DEFERRED PROSECUTION AGREEMENTS: CANADA PROVIDES SOME CLARITY, BUT MANY QUESTIONS REMAIN

Posted on February 6, 2020

Categories: Insights, Publications

Overview

The *Criminal Code* provides a regime under which Canada's Attorney General can approve a negotiated Remediation Agreement – also known as a Deferred Prosecution Agreement, or a DPA – between a prosecutor and an organization accused of a criminal offence.[1] Under a DPA, charges are stayed and ultimately dropped if the offending party fulfils all DPA conditions. DPAs were at the forefront of Canadian news in 2018-2019 after Canada's Director of Public Prosecutions (the "**Director**") declined to pursue a DPA in the SNC-Lavalin prosecution.

On December 18, 2019, an affiliate of SNC-Lavalin entered a guilty plea in connection with its activities in Libya while the charges relating to violations of the *Corruption of Foreign Public Officials Act*, SC 1998, c 34 were withdrawn against SNC-Lavalin and two of its subsidiaries.[2] To date, the Director has yet to negotiate a DPA with any corporate wrongdoer.

In previous bulletins, we explored Canada's emergent DPA regime (July 2018 bulletin), the statutory prohibition on considering the "national economic interest" in relation to foreign corruption offences (June 2019 bulletin), and how the French DPA regime has recovered more than a billion dollars in fines (September 2019 bulletin). In the latter bulletin, we noted that a significant challenge facing Canadian DPAs is a lack of clear statutory guidance and suggested that Canada might follow the French example by issuing guidelines to ensure a predictable approach for future DPAs.

On January 23, 2020, the Director did just that. Specifically, the Director issued new Guideline 3.21 on remediation agreements in the Public Prosecution Service of Canada Deskbook ("**Guideline 3.21**").

Guideline 3.21

Guideline 3.21 outlines the criteria applied by the Director in his or her capacity as Deputy Attorney General of Canada when determining whether to consent to DPA negotiation. Usually, counsel to an organization facing charges will start the process by inquiring about the likelihood of negotiating a DPA. Crown counsel will then

follow the procedures in Guideline 3.21 as they relate to recommending and negotiating a DPA. The key points of Guideline 3.21 are summarized below.

Statement of Policy

Before a DPA can be considered, the Director must be satisfied that there is a reasonable prospect of conviction. Once this threshold test is met, Crown counsel can recommend negotiation of a DPA, and the Attorney General may consent if it is in the public interest. The *Criminal Code* sets out factors to be considered in determining the public interest.[3] As discussed in our June 2019 bulletin, the *Criminal Code* also specifies that if the corporate wrongdoer was charged with a foreign corruption offence, the Director cannot consider certain factors when assessing the public interest. These prohibited factors include the national economic interest, potential effect on foreign relations, or the identity of any individual involved.

Procedure

Law enforcement must undertake a full investigation to evaluate whether there is "a reasonable prospect of conviction." Internal or private investigations by the corporate wrongdoer are insufficient. Crown counsel must also avoid any comment on the likelihood of negotiating a DPA until after a formal invitation to negotiate is issued.

Regional Offices

After law enforcement conducts an investigation and Crown counsel is satisfied that there is a reasonable prospect of conviction, Crown counsel must consider whether a DPA is appropriate in the circumstances.

If Crown counsel believes an invitation to negotiate a DPA should be considered, Crown counsel must recommend that the Chief Federal Prosecutor (the "**CFP**") seek the Attorney General's consent. If the CFP agrees, they will advise the Deputy Director of Public Prosecutions (the "**Deputy Director**") of their intention to seek Attorney General consent. The CFP must also issue a concise and objective legal memorandum explaining the available evidence, how this evidence results in a reasonable prospect of conviction, and why a DPA would be in the public interest.

If Crown counsel instead believes that an invitation to negotiate a DPA would be inappropriate in the circumstances, Crown counsel must notify the CFP in writing, who will in turn notify the Deputy Director.

Headquarters and Conduct of Negotiations

If the CFP recommends DPA negotiation, the Deputy Director will objectively assess the request. If the Deputy Director concludes that an invitation to negotiate would not be appropriate, the Deputy Director will notify the CFP accordingly.

If the Deputy Director agrees that an invitation to negotiate is appropriate, they will forward this recommendation to the Director. The Director – on behalf of the Attorney General – will make the final decision. If the Director consents, they will designate Crown counsel to review the file and issue a written invitation to negotiate. Crown counsel must then conduct any ensuing negotiations in their role as "prosecutor" under the *Criminal Code*.[4]

Guideline 3.21 as Compared to International Guidance

Guideline 3.21 is a welcome step towards increased clarity. Nevertheless, the Canadian DPA regime remains relatively unclear when compared to other jurisdictions. We canvassed France's DPA regime in our September 2019 bulletin. Additional comparisons against the United Kingdom and United States further emphasize Canada's remaining informational gaps.

