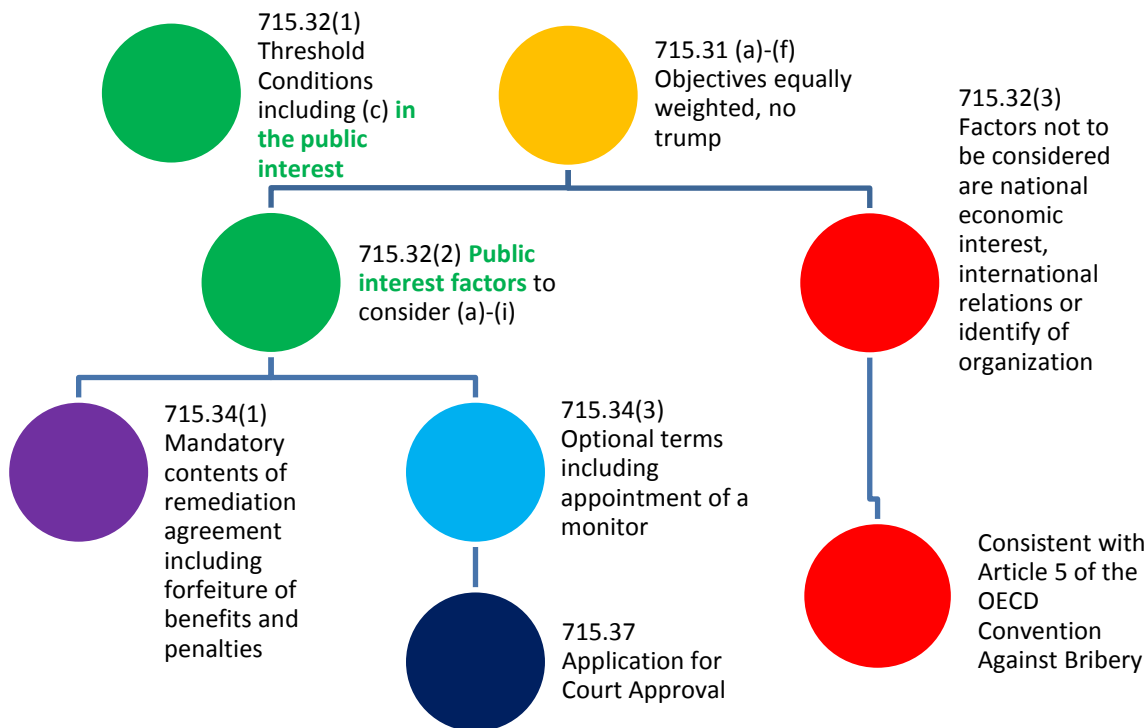
III ROADMAP TO REMEDIATION AGREEMENTS IN CANADA

The regime governing remediation agreements in Canada is relatively new and complex. Entire chapters in books are devoted to the complexity of this legislation.³¹

It is not the purpose of this article to exhaustively review this legislation. However, it is important to review the basic legislative scheme as context for the argument that remediation agreements should be extended to misleading advertising and deferred programs developed for administrative enforcement of deceptive marketing. The following figure sets out a roadmap to remediation agreements.

Figure III

³¹ Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters) Chapter 22 "Immunity, Leniency and Deferred Prosecution Agreements: Permissible and Prohibited Routes".



The purpose section of the legislation sets out six separate objectives of remediation agreements which are equally weighted; no one objective trumps the others. The purpose clause is an interesting amalgam of sentencing principles (such as denunciation), incentives to cooperate (encouraging voluntary disclosure) and economic principles (reduce the negative consequences for persons who did not engage in the wrongdoing). The Purpose clause is as follows:

715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:

- (a) to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
- (b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
- (c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
- (d) to encourage voluntary disclosure of the wrongdoing;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.



Section 715.31 does not "trump" one objective over the other.

The first hurdle that must be passed are threshold conditions which must be met in the public interest. The Attorney General is placed into the vortex of this threshold provision by statutory requirement that the Attorney General has consented to the negotiation of the agreement.

One of the threshold conditions is that the prosecutor is of the opinion that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group.

A threshold condition in s. 715.32(1) of the Criminal Code is that (c) the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances. This public interest condition is guided by a structured discretion of eight factors that are codified in s. 715.32(2) plus a ninth basket factor. This has been described as the "right road" to remediation agreements.³²

The remedial agreement scheme structures the discretion to be exercised by the prosecutor. Section 715.32(2) sets out factors to consider in the assessment of the public interest as follows:

Factors to consider

(2) For the purposes of paragraph (1)(c), the prosecutor must consider the following factors:

- (a) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- (b) the nature and gravity of the act or omission and its impact on any victim;
- (c) the degree of involvement of senior officers of the organization in the act or omission;
- (d) whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- (e) 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;
- (f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- (g) 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;
- (h) whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and

³² Kenneth Jull, "The Right and Wrong Way to Seek Remediation Agreements". Toronto Law Journal, March 2019.



(i) any other factor that the prosecutor considers relevant.

In my view, factor (a) “the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities” will inform the interpretation of the other factors. While this factor does not “trump” the other factors, it will impact them. Two extremes prove the point. Early self-disclosure, as soon as an organization determines that something is amiss, will minimize any future impact of the illegal act as well as eliminating the potential for a repetition of the conduct. This then impacts the other factors such as reparations for harm done and the gravity of the act and its impact on victims. Conversely, late disclosure of details after the authorities have already discovered the illegal act will not have prevented harm to victims as early as was possible and may have permitted those responsible to repeat the illegal acts.

Robert Frost wrote that “Two roads diverged in a yellow wood, And sorry I could not travel both.” The legislation for deferred prosecution agreements clearly sets out a permissible route, but also a prohibited route to seek such agreements.

Subsection 715.32(3) creates an effective “Do Not Enter” sign (depicted by the red circles in Figure III) which is consistent with the OECD Convention on Combating Bribery of Foreign Public Officials. If the organization is alleged to have committed a foreign corruption offence, 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.

Once the prosecutor is convinced that it would be in the public interest to negotiate a remediation agreement, the legislation sets out mandatory terms that must be in that agreement, including forfeiture of benefits obtained by the illegal act and penalties. Optional terms of the agreement may include the appointment of an independent monitor.

Having come this far, the journey to a remediation agreement is not yet complete. When the prosecutor and the organization have agreed to the terms of a remediation agreement, the prosecutor must apply to the court in writing for an order approving the agreement. The court must, by order, approve the agreement if it is satisfied that:

- (a) the organization is charged with an offence to which the agreement applies;
- (b) the agreement is in the public interest; and
- (c) the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

To date, no deferred prosecution agreement has been negotiated under the new legislation. The remediation scheme received great attention, however, with media focus on the “SNC-Lavalin Affair”. [The SNC-Lavalin case added a political dimension to the operation of the remediation scheme in Canada.](#)³³ For a period of several months beginning in early 2019, a national political tumult unfolded in Canada involving claims of political interference in prosecutorial independence. Canada's former minister of justice and attorney general, Jody Wilson-Raybould, alleged that she had been subjected to inappropriate *political* pressure to seek a deferred prosecution agreement (DPA) for SNC-Lavalin. These

³³ Kenneth Jull, “The Ethics Commissioner’s Report as a Political Football” *Toronto Law Journal* (October 2019)



allegations came to light after Ms. Wilson-Raybould was shuffled to Veterans Affairs, a portfolio from which she subsequently resigned.

