Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada

By Justice Todd Archibald and Kenneth Jull

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 have arrived in Canada under the form of “Remediation Agreements”.2 The availability of Remediation Agreements will be a "game changer" in creating incentives for corporations to conduct internal investigations and to self-report. The incentive held out by the prospect of these agreements is the absence of a conviction against corporations for serious Criminal Code offences such as foreign corruption, bribery, fraud, and insider trading.

An important objective of remediation agreements is “to encourage voluntary disclosure of the wrongdoing”.3 Organizations are encouraged to voluntarily come in from the zone of non-discovery: this is a zone where the government may never find out about serious criminal activity by corporate organizations in the absence of such disclosure. These are circumstances where the government ought to have sympathy for those organizations that “come in from the cold”.

We have previously written in support of bringing deferred prosecution agreements to Canada.4 The new Canadian framework is built on a “factor based” model which leaves significant discretion to prosecutors and to our Courts who must ultimately approve the agreements. It is the thesis of this short commentary that the central organizing theme in the exercise of that discretion should be the concept of coming in from the cold. From the zone of non-discovery by government regulators, organizations should be encouraged to conduct robust internal investigations and then self-report the results to the authorities. This theme would be consistent with the United States extensive experience in this area and would best promote compliance in Canada.

A controversial question is whether or not a company that is caught by authorities (and does not therefore voluntarily disclose) ought to be able to qualify for a remediation agreement.

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1 The Spy Who Came in from the Cold (1965), Quotes, [https://www.imdb.com/title/tt0059749/quotes](https://www.imdb.com/title/tt0059749/quotes)
3 Purpose section 715.31 (d).
4 Archibald, Jull and Roach, Regulatory and Corporation Liability: From Due Diligence to Risk Management (Thomson Reuters).
This question arises in the high-profile case of SNC-Lavalin.5 RCMP investigators executed a search warrant in April of 2012 at the Montreal headquarters of engineering firm SNC-Lavalin, as part of a probe into millions of dollars of mysterious payments.6 SNC was subsequently charged with corruption charges by the RCMP.7

Neil Bruce, SNC-Lavalin’s chief executive officer, has asserted that the company would be keen to strike a formal DPA settlement with the government to resolve the outstanding charges against it. Mr. Bruce views a DPA for SNC-Lavalin as a way of levelling the playing field with international rivals.8 SNC has recently resolved a class action lawsuit brought against it by shareholders in relation to an alleged failure to disclose the corruption details to the market.9

We cannot comment on the specifics of SNC-Lavalin as it is presently before the Courts. We can, however, comment on the general principles raised by the possibility of an organization qualifying for a remediation agreement, when it has not voluntarily disclosed. To be blunt, if a corporation can get a deferred prosecution agreement after being caught, this may create its own risk dynamic. Other corporations who become aware of this result, and who then uncover future misconduct, may run a cost-benefit calculation to not self-report and hope that they will not be caught. If they are caught, they may reason that they can then come in and seek a deferred prosecution agreement on the basis of the other factors listed.

If the legislation is interpreted to allow for companies to come in after being caught (in the zone of discovery as contrasted to the zone of non-disclosure), we argue in this comment that the “gold standard” of post discovery remediation should be the threshold requirement. If that organization’s post discovery remediation programme reaches a gold standard (beyond minimal statutory requirements and industry standards), a deferred prosecution agreement could be offered in those rare cases where that company has not come in from the cold.

(i) Remediation Agreements

A new part of the Criminal Code, Part XXII.1 is titled “Remediation Agreements”. The Government of Canada made the decision to create this deferred prosecution programme following public consultations.10 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

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5 The timeline of events concerning allegations against SNC-Lavalin are set out at https://www.680news.com/2015/02/19/timeline-key-dates-for-snc-lavalin/
7 https://www.canadianlawyermag.com/legalfees/rcmp-lays-corruption-charges-against-snc-lavalin-6195/
organization complies with the terms of the agreement.” The term “remediation agreements” can be traced to a roundtable on white collar crime hosted by the Institute for Research on Public Policy.

