

WE HAVE A DPA: PROSECUTORS AGREE TO DEFERRED PROSECUTION AGREEMENT WITH SNC-LAVALIN

Posted on May 16, 2022

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After being available for almost four years, prosecutors in Canada have now agreed to enter into the first deferred prosecution agreement (“DPA”) with a Canadian company.

Last week Quebec prosecutors and SNC-Lavalin received court approval of Canada’s first DPA that will have SNC-Lavalin pay **\$29,558,777** million and includes other terms lasting three years. The payment amount will be allocated as follows:

- \$ 18,135,135 paid as a penalty
- \$ 2,490,721 confiscated as proceeds of crime
- \$ 3,492,380 paid as compensation to the victim
- \$ 5,440,541 paid as victim surcharge.

An independent monitor will monitor the company for compliance with the agreement. The charges will be withdrawn if the conditions of the agreement have been met at the end of the three year term.

The DPA stems from multiple fraud and conspiracy charges following an RCMP bribery investigation into a \$128 million contract to refurbish the Jacques Cartier bridge in Montreal. Two former SNC-Lavalin executives were also charged following the investigation.

Deferred Prosecution Agreements

DPAs (or remediation agreements as they are called in Canada’s Criminal Code) are an alternative to prosecution of certain offences alleged to have been committed by organizations. If prosecutors agree to a DPA, the accused organization must fulfil certain conditions to receive a stay of the charges.

Increasingly popular in other jurisdictions, DPAs were codified into law in 2018 through Bill C-74, which establishes a framework for their use in Canada.

DPAs benefit corporations because they provide certainty and protection to stakeholders such as employees and shareholders. They also allow corporations to avoid findings of guilt. DPAs are beneficial to the justice

system, because they help to avoid costly and time-consuming trials.

In considering whether to agree to a DPA, prosecutors are required to, among other things, determine whether the agreement would be in the public interest. This requires an analysis of factors such as the nature and gravity of the offence as well as whether the organization has taken steps to remedy the harm caused.

SNC-Lavalin's DPA

SNC-Lavalin previously made headlines when the Public Prosecution Service of Canada ("PPSC") declined to offer a DPA in relation to different charges against the company stemming from deals in Libya. Kathleen Roussel, the Director of Public Prosecutions, noted at the time that a DPA was inappropriate due to the "severity and breadth" of the offence, which related to charges of foreign corrupt practices.

Unlike the previous case, Quebec prosecutors signaled this time around that it was in the public interest to negotiate a DPA, considering numerous factors such as an exemplary integrity program that SNC-Lavalin now has in place as well as its cooperation with investigators in respect of the allegations against the company's two former executives.

The prosecutors noted that convictions of the offenses charged would significantly affect the ability of SNC-Lavalin to contract with public corporations in Canada and Quebec, which would cause serious negative consequences for a large number of third parties not responsible and, more broadly, the engineering industry in Quebec and Canada.

It would also result in SNC-Lavalin losing eligibility to contract with the provincial and federal governments and their respective Crown agencies.

In Quebec, a conviction for any of the offences charged makes the company "ineligible" for public contracts for a period of five years from the moment when this declaration is recorded in the register of companies. This ineligibility applies to any contract with the Government of Quebec, its sub-entities and organizations.

At the federal level, under the Ineligibility and Suspension Policy, convictions for fraud offences would result in an automatic indefinite determination of ineligibility and ineligibility for a period of 10 years, which could be reduced to 5 years for the other offences charged.

For the Quebec prosecutors, such inadmissibility posed the risk of a wave of economic repercussions disproportionate to SNC-Lavalin, but above all, for third parties who had no responsibility for the illegal conduct.

SNC-Lavalin employs 37,584 people in Quebec, Canada and around the world. The prosecutors submitted to the Court that the public interest in the circumstances took into account the thousands of jobs in Quebec and

elsewhere that could be affected, the public shareholding of SNC-Lavalin, the private shareholding, as well as the pension funds of the employees, the maintenance of the head office in Quebec and the conservation of engineering expertise.

The prosecutors also stated that SNC-Lavalin recognized its responsibility for the offences. All of the senior officers have since ceased employment and, since 2012, SNC-Lavalin has implemented a compliance program that is subject to recurring scrutiny by various law enforcement agencies.

The prosecutors submitted to the court that for all these reasons the use of the DPA in these circumstances would tend to maintain public confidence in the administration of justice.

Also of note, one of SNC-Lavalin's affiliates had pleaded guilty to a single count of fraud in 2018, following the PPSC's refusal to agree to a DPA stemming from a similar but unrelated set of facts. Prosecutors take into account prior criminal convictions when considering plea agreements. What can be taken from this is that a prior related conviction will not necessarily preclude a DPA in the future, as in SNC-Lavalin's case.

Although not yet available, the court's written decision on this matter should be released soon before the trial of the two individuals is set. McMillan will provide a further bulletin on the decision once it becomes available to the public.

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A Cautionary Note

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