In a series of widely publicized meetings, the House of Commons Standing Committee on Justice and Human Rights heard testimony from some of the country's most senior public servants, ministers, political staff, and legal scholars.³⁴ In 2019, the story of the “SNC-Lavalin Affair” was the top media story only behind that of the Federal Election.³⁵ Commentators asked whether the affair was a constitutional or political crisis.³⁶

The SNC-Lavalin case was resolved in late 2019 when the Company entered a guilty plea to a count of fraud committed against various Libyan authorities. The charges under the *Corruption of Foreign Public Officials Act* (CFPOA) were withdrawn. SNC-Lavalin paid \$280 million as a fine, which is one of the largest fines assessed against a corporation in Canada. Although the plea relates to fraud, the Court recognized the elements of corruption that were involved.³⁷ Justice LeBlond commented that determining “the appropriate fine level for organizations is not achieved through a purely arithmetical process under Canadian law, especially in relation to offences such as fraud and corruption where there is limited precedent.”³⁸

The plea to fraud against Libyan authorities avoided the collateral damage of debarment that would have accompanied a plea or finding of guilt under the CFPOA. While fraud committed against the Canadian government is covered under the public works department’s integrity regime — and could thus trigger a ban — a fraud offence connected to a foreign government is not.³⁹ The plea was described by commentators as a deferred prosecution agreement “through the back door.”⁴⁰

In my view, this plea resolution can be perceived as a just result that reflected significant risk on both sides. From the defence perspective, a conviction would have brought certain debarment. The resolution allows SNC-Lavalin to continue to bid on federal contracts. This will have positive impacts on those innocent employees who were not complicit in the bribery as well as other innocent stakeholders such as pension funds who hold shares in the company. The Court recognized this factor in the sentencing judgment:

³⁴ Kenneth Jull, one of the authors of this book, testified before the Standing Committee on Justice and Human Rights of the House of Commons as a lawyer and academic witness on February 25, 2019: <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence>. The Committee studied REMEDIATION AGREEMENTS, THE SHAWCROSS DOCTRINE AND THE DISCUSSIONS BETWEEN THE OFFICE OF THE ATTORNEY GENERAL AND GOVERNMENT COLLEAGUES.

³⁵ <https://www.bellmedia.ca/the-lede/press/ctv-national-news-recaps-the-top-10-stories-of-2019-beginning-dec-23/>

³⁶ Kate Bezanson, “Constitutional Or Political Crisis: Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair,” 52 U.B.C. L. Rev. 761 (2019)

³⁷ Kenneth Jull, “SNC-Lavalin: The Final Chapter”, May 2020 *Toronto Law Journal* <https://bit.ly/2TKIUbZ>

³⁸ The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodex Inc.) Court of Quebec, (Criminal and Penal Division)

N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond, paragraph 9.6

³⁹ SNC-Lavalin settles Libya charges, pleads guilty to single count of fraud THE CANADIAN PRESS Dec. 18, 2019

⁴⁰ Legal observers noted the settlement’s effect is likely similar to what a DPA would have achieved: A hefty fine, a statement of guilt and monitoring of the company for a prescribed period. “One could say it’s a DPA through the back door,” said Kenneth Jull, <https://www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption/>



This mitigating factor considers the impact that a fine may have on individuals who are dependent on the corporation and who are not at fault. Such individuals include employees, as well as shareholders and other stakeholders such as pensioners, suppliers and clients.⁴¹

The prosecution also faced significant risks. Had the case of *SNC-Lavalin* gone to trial with respect to allegations of breaching the CFPOA, the issue of scope of authority of senior officers who paid or authorized bribes would have been likely litigated. Under section 22.2 of the Criminal Code, this was a hurdle that the prosecution would have had to clear on the standard of proof of beyond a reasonable doubt.

In addition, the prosecution faced the risk of a Charter stay application in relation to trial within a reasonable time, and indeed had suffered this fate on some individual prosecutions related to this case. A corporation is considered a person within the meaning of s. 11 of the Charter. The Supreme Court in *R. v. CIP Inc.*⁴² confirmed that it would be unfair to suggest that the community is less interested in seeing corporations brought to trial. Given the balance of risks for both the defence and the prosecution, this plea resolution was a just result accompanied by one of the largest fines in Canadian history.

Kate Bezanson, in her article “Constitutional Or Political Crisis: Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair,”⁴³ finds that the SNC-Lavalin crisis “was one born of competing legitimate interpretations of key provisions of the DPA regime, of what constitutes the public interest, and of what comprises appropriate and inappropriate political pressure.” The crisis was compounded by a communications breakdown between government colleagues and the Attorney General. Further, it was exacerbated by competing understandings of when, if at all, an attorney general's decision can be said to be final.

In my view the crisis was borne out of competing interpretations of the relatively new legislation and a misunderstanding of some fundamental corporate liability principles. The legislative framework is comprehensive and flexible. With that in mind, I turn to an analysis of the omission to include misleading advertising as one of the offences covered by deferred prosecution agreements.

IV DPAS ARE NOT PRESENTLY AVAILABLE FOR MISLEADING ADVERTISING OFFENCES

Unfortunately, there is an imbalance in Canadian law. Deferred prosecution agreements are only available for more serious Criminal Code offences, and are not available for the criminal offence of misleading advertising as illustrated in Figure 1 reproduced above.

Offences in respect of which a remediation agreement may be entered into are set out in the legislation and encompass a wide range of *Criminal Code* offences in the area of financial crimes. The list is contained in Schedule 6 to Bill C-74 and is as follows:

⁴¹ *The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodex Inc.)* Court of Quebec, (Criminal and Penal Division) N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond, paragraph 10.36 citing 42 T. Archibald, K. Jull and K. Roach, *The Changed Face of Corporate Criminal Liability*, 48 *Crim LQ* 367 2003-2004, at 390.

⁴² [1992 CarswellOnt 82, \[1992\] 1 S.C.R. 843, at para. 50](#)

⁴³ Kate Bezanson, “Constitutional Or Political Crisis: Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair,” 52 *U.B.C. L. Rev.* 761 (2019).



1. An offence under any of the following provisions of this Act:

- (a) section 119 or 120 (bribery of officers);
- (b) section 121 (frauds on the government);
- (c) section 123 (municipal corruption);
- (d) section 124 (selling or purchasing office);
- (e) section 125 (influencing or negotiating appointments or dealing in offices);
- (f) subsection 139(3) (obstructing justice);
- (g) section 322 (theft);
- (h) section 330 (theft by person required to account);
- (i) section 332 (misappropriation of money held under direction);
- (j) section 340 (destroying documents of title);
- (k) section 341 (fraudulent concealment);
- (l) section 354 (property obtained by crime);
- (m) section 362 (false pretence or false statement);
- (n) section 363 (obtaining execution of valuable security by fraud);
- (o) section 366 (forgery);
- (p) section 368 (use, trafficking or possession of forged document);
- (q) section 375 (obtaining by instrument based on forged document);
- (r) section 378 (offences in relation to registers);
- (s) section 380 (fraud);
- (t) section 382 (fraudulent manipulation of stock exchange transactions);
- (u) section 382.1 (prohibited insider trading);
- (v) section 383 (gaming in stocks or merchandise);
- (w) section 389 (fraudulent disposal of goods on which money advanced);
- (x) section 390 (fraudulent receipts under Bank Act);



(y) section 392 (disposal of property to defraud creditors);

(z) section 397 (books and documents);

(z.1) section 400 (false prospectus);

(z.2) section 418 (selling defective stores to Her Majesty); and

(z.3) section 426 (secret commissions).

2. An offence under any of the following provisions of the Corruption of Foreign Public Officials Act:

(a) section 3 (bribing a foreign public official); and

(b) section 4 (maintenance or destruction of books and records to facilitate or hide the bribing of a foreign public official).

3. A conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in section 1 or 2.

There is no eligibility for a remediation agreement for various federal criminal regimes outside the *Criminal Code* or the *Corruption of Foreign Public Officials Act*. For example, *Competition Act* offences do not qualify.

Imagine the following hypothetical: Company “A” does an internal privileged audit and discovers evidence of two different types of issues that the government is *not aware of*. The company is in the “zone of non-discovery” by government.

