# A Bargain with Justice? A Perspective on Canada's New Remediation Agreements

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## ABSTRACT

Remediation agreements, in other jurisdictions known as deferred prosecution agreements, have recently been implemented in the Canadian *Criminal Code* as a new tool for curbing corporate crime. The availability of such agreements serves as an incentive for corporations to self-report offences, the prosecution of which is traditionally difficult and resource intensive. In exchange for their cooperation in the investigation of such economic offences, corporations may receive significant discounts on fines and avoid the risks, costs and damaged reputation that lengthy trials entail. As with any system that involves incentives and deterrence, in other words the carrot and stick approach, finding the right balance is crucial for achieving results that are effective as well as legitimate. This article considers how Canada may draw upon the experiences gained with deferred prosecution agreements in both the United States and the United Kingdom, as a broad and robust foundation for the new Canadian provisions in favor of deferred prosecution agreements, and reductions lowering incurred fines and penalties. Such an approach would encourage self-reporting and mitigate the negative impacts of criminal prosecution on innocent corporate stakeholders, whilst achieving a balance that does not undermine the legitimacy of non-prosecution.

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## I. INTRODUCTION

Traditionally, the criminal justice system's approach has been to have justice realized by means of unilateral acts of the state, using its monopoly on force to issue judgments, and thereby impose fair punishments. Several jurisdictions[1] have recently supplemented their approaches to corporate crimes by introducing deferred prosecution agreements ("DPAs") as a new instrument for dealing with harm resulting thereof. Instead of a unilateral investigation followed by a trial, corporations and prosecutors enter into negotiations, leading to an agreement on a statement of facts and appropriate remedies.

On 19 September 2018, without much attention from legal scholars,[2] the Canadian *Criminal Code*[3] was amended to make provision for DPAs, or remediation agreements ("RAs") the preferred terminology by Canadian legislators.[4]

The recent scandal surrounding the bribing of Libyan officials by SNC-Lavalin Group Inc. ("SNC-Lavalin") brought this new instrument quickly to the attention of the broader Canadian public. Allegedly, then Minister

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1 Among them the United Kingdom, France, and Australia. The Law Reform Commission of Ireland has recommended the introduction of DPAs, *Report on Regulatory Powers and Corporate Offences*, vol 2 (Ireland: Law Reform Commission, 2018) at 755, online (pdf): <www.lawreform.ie/fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%202.pdf> [perma.cc/9CLS-56NM].

2 The exception being: Todd Archibald & Kenneth Jull, "Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada" (July 2018) Toronto LJ 1, online (pdf): <www.tlaonline.ca/document/107/deferred_prosecution-archiba.pdf> [perma.cc/3NQC-ZLBG].

3 *Criminal Code*, RSC 1985, c C-46 as amended by the *Budget Implementation Act, 2018, No 1*, SC 2018, c 12, Division 20 [*Criminal Code*] . The argument was made that the implementation of the new rules through the budget bill was to pass them "quietly", see Andy Blatchford "Bill quietly introduced in federal budget proposes tool to ease corporate crime penalties", *Global News* (15 May 2018) online: <globalnews.ca/news/4208910/federal-budget-proposes-ease-corporate-crime-penalties> [perma.cc/TE4V-JHLP].

4 The Canadian terminology is supposedly meant to shift the focus from avoiding penalties to the implementation of remedial measures, *Cf* Institute for Research and Public Policy, *Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement*, (Round Table Report) (Montreal: IRPP, 2016) at 12-13, online (pdf): <irpp.org/wp-content/uploads/2016/03/roundtable-report-2016-03-10.pdf> [perma.cc/8HP3-PYFD].

of Justice and Attorney General Jody Wilson-Raybould was pressured by the Prime Minister's Office to prevent prosecution against SNC-Lavalin by offering a RA to the corporation.[5] The heated debate that started over this particular case–which may likely also have been an important motive to amend the *Criminal Code* in the first place[6]–must not deter prosecutors in making use of RAs in future cases. As this article will show, RAs have the potential not only to adequately compensate the harm caused by corporate offenses to individuals and society as a whole, but also to avoid inefficiencies and additional detriments the traditional sanction system is often burdened with.

Two of the main policy goals to compensate for these inefficiencies and detriments underlying RAs are encouraging self-reporting of corporate offences and preventing bankruptcies due to the effects of criminal prosecution, incurred by defendant corporations, as a consequence of the particularly high costs of trials, fines, and additional reputational damages in such cases.[7] In both respects, perhaps in contrast to the notions of traditional prosecution, exercising broader use of discretion that the law confers upon prosecutors and judges by means of more modest penalties, promises to yield significant public benefits. Informed by experiences with DPAs in the two jurisdictions which provided the blueprint for the Canadian legislation,[8] the United States and the United Kingdom, this article will demonstrate that the Canadian rules for RAs provide for sufficient safeguards to support such a broad use of discretion without undermining the legitimacy of criminal prosecution.

