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By email

Government of Canada
Portage III Tower A 10A1
11 Laurier St
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Re: Canadian Deferred Prosecution Consultation

Ladies and Gentlemen:

We are pleased to make submissions in response to the Government of Canada's consultation process on a potential Canadian deferred prosecution agreement (DPA) regime.[1]

General

We believe a DPA regime would and should become an integral part of Canada's legal framework to enforce and promote compliance with laws by corporations and other firms, including through prevention, detection, self-reporting and remediation of wrongdoing. A DPA regime must be designed and implemented in a way that strikes the right balance in fostering fair and proportional outcomes that are beneficial to Canadian society and all relevant parties. Firms should not be penalized for taking steps to address wrongdoing, and for coming forward and giving up their right to contest allegations and proceed to trial. In seeking to meet the objective of corporate accountability for wrongdoing, it is crucial to recognize the potentially devastating consequences to stakeholders of corporations and other firms (such as employees and shareholders), the overwhelming majority of whom typically have no involvement in the problematic conduct.

Questions

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

The adoption of a DPA regime would promote compliance with laws and be aligned with existing Canadian law and international approaches:

1. Corporate, securities and other laws contemplate that firms take steps in respect of their compliance environment, which is necessary not only as a matter of good corporate conduct, but is frankly part of any sustainable business model. DPAs offer additional incentives in promoting compliance with laws and related programs, signal the tangible costs of non-compliance, and contribute to greater awareness about laws that apply to business activities. A DPA regime would support efforts by Canadian firms that detect and remediate wrongdoing and otherwise act appropriately by focusing on remediation and compliance as a primary objective, which is likely to be more effective than punishment in achieving optimal compliance.

[1] We reserve our assessment of an eventual DPA regime until such time as fully developed proposals are published and applied. We currently and may in future have clients who have an interest in seeing Canada adopt a DPA regime. Our submissions herein reflect the views of certain members of Stikeman Elliott LLP and not those of the firm generally or any client thereof, and do not bind the firm or any of its clients.

2. A DPA regime would be consistent with and reflect Canadian corporate law's concern with the interests of stakeholders, as articulated by the Supreme Court of Canada:

> "[T]he duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly." (*BCE Inc.* v. *1976 Debentureholders*, [2008] 3 S.C.R. 560, 2008 SCC 69, at par. 82)

Corporate law thus contemplates that stakeholders' interests be considered by boards of directors when making decisions for the firm. It is appropriate that prosecutors and courts have regard to the same considerations in determining enforcement outcomes, because a failure to do so results in significant prejudice to innocent stakeholders.

3. In 2003, Bill C-45 sought to expand the basis on which the criminal liability of organizations can be engaged. Thus, criminal liability may be sought in cases where a firm's "directing mind" is not involved. The legal framework ought therefore properly to allow for the option of sanctioning wrongdoing without causing further harm to innocent stakeholders.

4. DPAs are in line with the objectives of sentencing in Canadian criminal law (*Criminal Code*, ss. 718 and 718.21). In particular, the *Code* provides that "the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees" is a factor in sentencing organizations (subs. 718.21(d)). Moreover, DPAs would allow for proportional consequences to flow from settlements, consistent with this fundamental principle in sentencing (*Criminal Code*, s. 718.1).

5. A DPA regime would build on Canadian prosecutorial discretion and introduce flexibility in enforcement options. DPAs are not and should not be seen as a lesser remedy given the obvious benefits that they can provide to society, firms and potential victims by allowing timely and satisfactory resolution of wrongdoing in appropriate cases. To be clear, DPAs would be added to the toolkit, they would not replace it. It would also be appropriate for some guidance to be provided as to the factors prosecutors will consider when exercising their discretion to enter into a DPA.

6. DPAs also allow authorities to raise awareness about their enforcement efforts and the consequences of wrongdoing. They allow prosecutors to achieve real and significant results within reduced timeframes and with much lower resource expenditures – all the more significant in a post-*Jordan* era – and to dedicate such time and resources to other initiatives or matters.

7. Significantly, DPAs provide certainty and resolution not only for firms, but also for prosecution authorities who have the burden of proving their case beyond a reasonable doubt. The benefits to the justice and administrative systems of a timely uncontested resolution should not be understated.