(ii) Purpose of remediation agreements

The purpose of the remediation agreements is set out in the legislation. 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:

**Purpose**

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.

The purpose section will no doubt be the subject of judicial comment. In this comment, we will focus on factor (d) “to encourage voluntary disclosure of the wrongdoing”.

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11 PART XXII.1 Remediation Agreements, Definitions 715.3(1).
12 http://irpp.org/wp-content/uploads/2016/03/roundtable-report-2016-03-10.pdf. “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, As an alternative, it was suggested that a more appropriate term might be “Structured Remediation Agreement” to emphasize that a significant penalty has been imposed, reforms have been agreed to and a robust monitoring mechanism has been put in place. See page 12-13. Kenneth Jull was one of the participants in the Round Table.
The United States is in the forefront of the use of non-prosecution and deferred prosecution agreements. A central concept in the United States programme is voluntary reporting in a timely manner, as illustrated by the following diagram:

In the United States, 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.  

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

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following:

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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.\(^\text{14}\)

(iii) **Factors considered in the public interest**

The remedial agreement scheme structures the discretion to be exercised by the prosecutor. The legislation 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

\(^{14}\) 9-47.120 - FCPA Corporate Enforcement Policy.
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

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

This commentary will focus on 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”.

The zone of non-discovery is a central concept, in our view, with respect to the concept of deferred prosecutions. The zone of non-discovery is recognized in the purpose section that states that a remediation agreement should have an objective of “(d) to encourage voluntary disclosure of the wrongdoing.” A primary benefit to the government is when organizations voluntarily disclose in circumstances where the government may never find out about the misconduct, and they provide details of an internal investigation into those matters. The primary benefit for the organization is the absence of a criminal conviction and its implications.

It would appear that 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”) is not a condition precedent. This conclusion is derived from the placement of this consideration in the factors section as contrasted to the conditions section (section 715.32 (1)).

The listing of “the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities” as only one factor would appear to make a remedial agreement potentially available to an organization that discloses wrongdoing after being discovered by the government. An organization that is caught could potentially argue that it is not precluded from applying for a remediation agreement, as there is no condition precedent that such agreements are only available to those who report "prior to an imminent threat of disclosure or government investigation".

We prefer the interpretation of this factor requiring that in general, a remediation agreement will only be available from the zone of non-discovery. Under this interpretation, the reference to “the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities” would refer to the length and breadth of the zone of non-discovery. In other words, there might be a difference between a company that self-reported in the first weeks after discovery compared to a company that waited several months before self-reporting, both from the zone of non-discovery. This follows the United States model where the company must disclose the conduct to the Department "within a reasonably prompt time after becoming aware of the offense."

If the legislation is interpreted to allow for companies to come in after being caught (the zone of discovery as contrasted to the zone of non-discovery), a very useful parallel would be to the
treatment of post offence remediation in regulatory sentencing. In the regulatory context, the Ontario Court of Appeal has stated in the *Flex-N-Gate* decision\(^{15}\) that post offence remediation that only complies with minimal requirements should not be treated as a mitigating factor on sentencing, as such compliance is required by law in any event. The possibility still exists that remediation levels that exceed the legal minimum might qualify as mitigating circumstances. For example, if the legal minimum requires a "bronze" standard, remediation that reaches a "gold" standard might qualify to have such efforts treated as mitigating a sentence as such steps exceed the statutory minimum requirements.\(^{16}\)

Applying this test to deferred prosecutions, if an organization’s post discovery remediation programme reaches a gold standard beyond minimal statutory requirements and industry standards, it might qualify for a deferred prosecution agreement in those rare cases and with strict conditions.

**(iv) Application for Court Approval**

Following the UK model, the remediation scheme requires Court approval. Section 715.37(6) states:

**Approval order**

(6) 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.

