Canada's deferred prosecution agreements: Still waiting for takeoff

DECEMBER 11, 2020 5 MIN READ

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Author: Lawrence E. Ritchie

Deferred prosecution agreements (DPAs) were introduced under Canadian law in September 2018 as part of a broader effort by the federal government to enhance its toolkit in the fight against corruption and other white-collar crime. DPAs are voluntary agreements that are negotiated between an accused and the Crown to resolve corporate wrongdoing as an alternative to long and costly prosecutions. The effect of a DPA is that the outstanding investigation or prosecution is suspended, in exchange for certain undertakings that the corporation must fulfil in order to have the charges dropped. DPAs often require full co-operation with the relevant law enforcement authority and an admission of guilt, fines and governance reform.

Following public consultations and largely at the urging of the business sector, the federal government established a DPA regime — labelled "remediation agreements" in the legislation — through amendments to Canada's *Criminal Code*. The amendments were generally consistent with the findings from the consultation process, including an emphasis on the importance of robust compliance programs in mitigating the risk of criminal convictions for organizations, and the requirement for DPAs to be in the public interest, as determined by a judge.

While the regime is new to Canada, it is not a novel concept. American authorities have been using DPAs to address corporate crime since the 1990s. DPAs have also been a common tool in the United Kingdom and France since 2014.

Highlights of Canada's regime

The stated goals of the DPA regime include: (a) to denounce an organization's wrongdoing and the harm caused by it; (b) to hold the organization accountable for its wrongdoing; (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 to victims or the community; and (f) to reduce the negative consequences of the wrongdoing for innocent third parties (e.g., employees, customers, pensioners and others), while holding responsible those individuals who did engage in the wrongdoing.

Key elements of the regime include the following:

- **Conditions for DPAs:** There are several conditions for the prosecutor to meet before entering into negotiations for a DPA, including that the offence does not relate to bodily harm or relate to a criminal organization, that negotiating the agreement is in the public interest and appropriate in the circumstances, and that the attorney general has

consented to the negotiation of the agreement.

- **Offences covered:** A DPA may be entered into in respect of certain specified offences, including prohibited insider trading, gaming in stocks or merchandise, fraudulent disposal of goods on which money was advanced, fraudulent receipts under the *Bank Act*, disposal of property to defraud creditors, books and documents, false prospectus, secret commissions, fraud and fraudulent manipulation of stock exchange transactions.
- **Factors for consideration:** In determining whether a DPA is in the public interest, the prosecutor must consider several factors, including: (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; and (i) any other factor that the prosecutor considers relevant.
- **Mandatory contents of agreement:** A DPA must comply with the mandatory content requirements in the *Criminal Code*, including a statement of facts related to the offence and admission of responsibility for the offence. A DPA is subject to court approval.

DPAs on an uncertain flight path

Most commentators and practitioners agree that DPAs and related arrangements are useful tools to meaningfully advance enforcement efforts and remediation in the face of "white-collar" wrongdoing allegations. Together with enhanced whistleblower protections, its long-sought introduction into the Canadian enforcement regime was considered a "game changer."

That said, to date, no remediation agreements have been announced in Canada. In 2019, the first public application seeking to benefit from the new DPA regime led to a series of controversies. In connection with ongoing foreign bribery and fraud charges, the Director of Public Prosecutions (DPP) declined to invite a firm to negotiate a remediation agreement. The then minister of justice and attorney general alleged that the Prime Minister's Office attempted to interfere in the exercise of her prosecutorial discretion by advocating for her to reconsider the DPP's decision. In the context of a judicial review, the Federal Court held that the decision to enter into settlement discussions falls within the ambit of the DPP's prosecutorial discretion.

Importance of a robust compliance program

Although Canada has not been seen as an aggressive pursuer of white-collar criminal convictions, it is coming under increasing domestic and international pressure to enhance its enforcement efforts. This is especially the case in the context of offences relating to bribery, corruption, anti-money laundering and sanctions restrictions which often have international dimensions. Directors, officers, compliance and legal personnel in all organizations should carefully assess their compliance programs, or put in place compliance programs if none exist, to ensure that they have taken all reasonable steps to reduce the risk of legal violations and criminal convictions. The recent DPA regime underscores the importance for organizations to have such compliance programs.

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