8. A Canadian DPA regime would also reflect consistency and convergence with other international jurisdictions, a point that is particularly significant to Canadian firms whose businesses are carried on beyond Canada's borders. International experience in respect of DPAs will continue to expand, providing useful guidance and precedents to Canadian prosecutors and courts.

Concerns have from time to time been expressed about the possible misuse of DPAs and that they may allow firms or individuals to "get away" with criminal wrongdoing. We believe, with respect, that these concerns can be addressed with a properly designed DPA regime. Prosecutorial discretion and (as we recommend below) judicial oversight will, with proper guidance, ensure that there will be proportional and appropriate use of DPAs in future.

Question 2: For which offences do you think DPAs should be available and why?

DPAs are well suited to address economic crimes. However, a properly designed and administered DPA regime should not be limited to certain specified offences only to the exclusion of others. If wrongdoing has been committed by rogue elements of a firm, why would the consequences for innocent stakeholders be preordained to be different based only upon the type of offence involved? As with all other aspects of a DPA programme, properly guided prosecutorial discretion and court oversight which takes into account all relevant factors, including the nature of the wrongdoing, are crucial.

DPA regimes need not as a matter of principle be limited to firms only. Their effectiveness might be enhanced if individuals were also eligible in specified circumstances. In any event, enforcement guidelines should address the concerns raised in the US about perceived lack of enforcement in a manner that is consistent with the objectives of the newly adopted DPA regime and the Canadian system of justice.

Question 3: What role do you think the courts should play with respect to DPAs?

Courts can and should have appropriate oversight with respect to DPAs. A balance will need to be struck in framing that role. Procedural fairness and whether the DPA is put forward in good faith are key considerations. As with a joint submission on sentencing, for example, courts should not substitute their judgment for the negotiated resolution, or engage in an evaluation of the underlying circumstances as they would do in a trial. Nonetheless, courts should be mandated to assess whether a DPA on its face is contrary to the public interest or would bring the administration of justice into disrepute.

Finally, as is the case in the UK there should be some mechanism for parties confidentially to seek interim guidance from courts. This could facilitate appropriate outcomes and efficient use of resources.

Question 4: What factors should to be taken into account in offering a DPA?

Clear guidance about the process and factors prosecutors intend to follow will be important in allowing firms to make reasoned decisions about whether to report problematic conduct and seek a DPA resolution; that assessment requires a high degree of certainty about the likely outcome. Sufficient resources will be required by the prosecutorial services to allow them to consider, negotiate and administer DPAs in such a way that they be a viable option for the firms involved and Canadians generally.

We believe that the most important factors in offering DPAs should be whether a firm has taken or is taking remedial measures to identify and address the causes of any wrongdoing and whether there is a prospect of effective remediation and ongoing compliance. Self-reporting should be a factor but not a pre-condition to a DPA resolution because a firm may not have sufficiently timely and complete information to self-report. Any list of factors should be non-exhaustive so as to allow for other relevant considerations to be taken into account. Finally, consistent with the principles set out in the *Criminal Code* (s. 718.21), the consequence of a finding of guilt (as contrasted with a DPA), including a firm's eligibility to engage in public and other contract opportunities, should be a relevant factor.

Question 5: When would a DPA not be appropriate?

This will largely be the flip-side of the factors for a DPA to be offered. The need to protect society and promote compliance with the law and impose just sanctions will be foremost in making determinations about whether to engage in a DPA process in any case. This may turn in some cases on the nature and gravity of the offence, any aggravating circumstances such as lack of cooperation with authorities[3] or remediation efforts, and whether there is an established pattern or expectation of repeat offences or disregard with respect to compliance matters.

Question 6: What terms should be included in a DPA?

The terms of DPAs should be established on a case-by-case basis. Therefore, any enabling legislation should allow broadly for terms and conditions that are appropriate in each circumstance, and not prescribe any specific terms, conditions or remedies, which may prove to be unduly rigid for all cases. (In due course, it may be appropriate to make public a template of possible DPA terms which could form part of such agreements.) If required, acknowledgements of responsibility or wrongdoing should to the extent possible be allowed to be framed in a manner that does not impact potential claims that may be made by third parties. As referred to above, the existing body of comparable agreements will continue to grow over time and Canadian prosecutors and courts should be able to draw from their own experience but also that of other jurisdictions as they evolve.

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[3] Cooperation should not require however that a firm be required to waive privilege on legal work-product.