Issue one (1) is evidence that a bribe was paid on behalf of Company A to a foreign public official. The potential exposure to the company is in the range of \$300 million⁴⁴ in fines and disbarment from government tendering for a 10 year period.

Issue two (2) is evidence that Company A knowingly or recklessly make a representation to the public that is false or misleading in a material respect. The potential exposure to the company on conviction on indictment is a fine in the discretion of the court or on summary conviction, a fine not exceeding \$200,000.⁴⁵

In Canada, the deferred prosecution regime is only available for issue (1) which is the serious crime of bribery. In the hypothetical posed above, Company A would therefore have an incentive or carrot to come in from the cold only in relation to the more serious conduct of bribery, but would not have the same incentive in relation to the evidence relating to the crime of misleading advertising. One can imagine that this could also create havoc in the compliance division of the company in terms of its disclosure to the government. In this example, does Company A disclose some, but not all of the discovery by the internal compliance division? This inverted pyramid lacks proportionality. If a deferred

⁴⁴ The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodex Inc.) Court of Quebec, (Criminal and Penal Division) N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond.

⁴⁵ A Canadian example is the *Competition Act* (R.S.C., 1985, c. C-34) section 52(5).



prosecution agreement might be available for the most serious of crimes such as bribery, they should also be available for lesser crimes such as misleading advertising.

There is, however, no official deferred agreement program in Canada in relation to misleading advertising offences. Crimes of misleading advertising are policed in Canada at the federal level under the *Competition Act*. The deferred prosecution regime in the Canadian Criminal Code does not apply to the *Competition Act*.⁴⁶ The Competition Bureau has a separate policy for immunity and leniency, but this only applies where there are multiple corporations involved in misleading advertising and the first to come in from the cold gives evidence against the others. Where the applicant is the only party involved in the offence it will not be eligible for immunity.⁴⁷ For example, the offence of false or misleading representations may be committed by one organization and be intended for the sole benefit of that organization. Individuals employed by an organization are ineligible as a result of being the sole participant but may be separately eligible under the Immunity Program, as their admissions and evidence may further an investigation of the organization.

The curious result is that if an organization internally discovers that it, and it alone, has committed misleading advertising, there is no DPA or Immunity or Leniency programme that would encourage it to come in from the cold. Employees of that organization who are parties to the offence do have an incentive to come in from the cold under the immunity programme, but the organization itself has no similar incentive.

The exclusion of the misleading advertising crime from the deferred prosecution regime has some significant consequences. A conviction under section 52 of the *Competition Act* (false or misleading representation), or section 53 (deceptive notice of winning a prize) of the *Competition Act* is an offence that will lead to debarment from government contracting for a period of 10 years, which can only be reduced to 5 years pursuant to an administrative agreement.⁴⁸ Despite this potentially very serious consequence, there is no deferred prosecution agreement available for a company acting alone that desires to come in from the cold and avoid a conviction accompanied by debarment.

One technique to deal with this omission is the use of section 34 prohibition orders. This might be described as a deferred prosecution through the back door. Section 34(2) of the *Competition Act* provides:

⁴⁶ In the Canadian regime, offences in respect of which a deferred prosecution agreement (remediation agreement) may be entered into are set out in the legislation and encompass a wide range of *Criminal Code* offences in the area of financial crimes. The list is contained in a schedule to PART XXII.1 Remediation Agreements and includes a list of offences under the *Criminal Code* and the *Corruption of Foreign Public Officials Act*. No offences under the *Competition Act* are listed or subject to the deferred prosecution scheme. See Jull and Spadotto, client alert, "Compliance Now Counts in Antitrust" Gardiner Roberts July 12, 2019. Note that one technique to deal with this omission is the use of section 34 prohibition orders. This might be described as a deferred prosecution through the back door. See <https://www.canada.ca/en/competition-bureau/news/2020/03/third-engineering-firm-to-pay-750000-in-settlement-for-quebec-bid-rigging.html>

⁴⁷ Immunity and Leniency Programs under the *Competition Act* (March 15, 2019) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html#sec02> paragraph 29 states: "Where the applicant is the only party involved in the offence it will not be eligible for immunity. For example, the offence of false or misleading representations may be committed by one organization and be intended for the sole benefit of that organization. Individuals employed by an organization ineligible as a result of being the sole participant may be separately eligible under the Immunity Program, as their admissions and evidence may further an investigation of the organization. Individuals are encouraged to apply for immunity through their own separate counsel."

⁴⁸ The Ineligibility and Suspension Policy is part of the Government of Canada's Integrity Regime. <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>



(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence.

Prohibition orders have been used in creative ways by the Bureau to resolve cases where there were unique circumstances.⁴⁹ For a recent example, engineering firm SNC-Lavalin has been ordered to pay \$1.9 million for rigging bids on municipal infrastructure contracts in the province of Québec as part of a settlement with the Public Prosecution Service of Canada. The settlement, filed on June 19, 2020 with the Superior Court of Québec, ends the Competition Bureau's investigation of the company's role in a scheme in which several engineering firms conspired to rig bids for municipal contracts. SNC-Lavalin participated in the scheme between 2003 and 2012, rigging bids on public infrastructure contracts in Montréal and in the Québec City area, the period varying for each municipality. The settlement takes into account that SNC-Lavalin previously reimbursed the overpayments related to the bid-rigging through the [Government of Québec's Voluntary Reimbursement Program](#), and that the individuals involved in the scheme no longer work for the firm.⁵⁰ The mechanism for the settlement was a prohibition order.⁵¹

As will be explored in more detail below, there are good policy reasons to extend deferred prosecution agreements to the offence of misleading advertising. There is also precedent for this in other jurisdictions, which is dealt with in the next section.

V COMPARATIVE DEFERRED PROSECUTION AGREEMENTS FOR MISLEADING ADVERTISING

There are some comparative international precedents for the use of deferred prosecution agreements for misleading advertising, but generally these cases rise to the level of criminal fraud cases that involved an element of misleading acts. For example, on October 17, 2019, ContextMedia Health LLC ("ContextMedia"), a digital provider of medical information and advertising in doctors' offices, entered into a non-prosecution agreement ("NPA") with the DOJ and the U.S. Attorney's Office for the Northern District of Illinois.⁵² The agreement resolved allegations that from 2012 to 2017, former executives and employees of ContextMedia defrauded clients—most of which were pharmaceutical companies—by falsely inflating the numbers of physicians it told those clients they would reach by placing advertisements on ContextMedia's network.⁵³

⁴⁹ See <https://www.canada.ca/en/competition-bureau/news/2020/03/third-engineering-firm-to-pay-750000-in-settlement-for-quebec-bid-rigging.html>

⁵⁰ <https://www.canada.ca/en/competition-bureau/news/2020/06/snc-lavalin-to-pay-19-million-in-fourth-quebec-bid-rigging-settlement.html>

⁵¹ https://twitter.com/quaid_jennifer/status/1274052391877386240

⁵² Press Release, U.S. Dep't of Justice, Outcome Health Agrees to Pay \$70 Million to Resolve Fraud Investigation (Oct. 30, 2019), <https://www.justice.gov/opa/pr/outcome-health-agrees-pay-70-million-resolve-fraud-investigation>

⁵³ ContextMedia admitted that former executives invoiced clients as if advertising campaigns had been delivered in full, when in reality the company under-delivered the campaigns because its advertising network did not reach all of the physicians that ContextMedia represented it did. To conceal the under-deliveries, former employees allegedly falsified records to make it appear the company was delivering advertising content to the number of in-office devices its clients were promised their advertisements would reach. Former executives and employees also allegedly inflated metrics measuring the frequency with



Similarly, in the U.K., Serco Group Plc agreed to pay 19.2 million pound (\$24.1 million) to settle a six-year fraud probe into false accounting becoming the third major listed U.K. firm to strike a Deferred Prosecution agreement.⁵⁴ The investigation dates from 2013 when U.K. regulators begin looking into how Serco Group overcharged for electronic tagging services of criminals, including those who were already dead. The company lost contracts, its then chief executive officer and fifth of its value in the aftermath of the scandal.⁵⁵

Given these comparative precedents, the Canadian government should consider amending the legislation governing remediation agreements to include misleading advertising under the *Competition Act*. This would also be consistent with the inclusion of the offence of fraud as an eligible offence for which a remediation agreement can be obtained. In many cases the offence of misleading advertising is akin to or part of a fraudulent scheme. The two offences should be treated equally with respect to eligibility for a remediation agreement.