It will be very interesting times ahead in the compliance field, as organizations come in from the cold seeking the approval of government regulators and our Courts for the consideration of deferred prosecutions.

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\(^{1}\) Justice Todd Archibald of the Ontario Superior Court. Kenneth Jull, Counsel at Gardiner Roberts LLP; on interchange with the Competition Bureau Legal Services in the position of General Counsel until October 2018; the views in this article are the authors own and are not meant to represent the views of either the Superior Court, Gardiner Roberts or the Competition Bureau. This article is based on a July 2018 release of Archibald and Jull, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters).


\(^{16}\) Ibid., at paras. 29-30.
Ontario Court of Appeal clarifies jurisdictional limits of secondary market claims in *Yip v. HSBC Holdings plc*

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The recent judgment of the Ontario Court of Appeal in *Yip v. HSBC Holdings plc* provides helpful guidance on the jurisdictional limits of secondary market proceedings commenced in respect of securities traded on a foreign exchange. In particular, the Court cautioned against the risks of “jurisdictional overreach,” and confirmed that the common law “real and substantial connection” test for jurisdiction must be satisfied in respect of both statutory and common law misrepresentation claims against a foreign public issuer. While the Court acknowledged that a “responsible issuer” under Part XXIII.1 of the *Securities Act* goes beyond a reporting issuer, such that an action for secondary market misrepresentation may be sustained even where the underlying securities are not listed or traded on a Canadian exchange, the mere fact that the securities can be purchased online by an Ontario resident is not - in and of itself - sufficient to satisfy the common law test for jurisdiction. What is more, the principles of comity dictate that the forum analysis in respect of secondary market claims will often favour the forum of the exchange(s) where the securities are traded.

**Background**

The underlying proceedings were commenced by a Canadian resident who purchased securities issued by HSBC Holdings plc. (HSBC Holdings), the parent holding company of an international banking conglomerate with its head office in London, U.K. Notably, the securities at issue were never traded or listed on any Canadian exchange. The plaintiff acquired his shares online from Ontario, using a Hong Kong bank account on the Hong Kong Stock Exchange, and accessed HSBC Holdings’ disclosure documents from its website (not from the website of its domestic banking subsidiary, HSBC Canada).

The plaintiff alleged that HSBC Holdings’ continuous disclosure documents and public statements contained material misrepresentations relating to its asserted compliance with anti-money laundering and anti-terrorist financing laws, as well as to its disclaimer of participation in an illegal scheme to manipulate certain international benchmark interest rates. Notably, for the purposes of his analysis, the motion judge proceeded on the assumption that these misrepresentations were in fact communicated.

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1. 2018 ONCA 626.
On the basis of the foregoing facts, Justice Perell concluded that HSBC Holdings did not carry on business in Ontario (even though it was subject to Canadian banking regulations under the Bank Act\textsuperscript{4} and its subsidiary did itself carry on business in Ontario), and ruled that the Ontario courts did not have jurisdiction \textit{simpliciter}.\textsuperscript{5} In the alternative, Justice Perell concluded that Ontario would not be the appropriate forum in any event, deferring instead to the forum where the trades took place. Accordingly, Justice Perell dismissed the plaintiff’s proposed statutory claim for secondary market misrepresentation under the Securities Act and stayed the parallel common law negligent misrepresentation claim.

On appeal, the plaintiff’s arguments were threefold: (i) the court should adopt a statute-specific and unique interpretation of the words “real and substantial connection” in the definition of “responsible issuer” in section 138.1 of the Securities Act, (ii) even if the common law test for a real and substantial connection applies to the statutory definition of a responsible issuer, the motion judge erred in his application of the common law test and (iii) the motion judge erred in his application of the doctrine of \textit{forum non conveniens}.