After a brief introduction to the newly enacted Canadian rules for RAs in Part 2, Part 3 will discuss their rationale as it has been described in the

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5 "Jody Wilson-Raybould: Ex-minister increases pressure on Trudeau", *BBC News* (28 February 2019), online: <www.bbc.com/news/world-us-canada-47362652> [perma.cc/6G78-JP4S].

6 "SNC-Lavalin CEO urged Ottawa to change anti-corruption rules", *CBC News* (5 March 2019), online: <www.cbc.ca/news/business/snc-lavalin-ceo-letter-1.5044395> [perma.cc/CCS8-63NK].

7 Public Services and Procurement Canada, *Integrity Regime: Annual Report: April 1, 2017 to March 31, 2018*, (Ottawa: PSPC, 2018), online (pdf): <www.tpsgc-pwgsc.gc.ca/ci-if/documents/rpri-irr-2017-2018-eng.pdf> [perma.cc/99VA-9TG5]; *Criminal Code*, *supra* note 3, s 715.31.

8 Library of Parliament, *Legislative Summary Bill C-74*, Publication No 42-1-C74-E at 44-45, online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c74-e.pdf> [perma.cc/G2YX-6XNE].

legislative enactment process and as outlined in the law itself. Part 4 analyses the implementation of DPAs in the US, where, despite considerable criticism, they have been used quite extensively, and in the UK, where DPAs are subject to strict court scrutiny and are less frequent. Part 5 will draw upon the experiences of both jurisdictions and will show that in order to maximize the public benefit, careful consideration must be given to the conditions under which RAs may be entered into.

## II. REMEDIATION AGREEMENTS - AN OVERVIEW

After a one-year legislative process, including a public hearing with many contributions from the business and the justice sector,[9] RAs were introduced to the *Canadian Criminal Code* via Budget Bill C-74.[10]As defined in the *Criminal Code*, an RA is "*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*."[11] RAs are therefore exclusively open to "organizations" which include (a) societies, companies, firms, partnerships or (b) where the following conditions are met: (i) an association of persons; (ii) created for a common purpose, (iii) with an operational structure; and (iv) holds itself out to the public as an association of persons.[12] RAs are available for a limited number of corporate offences, including fraud, forgery, bribery (of domestic or foreign officials), gaming in stocks, or laundering proceeds of crime.[13] For remedying these offences, the agreement may impose different obligations of preventive and/or punitive character on the organization, in particular, the provision

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9 Out of 45 submissions, 47% were provided by business, 26% by individuals, 20% by the justice sector (including law enforcement) and 7% by NGOs. In addition, there were over 40 meetings held by government officials with approximately 370 participants; the results and participants thereof are unknown. Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing in Canada: What We Heard*, (Ottawa: GOC, 2018) at 7, online (pdf): <www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf> [perma.cc/4SHU-GZYL] [Canada, "What We Heard"].

10 The bill was granted Royal Assent on June 21, 2018. See Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018 (assented 21 June 2018), SC 2018, c 12.

11 *Criminal Code*, *supra* note 3, s 715.3 (1).

12 See *ibid*, s 2; *Ibid*, s 715.3 (1) excludes from this definition every public body, trade union, or municipality.

13 *Ibid*, Schedule to Part XXII.1.

of additional information, continuous cooperation, monetary penalties and costs reimbursement, disgorgement of profits, reparations to victims, compliance measures, and the appointment of an independent monitor.[14]

The commencement of negotiations by the prosecutor needs the assent of the Attorney General.[15] The draft agreement upon also has to be approved by a superior court.[16] The court must take into consideration the impact of the proposed RA on any victim and the community, and the suggested reparations, statements and additional measures the organization agrees to.[17] The court must approve the RA if three factors are met: (i) the court is satisfied the organization is charged with an offence to which the agreement applies; (ii) the agreement is in the public interest; (iii) and the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.[18]

Once in effect, an RA leads to a stay of proceedings against the organization.[19] Proceedings may only be reinstituted if the RA is terminated due to a breach by the organization.[20] If the organization fulfills all its obligations under the RA, "proceedings are deemed never to have been commenced and no other proceedings may be initiated against the organization for the same offence."[21]

The RA and the court's order have to be published except for cases in which the non-publication is necessary for the proper administration of justice.[22]

## III. Canadian Policy Objectives

RAs are an atypical instrument in the context of criminal prosecution. Instead of a thorough investigation by the prosecutor followed by a public trial and a unilateral act of judgment, RAs are results of bilateral

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14 *Ibid*, ss 715.34 (1), 715.34(3).

15 *Ibid*, s 715.32(1)(d).