VI DPAS ARE NOT PRESENTLY AVAILABLE DECEPTIVE MARKETING VIOLATIONS

The previous section used the hypothetical of Company “A” that does an internal privileged audit and discovers evidence of different types of issues that the government is *not aware of*. The company is in the “zone of non-discovery” by government.

This hypothetical could be expanded to include issue number (3), which is the internal discovery of a representation made by Company A to the public that is false or misleading in a material respect that was not intentional but was a failure of due diligence.⁵⁶ In Canada, there is a separate administrative track which covers deceptive marketing. The potential exposure to the company is a \$10 million Administrative Monetary Penalty (“AMP”).⁵⁷ A similar AMP is found in the *Telecommunications Act*⁵⁸ section 72.001 which is a general AMP applying to most contraventions of the Act. In the case of an

which patients engaged with devices receiving the clients’ advertising content. See <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/>

⁵⁴ <https://www.sfo.gov.uk/2019/07/04/sfo-completes-dpa-with-serco-geografix-ltd/>. The Serious Fraud Office and Serco Geografix Ltd (SGL) received final approval from Mr Justice William Davis for a Deferred Prosecution Agreement (DPA). In entering the DPA, SGL has taken responsibility for three offences of fraud and two of false accounting arising from a scheme to dishonestly mislead the Ministry of Justice (MoJ) as to the true extent of the profits being made between 2010 and 2013 by SGL’s parent company, Serco Limited (SL), from its contract for the provision of electronic monitoring services. By deceiving the MoJ about the true extent of SL’s profits, SGL prevented the MoJ from attempting to limit any of SL’s future profits, recover any of SL’s previous profits, seek more favourable terms during renegotiations of contracts, or otherwise threaten SL’s contract revenues. SGL will pay a financial penalty of £19.2 million, and the full amount of the SFO’s investigative costs (£3.7m). This is an addition to the £12.8m compensation already paid by Serco to the MoJ as part of a £70m civil settlement in 2013.

⁵⁵ <https://www.bloomberg.com/news/articles/2019-07-03/serco-reaches-24-million-deal-to-settle-u-k-fraud-probe>

⁵⁶ A Canadian example is the *Competition Act* (R.S.C., 1985, c. C-34) section 74.01(1)(a); Due diligence is a defence, as set out in 74.1 (3): No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

⁵⁷ *Competition Act* (R.S.C., 1985, c. C-34) section 74.1. The maximum AMP of \$10 million was imposed on Bell Canada in June 2011. Bell agreed to stop making what the Competition Bureau had concluded were misleading representations about the prices offered for its services. The Bureau determined that, since December 2007, Bell had charged higher prices than advertised for many of its services, including home phone, Internet, satellite TV and wireless. The advertised prices were not in fact available, as additional mandatory fees, such as those related to TouchTone, modem rental and digital television services, were hidden from consumers in fine-print disclaimers. See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html.

⁵⁸ *Telecommunications Act* (S.C. 1993, c. 38)



individual, the AMP does not exceeding \$25,000 for a first contravention and in the case of an organization the AMP does not exceed \$10,000,000 for a first contravention.

There is no formal programme for deferred administrative penalties in either the Competition Act or the Telecommunications Act. Administrative penalties do not generally qualify as offences.⁵⁹ Deceptive marketing administrative penalties are not characterized as “offences” in Canada.⁶⁰ The Competition Bureau’s Immunity and Leniency programme does not encompass the civil or administrative track as it applies only to the criminal provisions of the *Competition Act*.⁶¹

By contrast, in Europe some Courts have recognized that AMPs may be punitive for purposes of the application of double jeopardy rules. This perspective is reviewed by Marco Ventrizzo in his article “Do Market Abuse Rules Violate Human Rights? The *Grande Stevens v. Italy Case*”.⁶² The European Court of Human Rights (“ECHR”) concluded that the possibility to cumulate “administrative” pecuniary sanctions (or “civil penalties”) and criminal sanctions is contrary to the prohibition against double jeopardy. The ECHR had no difficulty in classifying the “administrative” sanctions in the *Grande Stevens* case as criminal for the purposes of the European Convention on Human Rights. The Court observes, first of all, that the rules are designed to protect the integrity of financial markets and the trust of investors, general interests typically protected by criminal law provisions. In addition, the Court holds that the main function of the administrative sanctions is deterrence and punishment, because they are proportional to the seriousness of the conducts, not to the damage caused to investors. The measure of the applicable fines, which can reach several million euros, and the fact that professional debarments can be inflicted, also lead, in the opinion of the Court, to support the criminal nature of the provisions. In this perspective, the Court underlines how what is relevant is the measure of the sanction that could be inflicted in the abstract, not the sanction actually inflicted in the specific case.

Neither the Competition Act nor the Telecommunications Act explicitly provide for deferral agreements relating to AMPs to encourage self reporting from the zone of non-discovery by government.

⁵⁹ The Supreme Court of Canada has articulated the test to determine whether an AMP scheme strays across the constitutional line into offence territory (which then become subject to Charter rights) in the case of *Guindon v. Canada*, (2015), 2015 CarswellNat 3231, 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) (“*Guindon*”). The court held that AMPs under s. 163.2 of the *Income Tax Act*³ are not offences that trigger constitutional protections such as the right to be presumed innocent.

⁶⁰ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315 [Chatr], at paragraph 575: The \$10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*. See also Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters) Chapter 16 “Competition Act Offences, Violations and Efficiency”.

⁶¹ See Immunity and Leniency Programs under the *Competition Act* March 15, 2019
Appendix 1: Criminal provisions of the *Competition Act*

- Part VI of the Act prohibits under criminal sanction: bid rigging, agreements between competitors to fix prices, allocate markets or restrict production, false or misleading representations and deceptive marketing practices. For operational and statistical purposes, those offences found in sections 45 to 49 (Table 1) are treated separately from the criminal false or misleading representations and deceptive marketing practices provisions found in sections 52 through 55.1 (Table 2). Note that Section 52.1(1) with respect to telemarketing is a strict liability offence with a due diligence defence, with a potential penalty on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both. The other listed offences contain various permutations and combinations of liabilities and defences.

⁶² Marco Ventrizzo “Do Market Abuse Rules Violate Human Rights? The *Grande Stevens v. Italy Case*” <http://ssrn.com/abstract=2517760>.