The Court of Appeal ultimately dismissed the appeal, subject to a variation of the underlying costs award,\textsuperscript{6} and concluded that it was in “substantial agreement with the reasons of the motion judge.” However, in so doing, the Court took the opportunity to offer “jurisprudential observations” in respect of three discrete but overlapping issues arising from the jurisdictional questions raised by the proceeding:

(i) the proper interpretation of the definition of “responsible issuer” in s. 138.1 of the Securities Act;

(ii) the application of the jurisdiction \textit{simpliciter} test to the common law and statutory tort claims of misrepresentation; and

(iii) the application of the doctrine of \textit{forum non conveniens}.

\textbf{The Court of Appeal’s “jurisprudential observations”}

\textbf{(a) The proper interpretation of “responsible issuer” under section 138.1 of the Securities Act}

While the Court of Appeal acknowledged that Part XXIII.1 of the Securities Act is remedial legislation and further accepted that the definition of “responsible issuer” under the Act goes

\textsuperscript{4} S.C. 1991, c. 46.

\textsuperscript{5} “Jurisdiction \textit{simpliciter}” refers to the court’s threshold ability to assert jurisdiction over an out-of-province party who has not submitted or otherwise attorned to the Ontario proceedings.

\textsuperscript{6} The motion judge’s decision was upheld on all issues related to jurisdiction. However, the Court of Appeal reduced the initial costs award on the grounds that the defendants’ expert fees were excessive and/or not adequately supported by the evidence. In so ruling, the Court noted as follows: “In our view, a class action defendant does not have carte blanche to unreasonably spend money on experts; we see this obligation of reasonableness in the expenditure of funds on experts as an aspect of ensuring access to justice, one of the principle purposes of class actions.”
beyond a reporting issuer whose shares may be listed or traded on a Canadian exchange, it ultimately rejected the plaintiff’s argument that “responsible issuers” should be expansively defined by reference to a purposive analysis that applies a unique statute-based conception of jurisdiction. In particular, the Court noted that s. 138.1 defines a “responsible issuer” to mean a reporting issuer or “any other issuer with a real and substantial connection to Ontario” whose securities are publicly traded, signaling an intention of the legislature to track the common law test for jurisdiction. Accordingly, the Court rejected the plaintiff’s argument that “an issuer that knows or ought to know that its investor information is being made available to Canadian investors has a securities regulatory nexus.” While it acknowledged that this proposed formulation was an attempt to import the Supreme Court’s articulation of “real and substantial connection” in Moran v. Pyle7 (a products liability case) into the securities realm, the Court concluded that the net effect of doing so would be to “make Ontario a universal jurisdiction for secondary market misrepresentations made anywhere in the world.”

After reviewing the legislative history of Part XXIII.1 of the Securities Act and the evolution of the common law in relation to matters of jurisdiction, the Court concluded that “the Legislature was content to allow the common law to develop in the ordinary course, as it did with Van Breda ... [and] had no expectation that the test for a real and substantial connection, in relation to securities matters, would diverge over time from the common law test.” In an effort to avoid “jurisdictional overreach,” therefore, the Court expressly limited the definition of a “responsible issuer” to an issuer that could be demonstrated to have a real and substantial connection to Ontario.

(b) Jurisdiction simpliciter in the context of common law and statutory claims of misrepresentation

The Court of Appeal premised its analysis of the question of jurisdiction simpliciter on the preliminary conclusion that “HSBC Holdings could not be said to be carrying on business in Ontario simply because the appellant could access a non-reporting issuer’s disclosure information using his home computer in Ontario. This would give rise to the universal jurisdiction that LeBel J. explicitly rejected in Van Breda.” Unlike the facts before the court in Abdula v. Canadian Solar Inc.,8 where a non-reporting issuer was deemed to be a “responsible issuer” by virtue of the real and substantial connection between the defendant and Ontario (including the fact that the issuer was incorporated in Ontario, maintained executive offices and certain business operations in Ontario, and had held its annual meeting in Ontario), the Court of Appeal noted that HSBC Holdings’ management business was wholly distinct from the businesses it manages: “Very few, if any, activities of HSBC Holdings’ business have ever occurred in Ontario; it has no fixed place of business in Canada; and there is no agent of HSBC Holdings doing its management business in Ontario.”