United Kingdom

DPAs came into force in the UK through the Crime and Courts Act 2013. They became available as an enforcement tool in February 2014, following publication of a DPA Code of Practice.[5] This code enshrines 22 pages of guidance from the UK's Crown Prosecution Service and Serious Fraud Office.

The UK entered its first DPA in 2015. The Serious Fraud Office negotiated the agreement with Standard Bank after Standard Bank self-reported its failure to prevent bribery. Recently, in January 2020, the High Court approved its most substantial DPA to date – an £830 million (C$1.4 billion) agreement between the Serious Fraud Office and Airbus where the aircraft manufacturer faced five foreign bribery charges.[6]

United States

The United States' DPA regime dates back even further, to a 1992 settlement between Salomon Brothers and the United States Department of Justice. The Department of Justice has since continually issued DPA guidance,[7] and the Securities and Exchange Commission equally discusses DPAs in its *Enforcement Manual*.[8] Over the past three decades, the American regime has developed into one of the broadest DPA schemes worldwide. Individual prosecutors have significant autonomy to enter DPAs, resulting in approximately 20-40 new DPAs each year.[9]

A US District Judge also recently approved a deal to resolve the Department of Justice's probe into charges that Airbus violated American anti-bribery laws. Under the deal, Airbus will pay US$527 million (C$700 million) to the US Treasury, resulting in a total of US$4 billion (C$5.3 billion) paid under DPAs in the UK, US, and France.[10] Contrary to Canada's legislation, the DPAs were possible because these jurisdictions permit consideration of the national economic interest in relation to foreign corruption offences.

Conclusion

As noted above, the recent issuance of Guideline 3.21 suggests that the Director is alive to the need for increased clarity around the Canadian DPA regime. However, when contrasted against other jurisdictions, the Canadian approach to DPAs leaves many questions as-yet unanswered.

The political climate is likely a significant factor in Canada's caution with respect to DPAs, with several commentators taking the position that DPAs allow corrupt companies to "get off the hook."[11] This is an understandable concern. However, as proven by their widespread use abroad, DPAs can efficiently punish, monitor, and ultimately rehabilitate corporate wrongdoers.[12]

Canada has also placed secondhand trust in the process of DPA rehabilitation. For example, in 2006, Siemens entered a bribery-related DPA with Germany valued at US$1.4 billion (C$1.86 billion).[13] In December 2018, VIA Rail Canada awarded to Siemens a C$989 million contract following a fair and transparent bidding process.[14]

Ultimately, the local DPA regime is a relatively recent development; time will reveal exactly how and when Canada will choose to undertake DPA negotiations. For now, Canadians must wait for the country's first formalized DPA as proof of how the regime will work in practice.

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[1] *Criminal Code*, RSC, 1985, c C-46 [Code], Part XXII.1.[ps2id id='1' target='/]
[2] Bronskill, Jim, SNC-Lavalin drops court challenge to block criminal proceedings, Canada's National Observer (January 23, 2020).[ps2id id='2' target='/]
[3] Code, *supra* note 1, s 715.32(2).[ps2id id='3' target='/]
[4] Code, *supra* note 1, Part XXII.1.[ps2id id='4' target='/]
[5] Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013.[ps2id id='5' target='/]
[6] BT, Airbus £830m settlement over UK bribery prosecution approved by High Court (January 31, 2020).[ps2id id='6' target='/]
[7] See, for example, the Grindler Memorandum and Morford Memorandum. The Department of Justice similarly responds to feedback, e.g. the 2009 GAO report "Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts".[ps2id id='7' target='/]
[8] Securities and Exchange Commission *Enforcement Manual* (s 6.2.2).[ps2id id='8' target='/]
[9] Boisvert, Yves, A deferred prosecution agreement is not what you think it is, The Globe and Mail (March 1, 2019).[ps2id id='9' target='/]
[10] Prentice, Chris and Shepardson, David, U.S. judge approves Airbus deferred prosecution agreement over bribery probe, Reuters (January 31, 2020).[ps2id id='10' target='/]

[11] *supra* note 9.[ps2id id='11' target='/]
[12] *supra* note 9.[ps2id id='12' target='/]
[13] *supra* note 9.[ps2id id='13' target='/]
[14] VIA Rail Canada, VIA Rail Selects Siemens Canada to Replace its Québec-Windsor Corridor Fleet (December 12, 2018).[ps2id id='14' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.