16 *Ibid*, s 715.37(2).

17 *Ibid*, s 715.37(3).

18 *Ibid*, s 715.37(6).

19 *Ibid*, s 715.37(7).

20 *Ibid*, ss 715.39(1)-(2).

21 *Ibid*, s 715.4(2).

22 *Ibid*, ss 715.42(1)-(2). Whether the proper administration of justice requires non-publication is to be determined by taking into consideration a variety of factors which are non-exclusively listed in s 715.42(3).

negotiations. This very special nature of RAs puts pressure on the justice system to justify their legitimacy in general, and their scope in particular cases, because their use may give the impression of reducing justice to a bargain, particularly in cases of economically powerful defendants.[23] The Canadian Parliament has articulated five objectives of RAs in s. 715.31:

- Denouncement of an organization's wrongdoing and the harm it has caused;
- Accountability through penalties;
- Contribution of respect for the law by imposing corrective measures and promoting a compliance culture;
- Encouragement of voluntary disclosure;
- Compensation of victims; and
- reducing the negative consequences of wrongdoings for the organization's stakeholders (among them employees, pensioners, customers).

Further objectives that can be taken from the new provisions are:

- Transparency by publishing RAs and judicial decisions thereon[24]; and
- Enabling or facilitating prosecution against individuals such as employees whose conduct cannot be a subject to an RA.[25]

One of the objectives not expressly mentioned as a policy consideration is the prevention of the unnecessary use and spending of prosecutorial and court resources, through prevention of costly and timely investigations and trials. While there is good reason not to overemphasize this objective and thereby give the impression that a lack of resources could lead to organizations buying themselves out of prosecution, this objective has been brought up in the public hearings,[26] and may provide a strong incentive for the prosecution to make effective use of RAs.

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23 The danger such impression could arise is very present in the warning of judge Sir Brian Leveson in *Serious Fraud Office v Rolls-Royce PLC*, [2017] Lloyd's Rep FC 249 at para 59 [*Rolls-Royce*]:
"…nothing must ever be done to encourage the view that those with money can 'buy' themselves out of prosecution…"

24 *Criminal Code*, *supra* note 3, s 715.42(1).

25 *Ibid*, ss 715.32(2)(c), 715.32(2)(f).

26 Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing*: Discussion paper for public consultation, (Ottawa: GOC, 2018) at 4 [Canada,

The express objectives are listed in no particular order and may not necessarily be of equal importance in every single case. This is obvious for compliance measures which are not an obligatory part of RAs.[27] The compensation of victims may be problematic in cases where there are no individual victims, for example when public goods are affected, or victims are not identifiable, notably in cases of foreign bribery.[28] Some of the policy objectives are even contradictory. For the organization's stakeholders, at least for those who are not at the same time its victims, the most favorable outcome would be the absence of any penalty. On the other hand, optimal corrective measures including reporting, monitoring, and the implementation of a tightly construed compliance structure might impose disproportionate costs on the organization, particularly in cases of small and medium enterprises. Moreover, preventive measures have no inherent boundaries as even the most sophisticated compliance system may still be improved to reduce peripheral risks. Accordingly, prosecutors and courts deciding on RAs and their terms, must take into account which policy considerations apply, and how their opposed objectives can be brought into a fair and equal balance.

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"Discussion paper"]; Canada, "What We Heard", *supra* note 9 at 14; the argument was openly accepted in the UK as parameter for the court's decision whether to approve a DPA, *Rolls-Royce*, *supra* note 23 at para 58:

"Although the SFO is ready and able to prosecute large corporates like Rolls-Royce, where necessary, its resources (both financial and in terms of manpower) are not unlimited so that when an agreement such as this can be negotiated, the public interest requires consideration to be given to the cases that will not be investigated if very substantial resources (sufficient to prepare the case for a hearing) are diverted to it."

27 See *Criminal Code*, *supra* note 3, s 715.34(3)(a).

28 *Cf Rolls-Royce*, *supra* note 23 at para 83; Serious Fraud Office v XYZ [2016] Lloyd's Rep FC 509 at 20 [XYZ]; *Criminal Code*, *supra* note 3, s 715.3(1) makes it clear though that foreign persons can be victims of foreign corruption. Thus, the *Corruption of Foreign Public Officials Act* not only protects a public good (for example the integrity of foreign administrations). Nevertheless, the problem for prosecution in such cases to identify individual victims remains.