Accordingly, the Court of Appeal ultimately agreed with the motion judge’s conclusion that “downloading HSBC Holdings’ material from a website was an ‘extremely weak connection’” and endorsed the view that “HSBC Holdings had no reason to believe that it was obliged to comply with or would be subject to securities regulation in Ontario.” On this basis, the presumptive real and substantial connection to Ontario that arose by virtue of the possible commission of a misrepresentation-based tort in Ontario was deemed to have been rebutted on the evidence.

(c) The application of the doctrine of forum non conveniens in the context of secondary market misrepresentation claims

Although the Court did not need to address the question of forum non conveniens in the context of its analysis, having already upheld the motion judge’s conclusion that the Ontario courts lacked jurisdiction simpliciter, it nevertheless took the opportunity to clarify the application of the common law test to the securities realm. In particular, the Court rejected the plaintiff’s submissions that the motion judge “placed too much emphasis on the place of the trade,” and clarified that there is no inconsistency between the two Kaynes decisions, which had previously been rendered in the context of proposed class actions under Part XXIII.1 of the Securities Act.

On the question of “place of trade,” the Court of Appeal noted that the motion judge correctly conceded that “there is no place of trading requirement under Part XXIII.1 of the Ontario Securities Act.” However, it also agreed with his conclusion that courts should generally favour the forum where the trade took place in the context of secondary market claims. In so doing, the Court also expressly rejected the plaintiff’s argument to the effect that the Ontario court’s prior statement in Kaynes (2014) that “the prevailing international standard tying jurisdiction to the place where the securities were traded” was wrong and was in fact corrected by the court in Kaynes (2016). In particular, the Court of Appeal noted as follows:

“[T]he framework in Kaynes (2014) for the forum non conveniens analysis in the context of secondary market liability was not reversed by Kaynes (2016). Comity continues to underlie the forum non conveniens analysis. Other factors in the forum non conveniens analysis must be considered, but comity is a key consideration. As such, the more appropriate forum for secondary market claims will often favour the forum of the exchange(s) where the securities trade.”

In this context, the Court of Appeal also clarified that the Kaynes (2016) ruling similarly did not “elevate the juridical advantage of asserting a claim as a class action to the status of an inviolable right,” and warned of the difficulties of applying the notion of juridical advantage as a factor in the forum non conveniens analysis. In particular, the Court echoed the Supreme Court’s cautionary statement in Amchem Products Incorporated v. British Columbia: “Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if

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any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum.”

Conclusion

The Court of Appeal’s ruling in *Yip v. HSBC Holdings plc* seeks to articulate the jurisdictional bounds of secondary market misrepresentation claims asserted against foreign public issuers. In so doing, the Court recognizes the realities of modern trading activity, which can be effected on global exchanges from virtually anywhere in the world, and acknowledges the inherent tension between the desire to regulate and protect the public markets and the need to respect the rules of comity. With a view to avoiding perceived “jurisdictional overreach,” the Court of Appeal’s ruling articulates a helpful roadmap for navigating secondary market claims that engage foreign issuers.
The legalization of cannabis in Canada is right around the corner with the Cannabis Act receiving royal assent in June 2018 and coming into force in October 2018. The Act will create an entirely new regulated industry which offers both significant opportunities and significant risks for businesses selling cannabis, cannabis accessories, or related services, and their directors and officers.

The Act creates exceptional liability risks for corporations and their directors and officers. For example, directors and officers can be personally liable for offences (punishments for indictable offences can be a fine of up to $5,000,000 or imprisonment for up to three years or both) and violations (administrative monetary penalties for violations can be up to an extraordinary $1,000,000). In the case of administrative monetary penalties, the Act expressly removes the defence of due diligence or mistake of fact, creating a strict liability offence.