Under the *Competition Act* there is the mechanism of consent agreements, but these are different from DPAs because a formal filing is made with the Competition Tribunal and the conditions are enforceable going forward rather than being deferred. Moreover, historically consent agreements have not generally been used to reward self-reporting from the zone of non-discovery by government. An example from the telecommunications industry is the administrative monetary penalty (“AMP”) of \$9 million paid by Facebook by way of a consent agreement with the Canadian Competition Bureau on May 19, 2020.⁶³ The Competition Bureau concluded that the company made false or misleading claims about the privacy of Canadians’ personal information on Facebook and Messenger. Facebook will also pay an additional \$500,000 for the costs of the Bureau’s investigation.⁶⁴

The mechanism of a consent agreement is a hybrid compromise. The consent agreement has a “no admissions” clause whereby Facebook did not contest the Commissioner’s conclusions but that nothing in the agreement shall constitute an admission by the Facebook as to the facts or findings in any civil, criminal, regulatory, or administrative proceeding. The payment of the formal penalty and compliance terms are set out in the detailed consent agreement which is filed with the Competition Tribunal. Deferred prosecution agreements contain some of these features, but upside down. No formal conviction is entered with a court, but formal admissions must be made.⁶⁵

Consent agreements have *not* historically been held out as a carrot to corporations to come in from the cold. Rather, they tend to be negotiated as a mechanism to resolve cases that have been commenced by way of an investigation or formal notice of application. For example, the Competition Bureau collected a \$300,000 penalty from Comwave Networks, a telecommunications service provider.⁶⁶ Comwave Networks advertised “unattainable” prices for internet and phone plans. The Consent Agreement reached between the Commissioner of Competition and Comwave indicated that the company made “concerning” “price representations . . . at which consumers could obtain various telecommunications services.”⁶⁷

Comwave allegedly made “fine-print disclaimers” about certain “non-optional fees,” disclosing them in the “telephone sales intake process” and requiring personnel “to provide consumers with an itemized breakdown of charges, including these non-optional fees.” All of these disclaimers and disclosures proved insufficient, however, according to the Commissioner, to correct the overall impressions that the initial price representation left with consumers. The Commissioner concluded that notwithstanding the disclaimers and telephone intake process, Comwave’s advertisements created the general impression that consumers could obtain communications services at prices that were not in fact *attainable*, because consumers were required to pay . . . additional non-optional fees.

⁶³ Facebook, Inc - CT-2020-004, <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/471812/index.do>

⁶⁴ <https://www.canada.ca/en/competition-bureau/news/2020/05/facebook-to-pay-9-million-penalty-to-settle-competition-bureau-concerns-about-misleading-privacy-claims.html>

⁶⁵ Criminal Code 715.34 (1) A remediation agreement must include

(a) a statement of facts related to the offence that the organization is alleged to have committed and an undertaking by the organization not to make or condone any public statement that contradicts those facts;

(b) the organization’s admission of responsibility for the act or omission that forms the basis of the offence;

⁶⁶ Competition Bureau Canada, *Annual Report of the Commissioner of Competition for the Year Ending March 31 2017* (2017): [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-annual-report-2016-2017-e.pdf/\\$file/cb-annual-report-2016-2017-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-annual-report-2016-2017-e.pdf/$file/cb-annual-report-2016-2017-e.pdf) [Note this moved to an archived page].

⁶⁷ Consent Agreement, Commissioner of Competition v. Comwave Networks (Sep. 13, 2016): www.ct-tc.gc.ca/CMFiles/CT-2016-014_Registered%20Consent%20Agreement_02_38_9-13-2016_7866.pdf.



In the first Canadian case on digital advertising and pricing, the Competition Bureau has settled with Ticketmaster via a Registered Consent Agreement (RCA) for an administrative monetary penalty of \$4 million and costs of \$500,000.⁶⁸ As part of the RCA, Ticketmaster has also committed to establishing and adhering to an internal corporate compliance program.

In the application, the Competition Bureau alleged that Ticketmaster engaged in "deceptive marketing practices by promoting the sale of tickets to the public at prices that are not in fact attainable and then supplying tickets at prices above the advertised price." The Competition Bureau also noted that the process to buy these tickets is online and digital. Drip pricing in the digital sphere can particularly encourage consumers to buy tickets because of pop-ups, countdown clocks, and the reveal of the higher price only after the interactive digital transaction has begun. The application suggests that drip pricing, while misleading across all mediums, may be a particularly nefarious technique on digital platforms.

It is important to note that the settlement between the Competition Bureau and Ticketmaster is a consent agreement. Consent agreements are not law, but they are persuasive and can be good indications of regulatory requirements. As such, the settlement between the Competition Bureau and Ticketmaster may affect the digital advertising practices of other vendors. The settlement recognized that Ticketmaster had voluntarily and fundamentally revised their platform so that many of the misleading representations were eradicated. The lesson here is that proactive voluntary actions taken after a complaint is filed will be rewarded as a mitigating factor.

Cases such as Comwave and Ticketmaster resolved investigations that had been commenced by the Bureau. The consent agreements were *not* the result of voluntary disclosure of information, although subsequent voluntary remediation efforts in Ticketmaster were a significant factor in the resolution.

Some regulatory agencies have the mechanism of alternate case resolutions ("ACRs") that avoid the official filing of a violation with the Tribunal. For example, the Canadian Radio-television Commission ("CRTC") has used these mechanisms sparingly in the past.⁶⁹ However, as is the case with consent agreements, ACRs have not historically been held out as a carrot to corporations to come in from the cold. Rather, they tend to be negotiated as a mechanism to resolve cases that have been commenced by way of a formal notice of application or violation. For example the CRTC agreed resolved a case with Rogers Communications (Rogers) by way of an ACR. Rogers immediately volunteered to cease using automated calling devices to notify its prepaid mobile customers of an actual or imminent service interruption and how to purchase more minutes to avoid such an interruption without obtaining their prior express consent. Rogers made charitable donations of \$175,000 to the École Polytechnique de Montréal and \$100,000 to the British Columbia Institute of Technology, and Rogers reviewed its compliance policies to ensure ongoing adherence with the CRTC's rules relating to automated calling devices.⁷⁰

⁶⁸ https://www.ct-tc.gc.ca/CMFiles/CT-2018-005_Registered%20Consent%20Agreement_96_67_6-27-2019_2753.pdf. Kenneth Jull is Counsel at Gardiner Roberts and was a member of the counsel team on this case as part of his interchange with the Competition Bureau Legal Services. The views herein are not meant to represent the views of the Competition Bureau or the Department of Justice.

⁶⁹ https://crtc.gc.ca/eng/dncl/dnclb.htm?_ga=2.194028137.53248018.1592075922-1470883755.1592075922

⁷⁰ https://crtc.gc.ca/eng/dncl/dnclb.htm?_ga=2.194028137.53248018.1592075922-1470883755.1592075922; The Rogers agreement followed a precedent set by TELUS the year prior.



The ACR in Rogers used the vehicle of charitable donations. More recently the CRTC ACRs have required monetary payments to the Receiver General.⁷¹

The Competition Bureau has also resolved cases without a formal filing of a consent agreement, but this is rare and usually the result of a mediation to resolve a matter that has been contested. This route has not generally been offered as a carrot to come in from the cold. For example, the Competition Bureau worked cooperatively with Leon's and The Brick to reach an agreement regarding concerns over its advertising of financing plans. This agreement brought an end to the legal proceedings launched by the Bureau. As part of the settlement, Leon's and The Brick agreed to each donate \$750,000 worth of home furnishings over two years to charities in Canada. The companies also agreed to adhere to the Bureau's guidance on the proper use of disclaimers in advertising and the disclosure of fees associated with their financing plans.⁷²

A separate programme for *deferral* of administrative penalties could, however, be created. Although there is no conviction to defer, the entering of a public violation or filing of a consent agreement in a Tribunal could be deferred. If the conditions of the deferral were fulfilled, the agreement would provide that there would be no filing of an official violation. The next sections make the policy argument for deferred administrative sanctions.