## IV. DEFERRED PROSECUTION AGREEMENTS IN THE UNITED STATES AND THE UNITED KINGDOM

### A. United States

In the United States, DPAs have been concluded in considerable numbers since their introduction to address corporate white-collar crimes by the Department of Justice ("DOJ") in 1994,[29] and their adoption by the Securities and Exchange Commission ("SEC") in 2013.[30] In contrast to Canada and the UK, no statutory framework on DPAs exists, but only DOJ and SEC policies.[31] These policies make DPAs available to organizations as well as to individuals for a wide variety of offences without limitation to white-collar crimes.[32] In practice, particularly in the area of foreign corruption, the clear focus of DPAs has been corporate crimes, while individuals such as corporate employees are rarely prosecuted.[33]

The extensive use of DPAs is often attributed by legal commentators to a particular case: The conviction of accounting firm Arthur Andersen LLP.[34] The partnership was the auditor for Enron Corporation, which conducted fraudulent accounting practices to an unprecedented extent. As investigations were initiated, employees of Arthur Anderson destroyed significant evidence leading to the firm's conviction for obstruction of justice. As a consequence of this conviction, which was later overturned, Arthur Anderson went bankrupt. Based on the experience from this case, the DOJ shifted its policy from prosecuting corporate crime to negotiating

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29 Wulf Kaal & Timothy Lacine, "Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014) 70:1 Bus Lawyer 61 at 72.

30 *Ibid* at 63.

31 The DOJ policies were shaped by a series of memoranda, namely the Thompson, Holder, McCallum, Mc Nulty, and the Filip Memorandum, each revising US, Department of Justice, *Justice Manual*, s 9-28.000 - Principles of Federal Prosecution Of Business Organizations [Justice Manual] (previously known as U.S. Attorneys' Manual). For a detailed history of these policy revisions see Kaal & Lacine, *supra* note 29 at 64-77.

32 DPAs were traditionally used in non-corporate crimes, see Peter Spivack & Sujit Raman, "Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements" (2008) 45 Am Crim L Rev 159 at 163.

33 Mike Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement" (2015) 49:2 UC Davis L Rev 497 at 530.

34 *Ibid* at 501; Kaal & Lacine, *supra* note 29 at 69.

DPAs. The conclusion was to avoid what became known as the "Arthur Anderson effect" or the "death sentence for corporations," by initiating criminal investigations and thereby burdening the corporation with costs and disrepute. Although empiric research suggests that Arthur Anderson was an extraordinary case, and there is no evidence that criminal conviction or even mere investigations by default impose a severe risk of bankruptcy,[35] the adoption of the negotiation-based approach has developed a dynamic on its own. A private study[36] revealed that between 2000-2017, 483 DPAs were concluded;[37] the vast majority of which were initiated by the DOJ. The OECD has subtly insinuated the increase of DPAs as "dramatic."[38]On the other hand, it keeps emphasizing the leading role of the US in combating foreign corruption,[39] which seemingly has been enabled by DPAs.[40]

Scholars have not been able to establish clear causation for the increasing numbers of DPAs. Thus, it remains unclear whether it was due to a rise in corporate crimes, more effective investigations, or a more significant focus of corporations in compliance and self-reporting.[41] Nevertheless, there are two factors unique to the US legal system that arguably have played a decisive role in this development. Firstly, the near absence of judicial oversight suggests that prosecutors are inclined to use DPAs as an instrument to avoid the risk of losing cases and shaping enforcement policies without judicial interference.[42]Although this absence has been criticized by scholars and judges,[43] and a Congress bill was

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35 Koehler, *supra* note 33 at 511.

36 Gibson Dunn, "2017 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)" (4 January 2018), online (pdf): <www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-NPA-DPA-update.pdf> [perma.cc/7Z8V-TXZ5].

37 This number includes non-prosecution agreements.

38 OECD, Working Group on Bribery in International Business Transactions, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, (OECD, 2010) at 112, online (pdf): <www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf> [perma.cc/PJ79-DN5X] [OECD].

39 *Ibid* at 13.

40 *Ibid* at 20: "It seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S."

41 Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement, IRPP Round Table Report March 2016, 8.

42 Koehler, *supra* note 33 at 521.

43 Gordon Bourjaily "DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions"

introduced to establish further judicial oversight,[44] this has not yet led to any change. On the contrary, the U.S. Court of Appeals for the District of Columbia Circuit has recently emphasized that the decision to conclude a DPA and the terms of such an agreement fall within the scope of a prosecutor's discretion.[45] Secondly, the extensive application of criminal law by prosecutors without judicial oversight and review. Further, corporations cannot invoke a compliance defense, and the attribution of their employees' misconduct is not limited, such as under the "controlling minds" doctrine in the UK and Canada.[46]

Despite the fact that negative anecdotal evidence of single corporations which repeatedly conducted relevant offenses and underwent consecutive DPAs suggests that such agreements may sometimes result in insufficient deterrence,[47] their broad use seems to have uncovered a considerable number of corporate crimes through self-reporting, particularly in the field of foreign corruption.[48] Further, there is wide belief that DPAs, by imposing compliance measures, have a severe impact on the change in corporate culture in the US.[49]

## B. United Kingdom

Based on the US model,[50] but with noteworthy deviations, DPAs were introduced in the UK by the *Crime and Courts Act 2013* on 24 February

(2015) 52 Harv J on Legis 543 at 547-549, 562-564; Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements" (2016) J Leg Analysis 191 at 231-232.