Finally, guidance on how financial penalties would be calculated should be provided, as is the case in other jurisdictions. While these may be significant, there should be a rational basis for them, which in turn firms can understand and assess in making their decision whether to seek a DPA or submit to a trial.

Question 7: What factors should be taken into account in setting the duration of a DPA?

The duration of a DPA will be a function of those remedies that it prescribes and the "probation period" that is appropriate in the circumstances. We note that probation orders cannot generally extend beyond three years (*Criminal Code*, s. 732.2(2)), and that recent practice for DPAs in the US appears to be a term of three years or less in most cases.

Question 8: Under what circumstances should publication be waived or delayed?

DPAs or the core terms thereof should as a rule be published in order that justice be seen to be done. Publication should be delayed until final court approval of a DPA in order to avoid premature disclosure and the uncertainty, confusion and prejudice that would otherwise occur, which would create a disincentive to entering into a DPA negotiation. Publication should also be delayed or limited to the extent possible if there are ongoing trials, proceedings or negotiations where the interests of the firm and its stakeholders could be at risk. Finally, there should be the ability, subject to court oversight to avoid any perception of abuse, to waive publication of those terms or elements of the DPA process which involve private or commercially sensitive information, as well as any information that would be seriously prejudicial to the interests of the firm or would violate confidentiality provisions or privacy laws.

Question 9: How should non-compliance be addressed?

We believe that material non-compliance should be addressed in the DPA itself but not prescribed by law. It is understood that a material and uncured breach of a DPA may lead to prosecution of the deferred and other charges. Consistent with general principles of contract law, parties should be given notice of any breach and given an opportunity to cure the breach or negotiate alternate terms. Ultimately, the court could retain a supervisory role over the terms of the DPA and unresolved issues could be brought to it for resolution absent agreement.

The efficacy of compliance and control systems is based not only on prevention but also on detection and response to wrongdoing, which the US Department of Justice and Securities and Exchange Commission make clear in their 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act*:[4]

> "[A] company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective. DOJ and SEC understand that "no compliance program can ever prevent all criminal activity by a corporation's employees,"[footnote omitted] and they do not hold companies to a standard of perfection."

A Canadian DPA regime should take the same approach in measuring a firm's progress towards an effective compliance programme, and DPAs should be interpreted accordingly.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

Any information exchanged during the negotiation of a DPA should be protected consistent with settlement or other applicable privileges to allow for each party to negotiate transparently and openly without the fear of jeopardizing their positions should there be no agreement. Those privileges would apply equally to any third party who might seek disclosure of communications, correspondence or other material exchanged during the DPA negotiation phase.

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[4] US DOJ, Criminal Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* November 14, 2012 (https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf).

Question 11: How should compliance monitors be selected and governed?

Monitorships are provided for in other contexts in Canada (e.g. Canadian procurement rules, the *Companies Creditors Arrangement Act,* or as a term of consent agreements registered with the Competition Tribunal). The DPA regime should draw on both domestic and international experience.

Monitorships, when used, should not be substitutes for firm governance. In due course the monitor's mandate will end, and the firm will need to function consistent with a sustainable and autonomous governance structure. Monitors should report to the relevant authorities and ultimately be subject to court oversight. It is also appropriate to recognize and balance the burden and expense of monitorships when considering whether it would be an appropriate DPA term.

Question 12: What use should be made of compliance monitoring reports?

Monitors' reports and work product should be kept confidential and to the extent possible treated as privileged and not be available to third parties. This is essential in order that monitors have effective access to a firm's operations and prepare proper assessments, and to allow firms to proceed with self-evaluation and improvement.

Some ability for reports or extracts thereof to be used with other authorities should be provided for to avoid duplicative mandates, subject to appropriate consents and safeguards.

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

Remedial actions to be taken by a firm in the event of wrongdoing may in due course include compensating victims that have been harmed. The DPA regime could take into account that a firm has chosen to do so based upon its particular circumstances, but a failure to have done so should not disqualify a firm from DPA consideration. At its core a DPA involves a settlement which a firm may agree to for a variety of reasons unrelated to the merits of the underlying alleged wrongdoing, and it will likely be appropriate in most if not all cases to let the civil court processes follow their courses.

Other comments or suggestions regarding DPAs.

We believe that NPAs and declinations should also be available in appropriate cases, as is the case in other jurisdictions. Consideration of this possibility should not however delay the implementation of a DPA regime. Consideration should also be given to allocating a portion of any funds received under DPA settlements to law reform, research, education and access to justice initiatives.