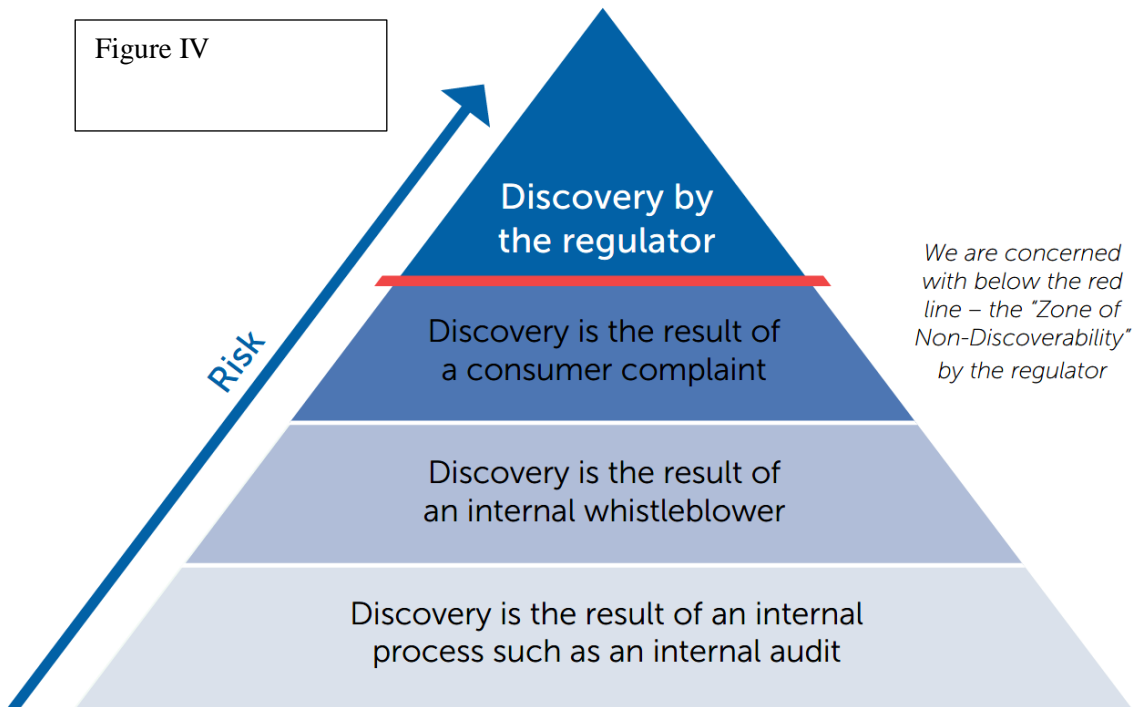
VII RISKS IN RELATION TO MISLEADING ADVERTISING AND DECEPTIVE VIOLATIONS

When a company is faced with the decision as to whether it should come in from the cold and self-report evidence of misleading offences or deceptive marketing, the same policy rationale to encourage self-disclosure applies, as it does with the case of more serious crimes such as foreign bribery.

In the zone of non-discovery by government, the risk of the matter being discovered by regulators escalates with the type of internal process, as illustrated in Figure IV:

⁷¹ April 25, 2019 Brunswick News Inc., https://crtc.gc.ca/eng/dncl/dnclb.htm?_ga=2.194028137.53248018.1592075922-1470883755.1592075922

⁷² https://www.canada.ca/en/competitionbureau/news/2018/02/competition_bureaureachessettlementwithleonsandthebrickinadverti.html.



At the lowest level of risk is the internal discovery of potential misconduct by way of an internal audit. Risk increases at the next level, where the discovery is the result of an internal whistleblower complaint. If the whistleblower is not satisfied with the way in which the matter is handled, he or she may choose to go to the regulator, where there may even be a paid bounty.⁷³

The next level of risk is higher where the internal discovery is the result of a complaint by a consumer. A consumer may report first to a corporation and then if not satisfied report to the regulatory authority shortly thereafter.

All of the above risks apply to misleading advertising offences and deceptive marketing violations. The risk to the corporation is the potential for escalation from the zone of non-discovery by government to the zone of discovery by government. Once a corporate becomes aware of this risk, it must consider whether or not it is legally required to self-report, which is the subject of the next section.

VIII DETERMINING WHETHER THERE IS A DUTY TO SELF-REPORT

Figure V illustrates the dynamics that may apply depending on whether a company has a duty to self-report to the regulator.

⁷³ A recent collection of essays is edited by S. Lombard et al., *Corporate Whistleblowing Regulation*, Springer Nature Singapore Pte Ltd. 2020 https://doi.org/10.1007/978-981-15-0259-0_4, including Kenneth Jull, “Paid Whistleblowers and Paid Compliance Programs: Opposite Sides of the Same Coin”.

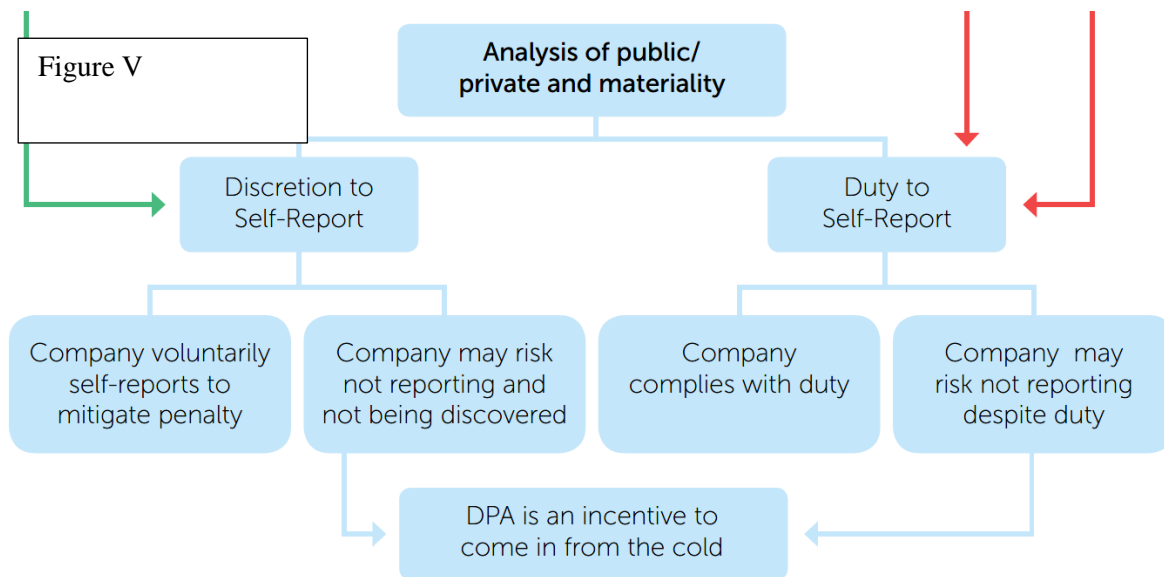


Figure V depicts a spectrum in relation to self-reporting. A company that is not publicly traded has no duty to self-disclose non-compliance, unless there is a specific statutory duty requiring self-reporting. Examples of this include the obligation to report spills.⁷⁴

If the company is publicly traded, there is a statutory continuous disclosure obligation to report any material change that could affect a publicly traded company's share value.⁷⁵ Reporting issuers subject to disclosure requirements under Canadian securities laws are obligated to disclose to the market "material facts" related to the issuer's business or assets or "material changes" to the issuer's business or assets. For example, a risk assessment of suspected or proven corrupt practices can lead to the identification of activities arguably "material" in character.⁷⁶

A publicly traded company must disclose material non-compliance with regulatory schemes.⁷⁷ The converse of this is that not every minor breach or minor non-compliance with the regulatory scheme will rise to the level of materiality requiring self-reporting to the market.⁷⁸

(i) Zone where there is no duty to self-report; but there is a discretion to self-report

Each fact situation must be examined with the benefit of legal counsel. The Supreme Court of Canada has provided some guidance in the decision of *Kerr v. Danier Leather Inc.*⁷⁹ In that case, unseasonably warm weather across central and eastern Canada coincided with Danier's first ever offering of its shares to the public. Not surprisingly, hot weather resulted in lower than expected sales of leather garments at

⁷⁴ *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 92

⁷⁵ *Securities Act*, R.S.O. 1990, c. S.5, Part XVIII, "Continuous Disclosure".

