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Deferred Prosecution Agreements and the "National Economic Interest"

Deferred prosecution agreements ("DPA") have been a hot topic lately, owing largely to the attention that the agreements have received in relation to the SNC-Lavalin prosecution. Writing about Canada's nascent DPA regime last year, we described DPAs as an "exciting alternative prosecution tool in Canada", and stated, "only time will tell if Canada's … approach will prove successful at addressing corporate crime".[1] The new legislation received Royal Assent in June 2018, and looking back at its first year, Canada's introduction to DPAs has been complicated – to say the least.

DPAs, also called remediation agreements, are prosecutorial tools available for combatting economic crimes. They are legal contracts between prosecutors and offending parties whereby charges are laid, stayed, and subsequently dropped if the terms of the agreement are met. Used for corporations that have committed offences such as fraud and bribery, prosecutors can use DPAs as part of a comprehensive strategy to fight corporate crime.[2]

Companies entering into DPAs must acknowledge guilt, make reparations to injured parties, and improve organizational culture. If the terms of the agreement are satisfied, then the long-term viability of the corporation may be preserved. Innocent third parties such as employees, shareholders, and pensioners who did not participate in

[1] *Deferred Prosecution Agreements - A New Canadian Regime*, McMillan Litigation Bulletin (2018).

[2] *Deferred Prosecution Agreements - A New Canadian Regime*, McMillan Litigation Bulletin (2018).

the malfeasance may not be as adversely affected. Prosecution will resume, however, if the wrongdoer does not comply with the terms of the agreement. In this way, offenders are held accountable while collateral damage can be minimized. While the Canadian program is still in its infancy, the United States and the United Kingdom have employed their own DPA programs for many years with varying degrees of success. The US government has signalled that DPAs and NPAs remain favoured tools for resolving complex corporate enforcement matters. Since 2010 and until the end of 2018, US prosecutors have entered into 348 DPAs and NPAs. Meanwhile, the United Kingdom's Serious Fraud Office has concluded 4 DPAs in the last 5 years.[3]

In February, DPAs became the subject of national discussion when allegations of political intervention arose in the SNC-Lavalin prosecution. The Quebec-based engineering firm, which employs 9,000 Canadians, is facing corruption and fraud charges stemming from corporate dealings in Libya.[4] If convicted, SNC-Lavalin will be prevented from participating in federal contracts for 10 years, a prohibition that may affect the long-term viability of the company's Canadian operations.

SNC-Lavalin was not given the opportunity to negotiate a DPA. While the political controversy centered largely on prosecutorial independence, the broader public discourse prompted interesting legal questions regarding the circumstances under which a DPA may be offered.[5] The Canadian DPA regime allows for agreements with organizations – other than public bodies, trade unions, or municipalities – who have committed specific economic crimes.[6] To be eligible, certain conditions must exist:

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[3] *Deferred Prosecution Agreements*, United Kingdom Serious Fraud Office (2019).

[4] *Charges against SNC-Lavalin explained – and how the PMO allegedly got involved*, Global News (2019).

[5] *The inconvenient reality: Economic interest has nothing to do with SNC-Lavalin getting a DPA*, The Globe and Mail (2019).

[6] *Criminal Code of Canada*, RSC 1985, c C-46, Schedule to Part XXII.1.

1. prosecutors must believe that there is a reasonable prospect of conviction;

2. the alleged act or omission was not likely to have caused certain serious results;

3. the agreement must be in the public interest; and

4. the attorney-general must consent to negotiations of the agreement.[7]

In considering the suitability of a DPA, the *Criminal Code* sets out factors to guide prosecutorial discretion.[8] Additionally, there is a statutory prohibition on considering the "national economic interest" in relation to offences under s. 3 and s. 4 of the *Corruption of Foreign Public Officials Act*.[9] It is this provision in particular that has been the subject of considerable punditry.[10] The focus of the discussion is as follows: circumstances are easily foreseeable in which a company's future is of both the "national economic interest", a prohibited factor, and the "public interest", a necessary condition, to entering into a DPA. The conflict in this regard creates an inherent tension and may ultimately affect the success of Canada's DPA regime.

A recent case in the US provides an interesting contrast to Canada's experience with DPAs. A US company, Heritage Pharmaceuticals, was charged in a criminal antitrust conspiracy to fix prices, rig bids, and allocate customers. The company subsequently entered into a DPA with the United States Department of Justice Anti-Trust Division (DOJ), admitted guilt, paid a $225,000 criminal penalty, and reimbursed the federal government $7.1 million.[11]

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[7] *Criminal Code of Canada*, RSC 1985, c C-46, s. 715.32(1).

[8] *Criminal Code of Canada*, RSC 1985, c C-46, s. 715.32(2).

[9] *Criminal Code of Canada*, RSC 1985, c C-46, s. 715.32(3).

[10] *Was SNC-Lavalin denied a deal all because of three simple but misunderstood words?*, Financial Post (2019).

[11] *Office of Public Affairs*, Department of Justice (2019).

US prosecutors have typically avoided DPAs in the context of competition offences, because such agreements were traditionally seen to undermine the amnesty available under the US DOJ Leniency Program.[12] Out of the 470 DPAs and NPAs used by US prosecutors since 2005, only once, during the LIBOR investigation, were they used in relation to competition offences.[13] Given the circumstances, the DOJ's decision to offer Heritage Pharmaceuticals a DPA was surprising. In Canada, competition related offences were likely left out of the DPA regime for similar reasons and because Canadian prosecutors have the ability to use prohibition orders pursuant to s. 34(2) of the *Competition Act*, which can have the same capabilities as a DPA.[14]

Heritage Pharmaceuticals was offered a DPA because of ongoing cooperation with authorities, an agreement to settle civil claims arising from its conduct, and most notably, the financial implications to the firm. The United States DOJ highlighted long-term financial viability as a reason for the DPA, explicitly stating the concern that a conviction would result in a mandatory 5-year exclusion from all federal health care programs.[15] In the US, DPAs and non-prosecution agreements have been offered to hundreds of corporations for violations of the *Foreign Corrupt Practices Act*, despite being a signatory of the OECD's *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*.[16] US prosecutors are clearly willing (and permitted) to consider factors of national interest in deciding whether to grant a DPA. Returning to Canada, the concern with allowing consideration of the "national economic interest" in relation to offences involving corruption of foreign officials is perhaps obvious, but the difference between "public interest" and "national economic interest" is less clear.

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[12] *Frequently Asked Questions*, Department of Justice (2017).

[13] *Office of Public Affairs*, Department of Justice (2015).

[14] *Competition Act*, RSC 1985, c C-34, s. 34(2).

[15] *Office of Public Affairs*, Department of Justice (2019).

[16] *The Detection of Foreign Bribery*, OECD (2017).

DPAs offer prosecutors a powerful method of holding guilty parties to account, ensuring future compliance, and protecting blameless stakeholders.[17] The tool is most effective, however, when clear statutory guidelines are established. Without unreasonably fettering prosecutorial discretion, additional certainty is needed as to what economic factors can be considered when entering DPA negotiations. Canada's experience to date demonstrates that greater clarity is required to ensure that the Canadian regime operates as effectively as possible.

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a cautionary note

[17] *Deferred Prosecution Agreements - A New Canadian Regime*, McMillan Litigation Bulletin (2018).