44 US, Bill S 2544, *Ending Too Big to Jail Act*, 115 Cong. 2018, online: <www.congress.gov/bill/115th-congress/senate-bill/2544/text> [perma.cc/M6BP-G8NX].

45 *United States v Fokker Services BV*, 818 F (3d) 733 at 744 (DC Cir 2016). In Canada, on the other hand, only the decision whether to offer a RA is not subject to judicial review except for abuse of process, see *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282 at para 180.

46 Koehler, *supra* note 33 at 512.

47 Notoriously in the case of Pfizer H.C.P. Corporation which subsequently entered three DPAs on similar offences, see Patrick Radden Keefe "Why Corrupt Bankers avoid Jail", *The New Yorker* (31 July 2012), online: <www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail> [perma.cc/9M6U-3TXT].

48 OECD, *supra* note 38.

49 Jake A Nasar, "In Defense of Deferred Prosecution Agreements"(2017) 11 NYU JL & Liberty 838 at 849-856; Koehler, *supra* note 33 at 512.; Kaal & Lacine, *supra* note 29 at 82.

50 Serious Fraud Office, "Alun Milford on Deferred Prosecution Agreements" (5 September 2017), online: <www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-

2014.[51] The UK provisions in turn served as a model for the Canadian RAs,[52] and are therefore more similar to the Canadian legislation. In particular,

- no individuals may enter a DPA;[53]
- DPAs are reserved for a restricted list of white-collar crimes[54];
- the DPA needs the assent by the Crown Court, which has to review whether the DPA is in the public interest, and assess if its terms are fair, reasonable and proportionate;[55] and
- the court's decision, together with the DPA itself, is generally to be published.[56]

So far, only five DPAs have been concluded in the UK under the auspices of the Serious Fraud Office ("SFO"),[57] all involving bribery of foreign officials or false accounting, and all approved by the same judge, Sir Brian Leveson who accordingly had considerable influence in shaping the terms under which a proposed DPA may be approved by the Crown Court. The court has taken its role in overseeing proposed DPAs very seriously, and attempted to balance the policy issues at stake. In two decisions, the court has given important guidance on the problems of self-reporting and the determination of fines.

The first being the case of the *Rolls-Royce*, where the court made an exception to the UK's general rule that self-reporting is a condition for entering a DPA.[58] This exception has attracted much attention among commentators,[59] but is less significant if the details of the case are reviewed more carefully. Rolls-Royce was, for a considerable time, involved in the bribery of foreign officials in various jurisdictions to obtain government

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prosecution-agreements> [perma.cc/893J-7KV9] [SFO, "Alun Milford"].

51 Koehler, *supra* note 33 at 561.

52 Archibald & Jull, *supra* note 2 at 7.

53 *Crime and Courts Act 2013* (UK), Schedule 17, s 4(1);

54 See *Ibid*, Schedule 17, Part 2.

55 *Ibid*, Schedule 17, ss 8(1), 8(3).

56 *Ibid*, Schedule 17, s 8(7).

57 Serious Fraud Office, "Deferred Prosecution Agreements" (last visited 2 August 2019), online: <www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> [perma.cc/X6QK-BUR2].

58 *Rolls-Royce*, *supra* note 23.

59 SFO "Alun Milford", *supra* note 50: "some commentators have dwelt on this aspect of the case".

orders. The SFO got first indications of these activities through the observation of public online forums.[60] Shortly after, Rolls-Royce cooperated over the course of the next several years, providing considerable detailed information, naming individual wrongdoers, and waiving legal privilege on many documents. Further, the company implemented considerable compliance measures to prevent similar offences in the future. As the SFO became aware of many other offences solely on the basis of the information provided by Rolls-Royce, the case came close to self-reporting.[61] The exception created by the court for "extraordinary cooperation"[62] thus remains rather narrow and is limited to such cases of almost complete self-reporting.[63]

As to the reduction of fines, the court has shown that it is willing to grant leniency through means of substantial reductions in specific circumstances. While reductions for self-reporting and cooperation in the UK usually result in a discount of one third,[64] the court made several important exemptions from this rather stringent rule. In the *Rolls-Royce* case, the court took the firm's "extraordinary cooperation" and its substantial role in the British (defense) industry into consideration, thereby reducing the fine more appropriately by 50%.[65] In the case of XYZ,[66] the court had to deal with a potential case of the "Anderson effect." Since XYZ did not have the financial means to pay such a considerable fine, the imposition thereof would likely have had the decimating effect of permanently shutting down the business. Thence, the court not only granted a discount of 50% for the company's cooperation but further reduced this amount to about 2%.[67] This enabled the company to continue its business operations for the sake of its stakeholders (the cooperative parent company, employees, pensioners,

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60 *Rolls-Royce*, *supra* note 23 at para 16.