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Thank you again for inviting submissions on a potential Canadian DPA regime. Please do not hesitate to contact any of the undersigned if you have any questions.

Yours truly,

"Marc Barbeau"

Marc Barbeau
on my own behalf
and on behalf of

Katherine Kay

and

Danielle Royal

MB/KK/DR/ma

ASSOCIATION
DES FIRMES DE
GÉNIE-CONSEIL
QUÉBEC

Consultation publique
Répondre aux actes répréhensibles des entreprises au Canada

Volet Accords de poursuite suspendue

NOVEMBRE 2017

Introduction

Les entreprises canadiennes doivent observer les meilleures pratiques en matières d'éthique et d'intégrité. Aucune entreprise, petite ou grande, n'est à l'abri de gestes répréhensibles qui pourraient être posés par des dirigeants ou employés. La législation ne pourra jamais éliminer ces risques, mais des mesures peuvent les réduire à un minimum en visant les bonnes cibles.

En effet, l'Association des firmes de génie-conseil (AFG) croit que les individus qui commettent des crimes économiques doivent être punis sévèrement pour leurs gestes. Toutefois, les dirigeants et employés innocents, ainsi que leurs familles, ne devraient pas avoir à en subir les conséquences de façon disproportionnée.

En ce sens, un régime d'Accords de poursuite suspendue (APS) permettrait d'établir un équilibre entre les sanctions imposées à l'entreprise, l'implantation de mesures correctives, le respect des employés et le maintien des poursuites criminelles pour les individus fautifs.

De plus, l'adoption d'un tel régime au Canada apparaît d'autant plus nécessaire dans l'optique d'assurer une équité avec les entreprises situées dans des pays qui ont déjà implanté ce type de mesures. Avec les accords commerciaux de plus en plus larges, cela devient un élément clé pour s'assurer que les entreprises canadiennes ne soient pas désavantagées face à des concurrentes internationales qui auraient été prises en défaut pour des crimes économiques similaires.

Au Québec, le *Programme de remboursement volontaire*, créé par le gouvernement en vue de récupérer des sommes payées injustement au cours des 20 dernières années à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics, a donné d'excellents résultats. Le taux de participation des firmes de génie-conseil concernées par l'objet du programme a été exceptionnel.

Le régime d'APS est une mesure semblable et l'AFG est donc en faveur de son adoption et de son application sur une base permanente.

Question 1

À votre avis, quels sont les principaux avantages et désavantages des APS en tant qu'outil pour reconnaître la responsabilité criminelle des entreprises au Canada?

Avantages

1. Advenant la découverte d'un crime économique, les administrateurs et dirigeants d'une entreprise seront plus enclins à le rapporter aux autorités en sachant que l'entreprise pourrait poursuivre ses activités selon certaines conditions.

2. Les mesures correctives qui sont normalement exigées dans l'application d'un APS sont une clé pour encourager les entreprises canadiennes à se doter de meilleurs mécanismes de contrôle dans la lutte aux crimes économiques. À l'inverse, les poursuites contre les entreprises visent simplement à punir les entreprises, et entraînent des conséquences pour l'ensemble des employés, fournisseurs, actionnaires et clients/consommateurs.

3. Les APS permettent de récupérer des sommes plus rapidement et de les verser directement aux victimes ou à des causes en lien avec le crime.

4. Les APS permettent aux entreprises dont certains dirigeants ont commis des crimes économiques de prendre leurs responsabilités pour réparer les dommages et resserrer les contrôles aux bons endroits.

5. Les APS permettent de prendre en considération les efforts et le contexte afin d'imposer des sanctions et des mesures appropriées.

6. Considérant les difficultés possibles d'établir une preuve solide, la collaboration des entreprises concernées facilitera ce travail et devrait permettre d'établir plus précisément les lacunes des entreprises (et donc les corrections appropriées). Cela pourrait faciliter les poursuites visant les individus responsables des crimes.

7. La collaboration des entreprises dans l'établissement de la preuve devrait permettre d'évaluer de façon plus précise les dommages liés aux crimes économiques.

8. Les APS permettent d'établir un équilibre entre les sanctions imposées aux entreprises, la prise de mesures correctives, le respect des employés et le maintien des poursuites criminelles pour les individus fautifs.