As the cannabis industry explodes, corporations, directors and officers need to be aware of and manage the distinctive liability risks created by the Act. Corporations, directors, and officers should also be aware of different ways to defend against criminal prosecutions and resolve violations and administrative monetary penalties.

This article reviews the different offences and violations under the Act that corporations, directors, and officers can be liable for; punishments for offences and administrative monetary penalties for violations; and potential defences and defence strategies.

Offences and violations under the Act

Offences and violations under the Act include:

- Contraventions of provisions prohibiting, among other things:
  - promotion, packaging, and labeling in a way that appeals to youths or evokes glamour, recreation, excitement, vitality, risk or daring;
  - promotion, packaging and labeling through sponsorship, testimonials, or endorsements, or depictions of persons, celebrities, characters, or animals;
  - false, misleading or deceptive promotion, packaging, and labeling of cannabis likely to create an erroneous impression about its characteristics, value, quantity, composition, strength, concentration, potency, purity, quality, merit, safety, health effects or health risks;
  - false, misleading or deceptive promotion of and packaging and labelling of cannabis accessories likely to create an erroneous impression about their design, construction, performance, intended use, characteristics, value, composition, merit, safety, health effects or health risks;
• promotion using foreign media;
• displaying a brand element on a sports or cultural events facility;
• providing or offering to provide cannabis or cannabis accessories for free or in exchange for the purchase of a thing or service or the provision of a service;
• providing or offering to provide a service or any thing that is not cannabis or a cannabis accessory if it is an inducement to purchase cannabis or a cannabis accessory;
• sale or distribution of cannabis subject to a recall order;
• sale or distribution of cannabis or cannabis accessory by self-service display or a dispensing device,
• obstructing an inspector, and
• making, or participating in, assenting to or acquiescing in the making of, a false or misleading statement in any record required to be prepared, retained or provided under the statute.

• Contraventions of provisions regarding:
  • compliance with license conditions;
  • cessation of activities related to the suspension of a license; and
  • making available to the public information about cannabis.

• Contraventions of regulations or orders to provide the Minister information, recall, conduct tests, or take measures.

Liability under the Act

The Act provides for both criminal prosecution for offences and administrative monetary penalties for violations. If proceedings against a person for an act or omission are initiated under the administrative monetary penalty scheme, a criminal prosecution could not also be commenced for the same act or omission.

Punishment for offences under the Act

The punishment for an indictable offence is a fine of up to $5,000,000 or imprisonment for up to three years, or both. The punishment for a summary conviction offence is up to $250,000 or imprisonment for up to six months, or both, for the first offence and a fine of up to $500,000 or imprisonment for up to 18 months, or both, for any subsequent offence. Notably, if an offence continues for more than a day, it constitutes a separate offence for each day it is committed.

Administrative monetary penalties for violations under the Act

The administrative monetary penalty for a violation is up to $1,000,000 or a maximum amount fixed by the regulations if the violation is classified as minor, serious or very serious. Regulations regarding penalties below $1,000,000 for classified violations have yet to be published. Notably, a violation that continues for more than a day constitutes a separate violation for each day it is committed.
Director and officer liability

Directors and officers may be personally liable for contraventions of the Act committed by the corporation. Directors and officers of a corporation who direct, authorize, assent to, acquiesce in or participate in the commission of a corporation’s offence under the Act are deemed parties to the offence and liable on conviction to the punishment provided for by the Act, even if the corporation is not prosecuted for the offence.

Similarly, directors and officers of a corporation who direct, authorize, assent to, acquiesce in or participate in the commission of a corporation’s violation under the Act are deemed parties to the violation and liable for it.

Defences

Corporations, directors, and officers can rely on several defences appropriate to their circumstances in a criminal prosecution or when facing an administrative monetary penalty.

Limitations defence in the context of criminal prosecutions

Regarding summary conviction offences, no proceedings may be commenced a year after the subject-matter of the proceeding arose.