⁷⁶ Paul Blyschak, "Corporate Foreign Corrupt Practices and Director Liability" (2014), 51:3 Alta. L. Rev. 555, at para. 68.

⁷⁷ *R. v. Drabinsky*, 2011 ONCA 582.

⁷⁸ *R. v. Potter* 2020 CarswellNS 76, 2020 NSCA 9 at paragraph 698.

⁷⁹ *Kerr v. Danier Leather Inc.*, 2007 SCC 44.



Danier's stores.⁸⁰ A number of purchasers then initiated a class action against Danier for failure to disclose material information, i.e., the disappointing intra-quarterly results. The Court held that this was not a material change as it was not a change in the business, operations or capital. Justice Binnie framed the test as follows:

It almost goes without saying that poor intra-quarterly results may *reflect* a material change in business operations.

A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves.

In the present case, there is no evidence that Danier made a change in its business, operations or capital during the period of distribution. It is not disputed that the revenue shortfall as of May 16 was caused by the unusually hot weather, a factor external to the issuer. Consequently, Danier experienced no material change that required disclosure and did not breach s. 57(1).⁸¹

As noted, each fact pattern must be evaluated by legal counsel. For example, in *Danier*, seasonal fluctuations in weather may be expected as part of nature. On the other hand, other types of natural phenomenon, such as the global spread of coronavirus, may trigger disclosure obligations.⁸²

In the zone where there is no duty to self-report because the company is not publicly traded, or because the regulatory breach is minor in nature, there is a *discretion to self-report*. The relationship between this discretion and availability of deferred prosecution agreements is considered below.

(ii) Zone where there is a duty to self-report

As noted above, there are some specific statutory duty requiring self-reporting. Examples of this include the obligation to report spills.⁸³

If the company is publicly traded, there is a statutory continuous disclosure obligation to report any material change that could affect a publicly traded company's share value.⁸⁴ The regulatory regime provides context for the interpretation of the phrase "affects the public market price".⁸⁵ If there is evidence of any sort of cover up to prevent a regulatory investigation, this will constitute evidence of the non-disclosure of material information.⁸⁶ A useful test is to put oneself in the shoes of a potential investor:

⁸⁰ *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at paragraph 2.

⁸¹ *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at paragraphs 47-48.

⁸² [Companies add coronavirus risks to earnings disclosures](#), by Christine Dobby, The Globe and Mail (Ontario Edition) Mar 04, 2020.

⁸³ *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 92

⁸⁴ *Securities Act*, R.S.O. 1990, c. S.5, Part XVIII, "Continuous Disclosure".

⁸⁵ *R. v. Potter* 2020 CarswellNS 76, 2020 NSCA 9 at paragraph 646.

⁸⁶ *R. v. Potter* 2020 CarswellNS 76, 2020 NSCA 9 at paragraph 661 and 668.



is this person making investment decisions based on a misleading impression of the level of demand for the stock?⁸⁷

In his article "Corporate Foreign Corrupt Practices and Director Liability", Paul Blyschak has highlighted several points to consider with respect to materiality. The concept of material changes requires that the fact or change is reasonably expected to have a significant effect on the market price of the securities of the issuer. Where a special committee is formed to investigate a suspected case of an offence such as bribery, but has not reached any conclusions, it is an open question as to whether the formation of the committee in and of itself requires disclosure under Canadian securities law.⁸⁸ At the earlier stage of investigation, there may not be sufficient facts or evidence to draw any legal conclusions or opinions, and further investigation and analysis may be warranted.

The complexity of the decision as to when a company should publicly report to investors about an internal investigation is illustrated by the class action lawsuit brought by investors in the SNC Lavalin case. SNC-Lavalin Group Inc. has settled two class action lawsuits worth a total of \$110 million over allegations of misleading investors about its activities in Libya, subject to court approval.⁸⁹

The settlement amount is far from the \$1.25 billion initially claimed by investors who bought SNC-Lavalin shares before they plunged in 2012 after the company announced an investigation into millions in undocumented payments and said its 2011 earnings would be less than expected.

The lawsuits were among the consequences of alleged payments made by SNC-Lavalin to members, associates and agents of the regime of late Libyan dictator Moammar Gadhafi to secure contracts for infrastructure projects in Libya. The suit claimed, among other things, that a 2009 prospectus offering \$350 million of debentures failed to contain full, true and plain disclosure of all material facts.

A legal grey area is whether conduct that could be sanctioned by large AMPs might rise to the level of being a material change that requires reporting. For example, if a company becomes aware of significant deceptive marketing that could result in the imposition of an AMP of \$10 million under the *Competition Act*, it is an unsettled question as to whether this would require self-reporting to the market.

Once a corporation has determined whether or not it has a duty to self-report, the next dynamic to consider is whether or not in practice this will be complied with, and whether or not the availability of deferred prosecution agreements will be an added incentive.

IX RELATIONSHIP BETWEEN DEFERRED PROSECUTIONS AND THE DUTY TO SELF-REPORT DICHOTOMY

(i) Discretion to Self-Report

In the sector where there is no duty to self-report, (as is the case of non-public companies or where the violation does not rise to the level of being material), different dynamics are at play. For an example to illustrate the point, if a publicly traded company discovers a violation that would be penalized by a small

⁸⁷ *R. v. Potter* 2020 CarswellNS 76, 2020 NSCA 9 at paragraph 593.

⁸⁸ Paul Blyschak, "Corporate Foreign Corrupt Practices and Director Liability" (2014), 51:3 Alta. L. Rev. 555, at para. 69.

⁸⁹ Ross Marowits, "SNC-Lavalin settles shareholder class actions in Ontario and Quebec for \$110 million" *The Canadian Press* (May 22, 2018).



administrative monetary penalty (AMP), this will not likely rise to a level of materiality that would impact the stock price. Self-reporting may lead to the regulatory authority levying a smaller AMP to reward the voluntary cooperation. But the company is within its legal rights to not self-report.

As illustrated by Figure V, in the sector where there is a discretion to self-report, a deferred prosecution regime provides an added incentive to self-report. This policy rationale would apply to the areas of misleading advertising and deceptive marketing if a deferred program was available for these regimes.

(ii) Duty to Self-Report

In the zone of non-discovery by government, there are several options that begin to look like game theory.⁹⁰ In the situation where an organization believes that it is likely to be caught in any event, the option of self-reporting makes sense, to comply with legal obligations. The more difficult situation is posed where there are inadequate state resources applied to enforcement, and detection is far less likely. Figure V illustrates the practical dynamic that some companies may choose to run the risk and not comply with legal obligations to self-report.

In the zone of non-discovery by regulators, it is *not appropriate* to consider the risk of getting caught as weighed against legal obligations. The risk of getting caught can never be part of the calculation of the risk of non-compliance. External and in-house counsel to compliance divisions are required by professional rules of conduct to advise the organization to cease any illegal conduct if they become aware of actual misconduct. The same rules would apply if there is a duty to self-report.

Notwithstanding this exhortation to companies to comply with duties to self-report, from an academic perspective, it would be naïve to assume that all companies will comply with a duty if they perceive a low risk of detection.

The OECD Report highlights the link between deferred prosecution agreements and enforcement levels. This is an important point, as there will be less incentive to come in from the cold in the zone of non-discovery if there is little chance of discovery by the government. The OECD makes this point in the following passage:

No matter how strong an incentive to enter a resolution might seem, it will be ineffective unless the alternative is a strong likelihood of trial and conviction. This critical prerequisite was discussed during the 2018 OECD Global Anti-Corruption and Integrity Forum. In a panel dedicated to non-trial resolution of foreign bribery cases, speakers used the "carrot and stick" metaphor to explain how resolution systems can only work where a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public. In other words, the carrot is only as enticing as the stick is menacing. Regardless of the incentives provided by a non-trial resolution, they will remain meaningless if the most probable alternative for an alleged offender is to escape any form of judicial reckoning.