9. Les APS permettent de soutenir le développement des entreprises canadiennes, en visant l'amélioration de leur gestion sans compromettre leur survie.

10. Les APS permettent d'assurer une équité avec les entreprises situées dans des pays qui ont implanté ce type de mesures, notamment les États-Unis, la France et le Royaume-Uni.

Désavantages

1. Des entreprises pourraient assumer qu'elles ne sont pas à risque de poursuites en raison du processus d'APS – il faut se rappeler à cet égard que les APS n'éliminent pas la possibilité de poursuivre une entreprise. Aussi, les personnes qui ont commis les crimes seront poursuivies.

2. Des concurrents d'une entreprise fautive pourraient se sentir lésés par l'application d'un APS – sur ce point, il faut rappeler qu'aucune entreprise ne peut se dire à l'abri des agissements malhonnêtes de dirigeants ou d'employés. Il faut garder une vue d'ensemble de l'économie canadienne, et adapter la sévérité des sanctions à l'envergure des crimes commis.

3. Des citoyens pourraient trouver injuste que seules les entreprises bénéficient des APS – face à ce risque, il importe à nouveau de rappeler que ce sont des personnes physiques à l'emploi des entreprises qui commettent des crimes. Aussi, les individus responsables seront poursuivis, et ce encore plus efficacement avec la collaboration des entreprises.

Question 2
À votre avis, pour quelles infractions le recours aux APS devrait-il être permis et pourquoi?

L'approche des États-Unis, où le recours aux APS est permis pour toutes les infractions fédérales, sauf indication contraire pour des raisons d'intérêt public, apparaît comme étant la plus appropriée. En effet, dans l'optique d'encourager l'adoption de meilleures pratiques chez les entreprises fautives et d'éviter de graves conséquences pour des employés innocents, l'expérience de la législation récente au Québec a démontré les difficultés liées à l'identification d'infractions trop précises dans la loi pour appliquer des sanctions automatiques.

En effet, après avoir adopté en 2012 la *Loi sur l'intégrité en matière de contrats publics*, le gouvernement du Québec a modifié la législation pour se donner une plus grande marge de manœuvre dans l'application de la loi, afin de prendre en considération le contexte et des efforts déployés par les entreprises pour corriger les situations problématiques.

En tenant compte de cette réalité, ainsi que des démarches parfois longues et complexes pour modifier des lois existantes, l'AFG est d'avis que le champ d'application du régime d'APS devrait être plus large et être utilisé de façon appropriée selon le contexte particulier de chaque situation.

Question 3
À votre avis, quel est rôle que les tribunaux devraient jouer à l'égard des APS?

L'AFG considère que la possibilité de poursuivre l'entreprise en cas de non-respect des conditions, voire de l'échec des discussions en vue de conclure un APS, ainsi que la pression de la population, constituent des incitatifs puissants pour faire en sorte que les négociations soient faites dans le meilleur intérêt public.

Ceci dit, l'AFG adhère à l'idée que les parties fassent valoir devant les tribunaux que le recours à un APS est dans l'intérêt public et que les conditions proposées sont équitables, raisonnables et proportionnelles.

Même sans pouvoir décisionnel quant au contenu final des ententes, les tribunaux pourraient donner une opinion externe utile sur les conditions des APS, dans l'optique de favoriser la conclusion, par les parties prenantes, des meilleures ententes possibles dans l'intérêt public.

En examinant ces conditions et le bien-fondé de la démarche, les tribunaux rassureraient le public, obligeraient les parties prenantes à justifier clairement les termes de l'APS et rendraient le processus plus transparent.

Par ailleurs, les tribunaux pourraient être appelés à intervenir dans les cas de litiges reliés au respect des conditions de l'APS.

Question 4
Quels sont les facteurs qui devraient être pris en considération pour offrir le recours à un APS?

Selon l'AFG, les facteurs qui devraient être pris en considération pour offrir le recours à un APS sont les suivants :

- établir s'il convient d'avoir recours à un APS, au regard du fait qu'il existe une possibilité raisonnable de déclaration de culpabilité et que la poursuite est dans l'intérêt public;
- établir si l'accusé accepte la responsabilité du comportement qui constituerait l'infraction et s'il consent à participer au processus;
- le fait qu'elle a ou non signalé les actes répréhensibles;
- le niveau de coopération de l'entreprise avec les autorités pour remédier à la situation, y compris sa volonté d'identifier les individus impliqués;
- le fait qu'elle cherche réellement ou non à modifier ses pratiques opérationnelles et sa culture organisationnelle (mesures correctives déjà prises ou à venir);
- établir le comportement de l'entreprise, notamment tout antécédent de comportement semblable;
- établir notamment si l'entreprise a déjà conclu un APS.