61 A fact, often ignored by criticists, *Cf* Rita Cheung, "Deferred Prosecution Agreements: Cooperation and Confession" (2018) 77:1 Cambridge LJ 12 at 13; OECD, Working Group on Bribery in International Business Transactions, *Implementing the OECD Anti-Bribery Convention Phase 4 Report*: United Kingdom, para 22, online (pdf): <www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf> [perma.cc/M84S-HUK7].

62 *Rolls-Royce*, *supra* note 23 at para 121.

63 SFO, "Alun Milford", *supra* note 50.

64 *Rolls-Royce*, *supra* note 23 at para 119.

65 *Ibid* at para 123.

66 XYZ, *supra* note 28. The defendant's name remains anonymous until related criminal proceedings are concluded.

67 £352,000 of £16.4 million, *ibid* at 22, 24.

suppliers, and customers),[68] and to additionally acknowledge the positive decisions to comply made by XYZ and its parent company. In this context, the judge emphasized the importance of encouraging self-reporting and cooperation with prosecutors.[69]

## V. The Canadian RA – A Chance For Change

The examples from the US and the UK indicate that different legislative frameworks and practices on DPAs have a decisive effect on their significance in the system of criminal prosecution. Although Canada has already, in part, set the course by modeling the framework of its rules on RAs as a derivative of the rules established in the UK, the interpretation and weighing of different factors to be taken into consideration by prosecutors and judges still leaves significant room for policy considerations. As RAs can only constitute a meaningful prosecutorial instrument if they have both, a merit for the public and an incentive for the offending organization, there has to be a reasonable balance between both.

In the following, ways to achieve this balance with regard to the requirement of self-reporting and the determination of penalties are discussed.

### A. No Requirement of Prior Self-Reporting in the *Criminal Code*

Given the nature of corporate crime, it is often difficult to uncover.[70] Encouraging self-reporting is therefore of significant importance and a common objective of any set of rules on DPAs. Although it has been argued in the Canadian context that for the benefits the organization may receive by concluding an RA, self-reporting should be made a strict condition thereof,[71] this is not supported by the law. On the contrary, policy considerations suggest a broad use of RAs.

The *Criminal Code* clearly states that while enhancing self-reporting is an objective of RAs, it is not a strict condition thereof.[72] Moreover, the

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68 *Ibid* at 24: "These [considerations] include the conclusion that the interests of justice did not require XYZ to be pursued into insolvency".

69 *Ibid* at 16, 18.

70 Miriam Hechler Baer, "Insuring Corporate Crime" (2008) 83 Ind LJ 1035 at 1038.

71 Archibald & Jull, *supra* note 2 at 6.

72 *Criminal Code*, *supra* note 3, s 715.32(1).

circumstances under which the wrongdoing came to the prosecution's attention are just one factor the prosecutor has to consider when determining whether an RA is in the public interest and appropriate in the circumstances.[73] This reading of the *Code* as being in the public interest becomes evident from the British *Rolls-Royce* case with its narrow yet remarkable exception. Had the court strictly enforced the requirement of self-reporting, the significant cooperation that Rolls-Royce had undertaken would not have been encouraged by the prospect for a DPA. A broad reading of the provisions is even further encouraged by the opening clause in s. 715.32(2)(i) which allows prosecutors to take any analogous factor into consideration when deciding on whether to offer an RA. The rigid restriction of RAs to a "zero discovery zone"[74] on the other hand, would discourage any self-reporting where even minimal parts of an offence series become public, or at least known to prosecutors. This would drastically limit the benefits of RAs by excluding the possibility to self-report on the facts that have not yet been discovered, and in particular on the individuals responsible for offences–not to mention all the other terms of an RA with beneficial potential for the public, particularly, specific compliance measures.[75] A restrictive interpretation would go even further than the very modest exemption made by the Crown Court on the rules upon which the Canadian RA framework is primarily based. This approach would, contrary to Archibald and Jull,[76] not be compatible with US policies, but on the contrary, follow the successful, and in this regard, well-balanced US approach. In the Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy, what the authors refer to does not address DPAs but rather only deviations and modifications from standard fine rates. While it grants up to 50% discounts for voluntary disclosure, it still grants up to 25% for involuntary disclosure.[77] Other US policies explicitly or implicitly leave open the possibility for concluding a DPA in cases of involuntary self-disclosure.[78]

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73 *Ibid*, s 715.32(2)(a).