Defences of due diligence, mistake of fact

Persons facing criminal prosecution under the Act may rely on defences of due diligence and mistake of fact. The defence of due diligence requires that the person took all reasonable care to avoid the breach of the Act. This involves consideration of what a reasonable person would have done in the circumstances. The defence of mistake of fact is available where the person reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.

Of particular interest to directors, officers, and their insurers is that these defences are not available in relation to the administrative monetary penalty scheme. The Act does, however, provide that “every rule and principle of the common law that excuses a violation continues to apply, so long as it is not inconsistent with this Act.” Common law defences include defences that impair volition, such as duress, coercion and necessity.

While the express elimination of the due diligence and mistake of fact defences is not unique (there are several other statutes in Canada that expressly remove these defences), the Act provides for a $1,000,000 maximum administrative monetary penalty which exceeds every other comparable statute. In other statutes where these defences are expressly removed, the statutes typically carry a maximum administrative monetary penalty of $25,000 for individuals and $100,000 for other persons (i.e., corporations).
Resolving violations and administrative monetary penalties

A person facing an administrative penalty may (a) enter into a compliance agreement where the amount of the penalty is $5,000 or more; (b) request a review by the Minister of the acts that constitute the alleged violation or of the amount of the penalty; or, (c) challenge the Minister on the basis of the six-month limitation period applicable to administrative monetary penalties. A person may elect to enter into a compliance agreement or request a review, but they cannot do both.

- **Compliance Agreements**

A compliance agreement may be proposed by corporations, directors, or officers and include a provision for the deposit of reasonable security to guarantee compliance. It may set out terms to remedy the effect of the violation and to ensure steps are taken to ensure the violation does not occur again. A compliance agreement will reduce in whole or in part the penalty. Persons negotiating a compliance agreement will need to consider carefully the deemed presumption under the Act which provides that persons who enter into compliance agreements are deemed to have committed the violation. The Act does not expressly remove the possibility of negotiating a compliance agreement without this presumption.

- **Request for Reviews**

Corporations, directors, or officers may request a review of the facts and/or penalty (whether the amount of the penalty was established in accordance with the Act). On a request for review, the Act only permits the Minister to consider written evidence and written submissions. With respect to a review of the facts, the Minister must determine whether the person requesting the review actually committed the violation. Directors or officers may provide evidence that they did not direct, authorize, assent to, acquiesce or participate in the commission of the violation. If the Minister determines persons did not commit the violation, the proceedings against them will end.

With respect to a review of the penalty, the Act requires the penalty to promote compliance with the Act. As such, there is a proportionality consideration as to the amount of the penalty and what is required to promote compliance. Further, the Minister is required to determine the amount of the penalty with reference to the following factors:

- the person’s history of compliance or non-compliance with the Act and regulations;
- the nature and scope of the violation;
- whether the person made reasonable efforts to mitigate or reverse the effects of the violation;
- whether the person derived any competitive or economic benefit from the violation;
- and, any other prescribed criteria - presumably indicating regulations will add further relevant factors for consideration.

For significant administrative penalties, a negotiated compliance agreement may be preferable since it would provide certainty and control over the outcome.
The Act does not currently provide for an appeal procedure for the Minister’s determinations. Corporations, directors, and officers may also consider applying for judicial review of the Minister’s determinations.

- **Limitation defence**

  Corporations, directors, and officers may also challenge the Minister’s timeliness in issuing a notice of violation. No proceedings in respect of a violation may be commenced six months after the Minister became aware of the acts or commissions that constituted the violation. This is fact dependent and will require prompt action to seek disclosure of documents and information relevant to determining when the Minister became aware of the alleged acts or commissions constituting the violation.

**Conclusion**

Under the Act, corporations that sell cannabis, cannabis accessories, or related services and their directors and officers are subject to numerous restrictions, including on how they promote, package, and label their products and services. The potential severity of punishments for offences and administrative monetary penalties for violations require careful consideration of an appropriate defence.

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