Question 5

Quand le recours à un APS ne serait-il pas approprié?

Le recours aux APS ne devrait pas être autorisé pour les individus responsables des crimes économiques commis. Ces derniers doivent être punis sévèrement afin d'entraîner un effet de dissuasion efficace.

En cas de récidive d'une entreprise, l'option d'offrir un APS devrait se faire selon des conditions plus strictes.

Question 6

Quelles sont les conditions qui devraient être incluses dans un APS?

Toutes les conditions identifiées dans le document de consultation apparaissent pertinentes et devraient être exigées dans le cadre d'un APS. Ces conditions sont les suivantes :

- admettre les faits qui constitueraient l'infraction et fournir des observations complètes et exactes tout au long du processus relatif à l'APS;
- consentir à faire l'objet de l'accord et faire enregistrer auprès d'un tribunal les admissions à l'appui;
- accepter de mettre en œuvre des mesures visant à garantir la conformité future et à prévenir toute inconduite future, ce qui peut inclure l'amélioration des contrôles internes et la prestation de formation aux employés;
- accepter d'aider les autorités responsables à faire enquête et à instituer des poursuites relatives aux individus associés à l'infraction;
- verser une sanction pécuniaire (sous réserve des autres indemnisations ou dédommagements prévus dans l'entente);
- fixer une date d'échéance pour l'APS;
- recouvrer les profits tirés de l'inconduite, indemniser les victimes sous forme de dédommagement anticipé, saisir-arrêter les traitements et les primes des cadres supérieurs.

Question 7

Quels sont les facteurs qui devraient être pris en considération pour établir la durée d'un APS?

Le temps requis pour mettre en place les mécanismes nécessaires afin de corriger la situation au sein de l'entreprise concernée devrait déterminer la durée de l'entente. Les ententes devraient prévoir une période suffisante pour laisser une marge de manœuvre à l'entreprise, en plus de laisser le temps nécessaire aux vérifications de conformité. Il serait important d'éviter autant que possible la prolongation des délais, une décision qui, même justifiée, pourrait créer une perception négative de la part de l'ensemble des observateurs externes.

Question 8
Dans quelles circonstances la publication devrait-elle être annulée ou retardée?

La confidentialité devrait être respectée dans le cadre des négociations. La signature d'une entente d'APS devrait cependant faire l'objet d'une publication.

La protection de l'intérêt public, la protection de renseignements confidentiels ou la protection d'autres démarches juridiques ou policières en cours pourraient justifier l'annulation ou le report d'une publication.

Question 9
De quelle façon faudrait-il remédier à la non-conformité?

Les situations de non-conformité devront être évaluées au cas par cas.

Dans les cas d'absence de collaboration de la part de l'entreprise, l'APS serait résiliée et des poursuites seraient entamées.

Sinon, dépendamment de l'ampleur de la non-conformité (une ou plusieurs conditions, importance de la ou des conditions par rapport à l'entente globale) et de la capacité de l'entreprise à y remédier, les conditions pourraient être modifiées pour tenir compte des circonstances ou un délai supplémentaire pourrait être accordé.

Un surveillant indépendant pourrait formuler des recommandations quant aux mesures à prendre pour remédier de manière réaliste à une non-conformité.

Question 10
Quand les faits divulgués dans le cadre de la négociation d'une APS devraient-ils être admissibles dans une poursuite instituée contre une entreprise?

Les admissions faites dans le cadre d'une offre d'APS ne devraient pas influencer de façon inéquitable les négociations des conditions de l'entente.

Donc, dans l'éventualité où un APS est conclu, les admissions faites dans le cadre de la négociation devraient pouvoir être utilisées lors de procédures judiciaires advenant la non-conformité de l'entreprise aux conditions de l'APS.

Cependant, advenant l'échec du processus de négociation d'un APS, les admissions faites dans le cadre de cette négociation ne devraient pas pouvoir être utilisées lors de procédures judiciaires.

Question 11

Comment les surveillants de conformité devraient-ils être sélectionnés et régis?