74 Archibald & Jull, *supra* note 2 at 6.

75 Kaal & Lacine, *supra* note 29 at 71.

76 Archibald & Jull, *supra* note 2 at 4-6.

77 Justice Manual, *supra* note 31, s 9-47.120 - FCPA Corporate Enforcement Policy at 2; reducing such insecurity is one objective of the Canadian regime, see *Debates of the Senate*, 41-1, No 218 (11 June 2018) at 5981 (Hon Grant Mitchell).

78 For example: According to Justice Manual, *supra* note 31, ss 9-28.300, 9-28.900, self-disclosure is merely one factor to be considered; likewise, the SEC considers "[w]hether

Presuming one of the main factors discouraging organizations from self-reporting is insecurity regarding the question whether, as a consequence, a RA will be offered to them,[79] Canadian prosecutors should issue clear statements on whether they intend to accept delayed/non-voluntary self-reporting and if so, under which circumstances. The arguments above and the experiences in the US indicate that a non-restrictive approach even beyond the limited *Rolls-Royce* exception, i.e. an approach that does not make self-reporting a strict condition for the offer of a RA, may incentivize self-reporting in areas where investigations traditionally are of limited impact. The next section will show that different reporting behavior can be dealt with comfortably by adjusting penalties.

## B. Penalty Discounts as Incentive

Entering a DPA potentially has considerable benefits for organizations: avoiding procedural costs and risks, loss of reputation, and debarment from public procurement.[80] Penalty reductions, (as compared to a conviction, can act as an additional and significant incentive for organizations to self-report and submit to compliance measures.

The *Criminal Code* does not set any criteria for determining penalties.[81] Practice in the US and UK use the same criteria for determining penalties as for deciding whether to enter into a DPA. Two important examples are the cooperation of the organization, particularly by self-reporting, and the avoidance of the "Arthur Anderson effect."

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the Investigation was initiated based on information or other cooperation" as only one relevant factor (Enforcement Manual [Nov. 2017] sec. 6.2.2, 6.1.1. a (1) (iii)); US, Department of Justice, *Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations* at 9, online: <www.justice.gov/nsd/file/902491/download> [perma.cc/5F8C-4SVJ], expressly states: "Where an organization does not voluntarily self-disclose, but, after learning of violations from the government's investigation, cooperates fully and appropriately remediates the practices that led to the violations, the company still may be eligible to receive some credit, to include the possibility of a deferred prosecution agreement."

79 Justice Manual, *supra* note 31, s 9-47.120 - FCPA Corporate Enforcement Policy at 2.

80 Canada, "Ineligibility and Suspension Policy" (last modified 14 July 2017), online: <www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html> [perma.cc/KF59-H6YK ], s 6, automatically debars organizations convicted for certain offences from public procurement for a period of up to 10 years.

81 The sole indirect exception of adding a default victim surcharge on penalties of 30% (*Criminal Code*, *supra* note 3, s 715.37(5)).

Both the US and the UK accept that self-reporting should not only be a factor for determining whether to enter a DPA, but also be of decisive significance for any penalty discounts. This applies to voluntary and non-voluntary self-reporting. While in the US involuntary self-disclosing can still lead to substantial penalty discounts of up to 25%,[82] the Crown Court in *Rolls-Royce* even applied a 50% fine reduction for "extraordinary cooperation."[83] While, as shown above, the *Rolls-Royce* case only constitutes a very limited exception to the general rule that self-reporting is required in the UK, the financial impact it had, in that case, was quite significant. The variance in reduction rates allows addressing a vast scale of self-reporting beyond the mere either/or choice when considering whether to enter an RA. Other areas, like competition law, allow even for complete immunity from prosecution,[84] for achieving policy objectives considered more prevailing, than the effective sanctioning of each offending organization. Further, such discounts could increase the incentive for managers to initiate early self-reporting as they otherwise may be held liable for lower discounts resulting from undue delays.[85]A reasonable graduation of penalty discounts is, therefore, a sound approach for outweighing any potential discouragement, and a less restrictive approach on self-reporting may grant the opportunity of concluding RAs even in cases of involuntary self-reporting.

As for the "Arthur Anderson effect," i.e. the avoidance of an organization's bankruptcy due to criminal prosecution and the level of fines imposed, the UK case of XYZ gives valuable guidance. The Crown Court, in this case, has shown a considerable determination to avoid the consequence of shutting down XYZ, taking into consideration the degree of cooperation both XYZ and its parent company had displayed, as well as the perceived adverse effects on XYZ's stakeholders.[86] The resulting discount amounting to almost 98% of penalties demonstrates that other policy

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82 Justice Manual, *supra* note 31, s 9-47.120 - FCPA Corporate Enforcement Policy at 2.

83 *Rolls-Royce*, *supra* note 23 at para 123.