In its evaluations, the Working Group on Bribery has observed this dynamic, noting that "there is little incentive to settle even for a defendant who has bribed in a system that is generally unable to

⁹⁰ Michael Ilg, "Imposing Self-Interest: Behavioural Law and Economics, the Ultimatum Game, and Value Possibilities" (2005), 28 Dal. L.J. 141.



bring cases to a conclusion". In several instances, the Working Group on Bribery found a correlation between weak foreign bribery enforcement and the infrequent use of resolution systems.⁹¹

If a deferred prosecution agreement is available for misleading or deceptive advertising, as it is for serious offences such as bribery of a foreign public official, there would be an added incentive to self-report and come in from the cold.⁹²

This paper has argued that the exclusion of the misleading advertising crime from the deferred prosecution regime has significant consequences. The Canadian government should add the criminal offence of misleading advertising and its variants in the *Competition Act* to the list of eligible offences for which a remediation agreement is available. This would bring Canada into line with other jurisdictions. There are some comparative international precedents for the use of deferred prosecution agreements for misleading advertising, although generally these cases rise to the level of criminal fraud cases that involved an element of misleading acts. The same policy rationales that support DPAs for serious criminal offences apply to misleading advertising offences: there needs to be an added incentive to either exercise discretion to self-report or to comply with the legal obligation to self-report.

X ADMINISTRATIVE MONETARY PENALTIES DO NOT INVOLVE CONVICTIONS: IS THIS AN ARGUMENT AGAINST DEFERRED PROGRAMS FOR AMPs GIVEN THE LOWER COLLATERAL DAMAGE?

This paper has also applied the same logic of encouraging disclosure of wrongdoing from the ‘zone of non-discovery’ to AMPs. I would encourage governments to study the use of deferred programmes in relation to civil and administrative penalties to encourage voluntary disclosure from the zone of non-discovery.

It might be argued that deferred prosecution agreements make no sense in an administrative regime where there is no liability to a conviction, and hence there is no *prosecution* to be deferred. My argument is that there still needs to be an incentive for organizations to come in from the cold when they discover non-compliance, regardless of whether the sanction is an AMP or other civil remedy. Moreover, as noted earlier, there are reform proposals in Canada to extend the debarment regime to cover AMPs that are serious, repetitive and/or otherwise egregious.⁹³ If these proposals are enacted, there will be a very real risk of collateral damage resulting from the imposition of an AMP. A deferred program could offer the carrot or incentive of avoiding that debarment.

The next section concludes with a discussion of some mechanics of this proposal.

⁹¹ OECD Resolutions Report at p. 82.

⁹² Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters, 2019) Chapter 22 — Immunity, Leniency and Deferred Prosecution Agreements: Permissible and Prohibited Routes

⁹³ <https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html>, Appendix 2, section 1. See Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters) at INT:120 — DEBARMENT PROPOSALS LOOSEN THEIR GRIP BUT REACH OUT FARTHER



XI REFORM PROPOSALS

First, the Canadian government should add the criminal offence of misleading advertising and its variants in the *Competition Act* to the list of eligible offences for which a remediation agreement is available. This would bring Canada into line with other jurisdictions. The same policy rationales that support DPAs for serious criminal offences apply to misleading advertising offences. In particular, reducing the negative consequences for innocent parties who would be impacted by a debarment is an important consideration.

As noted above, the debarment for misleading advertising is a 10 year period, potentially reduced to 5 years, and automatically flows from a conviction. A deferred prosecution program would avoid debarment and be a true incentive to come in from the cold for those companies that do significant government work.

Secondly, the government should hold a consultation to review the concept of developing a parallel deferred program for administrative penalties. There are many creative permutations and combinations of remedies that would be an incentive to come in from the cold. For example, a regulator could offer to *not issue* a formal notice of violation, and monetary amounts would be significantly reduced, if an organization voluntarily self-reported. The mechanism would be an “Alternate Case Resolution(“ACR’s”).⁹⁴ Although ACRs have been used by regulators, they have been traditionally used in the context of resolving investigations commenced by the regulator in the zone of discovery. ACRs have not traditionally been offered as an incentive to self-report in the administrative world, but they could be used for this purpose.

In the Competition context, the deferred program would resemble consent agreements, but would be different in several major respects. First, the agreement would not be filed with the Competition Tribunal. The agreements would be listed on the Competition Bureau website instead. Secondly, it would be explicit that the agreements did not qualify as AMPs with respect to any potential debarment implications. Thirdly, the monetary amounts would be significantly reduced below the present tariffs to reflect the voluntary reporting from the zone of non-discovery by the Bureau.

With respect to any monetary donations or fines that might be part of the resolution, a creative idea would be the funding of an “imbedded auditor”⁹⁵ or monitor that would report to the regulator for the deferral period. The Canadian legislation for remediation agreements provides for the optional remedy of the appointment of a monitor in appropriate cases. With respect to misleading advertising or deceptive marketing, the concept might be described as a “monitor lite”. Monitors are generally disliked by corporations given the intrusive nature of the potential review, and as such the use of monitors might not draw corporations out of the cold. The monitor lite concept recognizes that offences of misleading advertising or deceptive marketing violations are not generally in the same league as serious bribery offences. One option would be for an organization to appoint its own monitor, and to do a review before coming in from the cold. This monitor lite concept would be more palatable to corporations, while at the same time would serve the public interest.

⁹⁴ For example, the CRTC uses “Alternative Case Resolutions (ACR) - Telemarketing Compliance and Enforcement”. For example, see https://crtc.gc.ca/eng/dncl/dnclb.htm?_ga=2.194028137.53248018.1592075922-1470883755.1592075922

⁹⁵ Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters, 2019) Chapter 25 “Sentencing a Corporation: Imbedded Auditors, Secured Bonds, and Other Creative Strategies”.



Rory Van Loo studies the nature and scope of monitors in his article “Regulatory Monitors.”⁹⁶ Van Loo provides the insight that regulatory monitors wield sanctions, influence rulemaking, and create quasi-common law. In the monitor lite scenario, the monitor would play a more informal role.

Deferred programs for AMPs could be implemented by way of legislative amendments, parallel to the remediation legislation in Canada. It is possible, however, that these programs could be set up more informally by way of policy directives. Given the informal nature of the resolutions (which would not be filed with the Tribunal), policy directives might be more appropriate. Moreover, policy directives are more flexible and can be more easily adapted.

In the expanding digital economy⁹⁷, regulators are now focused on increasing enforcement of regulatory laws.⁹⁸ The COVID-19 pandemic has dramatically accelerated the importance of the digital sector.⁹⁹ There will be more internal audits conducted by corporations as part of compliance initiatives in the digital world. As a result, corporations will face increasingly difficult choices to make from the “zone of non-discovery by government”. Those corporations can't stay out of doors all the time.

One needs to come in from the cold.

⁹⁶ Rory Van Loo “Regulatory Monitors” *Columbia Law Review*, Vol. 119, No. 2 (March 2019), pp. 369-444

⁹⁷ Kenneth Jull and Nicole Spadotto “Digital Advertising and Purchasing: Fun or a New Type of Deception? (2020) 33 *Canadian Competition Law Review* 1

⁹⁸ “Amazon Set to Face Antitrust Charges in European Union” by Adam Satariano June 11, 2020: <https://www.nytimes.com/2020/06/11/technology/amazon-antitrust-european-union.html>

⁹⁹ Kenneth Jull, “Coronavirus Emergency Response: Risk Assessment and Risk Management” *Toronto Law Journal*, March 2020. See <http://ssrn.com/abstract=3573991>