Le mécanisme de surveillance indépendante apparaît comme une bonne pratique afin de s'assurer du sérieux de la démarche des entreprises et d'une appréciation neutre des efforts déployés.

Les honoraires des surveillants devraient être assumés par les entreprises.

Les surveillants devraient être sélectionnés conjointement par les représentants du gouvernement et des entreprises. Après avoir identifié des surveillants potentiels en fonction de leurs expertises liées au secteur d'activité de l'entreprise et aux gestes répréhensibles commis, des appels d'offres sur invitation pourraient permettre de faire une sélection finale.

Les surveillants potentiels devraient signer une déclaration attestant qu'ils ne sont pas en conflit d'intérêts par rapport à l'entreprise concernée (liens d'affaires, familiaux, actionnariat, intérêt chez des concurrents, etc.).

Les mandats des surveillants devraient être définis conjointement par les représentants du gouvernement et de l'entreprise, en fonction des principaux jalons liés aux conditions de l'APS. Les surveillants devraient faire rapport simultanément aux représentants du gouvernement et de l'entreprise.

Un surveillant ne devrait pas avoir réalisé de mandat pour l'entreprise concernée dans les cinq (5) années précédant son embauche, ou avoir été employé ou fournisseur de l'entreprise au moment où les gestes répréhensibles ont été commis. Un surveillant qui se voit confier un mandat dans le cadre d'un APS devrait s'engager à n'accepter aucun autre mandat pour l'entreprise concernée au cours des cinq (5) années suivantes.

Question 12

Quelle devrait être l'utilisation des rapports de surveillance de la conformité?

Les rapports de surveillance devraient servir à confirmer le respect des conditions de l'APS, ou à relever des non-conformités.

Dans le cas de non-conformités, les rapports de surveillance devraient contribuer à en expliquer les raisons, à identifier des solutions et à faire des recommandations quant aux mesures à prendre.

Question 13

Dans quelles circonstances l'indemnisation des victimes (dédommagement anticipé) devrait-elle faire partie des conditions d'un APS?

L'indemnisation des victimes apparaît comme un élément intéressant lorsque des victimes (ou leur famille) peuvent être identifiées et retracées. Le montant de l'indemnisation devrait alors être établi dans un processus de négociation avec les victimes (ou leur représentant).

Toutefois, le désavantage est que la conclusion d'une entente ne dépend pas seulement de la volonté de l'entreprise de négocier, mais également de celle des victimes (ou leur représentant). Dans ce contexte, il apparaît difficile d'en faire une condition à l'APS.

Dans l'absence de victimes facilement identifiables, l'idée d'inclure à l'APS un don à un organisme de charité ou à une tierce partie apparaît également intéressante.

Contrairement à une pénalité qui doit s'avérer exemplaire, le versement d'un don n'a pas besoin de correspondre aux dommages réels, mais vise surtout à démontrer la volonté de réparation de l'entreprise. Une compensation qui s'échelonnerait sur plusieurs années pourrait être envisagée afin de contribuer à changer de façon durable la culture de l'entreprise.

La capacité financière de l'entreprise doit évidemment être prise en considération dans le calcul des pénalités financières et des indemnisations aux victimes.

s.19(1)

s.20(1)(b)

November 17, 2017

Submission to the DPA/Integrity Regime Consultation

DPA Submission

DPAs should only be available to those who come forward before they are caught or fully cooperate once caught

Persons, natural and legal, make decisions using a risk-based approach and should be held accountable for their decisions and actions. As a natural person, if I exceed the speed limit on a highway, and am caught by police, I face potential fines if found guilty. I would have been aware of the risk of getting caught yet I decided to take a chance because my risk tolerance level was high enough to engage in unlawful behaviour. Legal persons, such as corporations, also make decisions using a risk-based approach. For example, making decisions on creating new products or services, entering new markets, investing resources, establishing internal controls, complying with laws and regulations, etc. and considering the environment they in which they operate (competition, unions, etc.).

Law-abiding competitors suffer an unlevel playing field when they invest resources to ensure compliance with laws compared to those don't. The public pays higher taxes to pay for inflated costs. If Senior Management and or board members of a corporation are involved in approving legally risky ventures, unlawful behaviour or not adequately mitigating the legal risks, that corporation should suffer the full consequences of its risk-based decisions and actions, including individual and corporate prosecution. When mind and management of a corporation is grossly negligent, wilfully blind or wilful in its unlawful actions, why should the corporation not be prosecuted? Corporations must be held to account: the bigger and more complex the organization, the greater the accountability for its actions.