84 Canada, "Immunity and Leniency Programs under the *Competition Act*" (15 March 2019), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html> [perma.cc/3UDZ-WXTG].

85 *Cf* Larissa Fulop & Jason Wadden "Canada Adopts New 'Remediation Agreement' Regime To Address Corporate Crime" (3 October 2018), online: <www.mondaq.com/canada/x/740126/Corporate+Crime/Canada+Adopts+New+Remediation+Agreement+Regime+to+Address+Corporate+Crime> [perma.cc/28D9-CWVR].

86 *XYZ*, *supra* note 28 at paras 23, 24.

objectives can have priority over imposing high penalties. This approach enables the corporation to opt for adopting well-implemented compliance structures, whilst yielding to the public interest instead of opting to bypass what would otherwise prove to be a financial and organizational burden, by filing bankruptcy, in which case, one would neither be able to collect penalties, nor would any deterrence be established for other wrongdoers. Ultimately, what has to be taken into consideration is that, in most cases, innocent parties end up having shoulder the substantial financial burden imposed through fines, whilst only partly, if at all, attributable to the organization's value gains, increased stock prices, and wage raises caused by the advantages resulting from the organization's offences.[87]

## VI. Conclusion

Whether the introduction of RAs will have a significant impact on how organizations assess litigation, investigations, and enforcement,[88] strongly depends on how prosecutors and courts will interpret and apply its underlying rules. The Canadian framework gives authorities the means to create strong positive incentives by not making prior self-reporting a condition, and by providing a balanced middle ground between not too severe a penalty and a reasonably deterrent and punitive penalty in appropriate cases.

While there is yet no empirical basis to verify this assumption, the mere numbers of DPAs entered in the UK suggest that the substantial restrictions the Crown Court and the SFO have implemented in their practice and interpretation of the law, may sharply restrict the scenarios in which a DPA can be entered into, and accordingly deter organizations from self-reporting. Through Sir Leveson's admonition to offenders to not only consider the financial burden resulting from a DPA, but to also take into consideration the supposedly much higher costs of criminal proceedings,[89] an economic rationale suggests that this is exactly what managers do, in particular, if the risk of discovery by investigations is perceived to be low. An obvious

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87 Canada, "Discussion paper", *supra* note 26 at 6.

88 As claimed by Riyaz Dattu, Larry Ritchie & Sonja Pavic, "Deferred prosecution agreements to be introduced in Canada", *Financier Worldwide Magazine* (July 2018), online: <www.financierworldwide.com/deferred-prosecution-agreements-to-be-introduced-in-canada/> [perma.cc/J894-XW7P].

89 *Rolls-Royce*, *supra* note 23 at para 143.

example is the area of foreign corruption where in Canada there have only been four convictions in almost two decades.[90]

In the US, on the other hand, the lack of judicial oversight has arguably led to an imbalance between the executive branch and the judiciary, resulting in broad interpretations of the law which are not subject to judiciary review. This detriment, however, is already efficiently contained by giving Canadian courts a critical oversight role in the RA regime. As the discussion in the US suggests, too broad and relaxed use of DPAs may have detrimental effects on deterrence and lead to a perceived loss of legitimacy among the general public.

Based on the newly established rules, Canadian authorities have the chance to avoid the dilemma of being caught between a rock and a hard place, especially when it comes to finding the right balance and preventing what could otherwise easily become a discouragingly restrictive approach of self-reporting, or undermining legitimacy by too broad a use of RAs. As self-reporting in some areas of criminal law remains the most effective, if not the only, possibility to uncover committed offences,[91] prosecutors and judges would be well-advised not to set the bar for concluding RAs too high, so as to render them unyielding. The variety of terms available for RAs, including flexibility for penalty discounts to be imposed, gives ample opportunity to establish customizable solutions for those organizations that are compromised.

The case of SNC-Lavalin, which at the time of the publication of this article is still controversially debated, illustrates not only that the burden on prosecutors to exercise their discretion on whether to offer a RA to the defendant corporation in a manner which does justice to all circumstances of the individual case as being high. It also demonstrates that responsible

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90 Since the Corruption of Foreign Public Officials Act was introduced in 1998 to August 2017, see Global Affairs Canada, "Fight against Foreign Bribery: Eighteenth Annual Report to Parliament" (last modified 11 October 2017), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-18.aspx?lang=eng> [perma.cc/AR8A-HF3Z].

91 The Law Reform Commission of Canada has accurately noted on the immunity provisions in competition law, Law Reform Commission of Canada, *Immunity From Prosecution*, Working Paper 64 (1992) at 9:

"We are prepared, however, to recognize that the consideration flowing from an immunized offender (regardless of motivation) may, in exceptional cases, be sufficient to counterbalance any debt he or she is thought to owe to society as a whole."

democratic institutions, including courts and the press, are capable of curbing any potential abuse of RAs.