All corporations should have effective internal compliance regimes. Chasing the horses (investigations and prosecution) after they have left the barn is time-consuming and costly. Corporations need to invest in prevention. Laws should be created to oblige corporations to implement compliance programs, commensurate to their size and reach (e.g., international), to prevent corporate financial crimes. Failure to do so should lead to severe consequences and **no DPAs should be offered** (if DPAs are adopted) when there is evidence of an ineffective compliance program. The "catch me if you can" approach (i.e., leaving the task of ensuring compliance to enforcement bodies exclusively) to ensuring compliance is unrealistic, too complex and costly in today's globalized world. Corporations should be required to "police" themselves, with legislated compliance programs, bear that cost and suffer the consequences for ineffective internal controls.

Reduce the complexity of investigations by providing investigators adequate resources and tools. Provide investigators with better tools such as more resources; better priority setting of cases; access to a publicly available registry of beneficial ownership information; better and timelier international cooperation and information exchange mechanisms, etc.

Increase the number of prosecutors provincially and federally, increase their pay and ensure the specialization of prosecutors targeting the corporate crime. Appoint more judges. More resources and expertise are needed in prosecutorial services, including more judges. Prosecutors are swamped with work, they shift from prosecuting a wide range of Criminal Code offences when they should be specializing and building expertise in discrete units prosecuting specific corporate criminal offences. They are underpaid, sometimes have less experience and are not effectively retained for government service in comparison to the defense lawyers they must face in court. The courts are underfunded and there is a gap in the number of judges available to hear cases, especially complex cases. If the state cannot effectively investigate and prosecute the smartest and wealthiest corporations and criminals, in a reasonable time, who else will? What happens when trust in the justice system is further undermined and eroded because of a lack of prosecution?

Conflicting objectives of the DPA proposal. Generally, at the federal level there has been a trend to create and impose administrative monetary penalties (AMPs) when violations of the law or its associated regulations have been detected. The objective of the AMPs legislation is not to be punitive but to encourage compliance. In contrast, the purpose of criminal sanctions is to specifically punish the person, natural or legal, with a fine and/or a jail sentence and promote general deterrence in society by demonstrating severe consequences for unlawful conduct and publicly naming the individuals or the organizations convicted.

In many federal acts and regulations, a regulator must opt for AMPs or a referral to criminal investigation and prosecution. One action precludes the other. The DPA proposal has one foot in the criminal process by laying charges then may offer to not prosecute if the accused corporation meets conditions of the DPA and complies. The DPA is clearly meant to encourage compliance yet it uses the threat of possible prosecution by laying charges. Why go through this process using the threat of prosecution?

I recommend offering a DPA to and not prosecuting:

1) corporations that voluntarily come forward (prior to the commencement of any investigation or enforcement action) to disclose non-compliance or unlawful behaviour[1] and

2) in certain situations, where an investigation has been launched by authorities and the corporation fully, quickly and cooperatively works with the authorities to disclose all required information and helps prosecute its corporate wrongdoers.

DPAs should not be available in any other circumstances other than these two.

DPAs, as proposed, will create a new business line benefiting private sector lawyers, to the detriment of the public interest. Governments currently underfund and underpay the prosecutorial services across Canada. While DPAs, as proposed, claim to provide an additional tool to prosecutors, they also provide a subtle incentive to prosecutors to abandon prosecution to avoid costs to the public purse. In a broader sense, it is a cop-out by governments from investing in shoring up the expertise and resources to investigate and prosecute some of the more complex corporate criminal cases or to provide better tools to investigators to gather evidence. Corporations will see this DPA proposal, as a way out, a cost of doing business and a catch-me-if-you can scenario. With the best lawyers and accountants at their disposal, corporations will obfuscate, delay and cause prosecution services to run out of time, effort, challenge witness recall and availability, undermine incentives for whistleblowing, increase turnover in investigative and prosecutorial staff, and waste resources. In the end, the pressure to resolve a case will overcome prosecutors as the clock keeps ticking. Prosecutors will reach for and settle with a DPA. All the while, the root causes of the challenges in investigating and prosecuting corporate criminal cases will remain unaddressed.

Consequences for criminal behaviour should be consistent and commensurate for all persons, natural or legal. As DPAs are not considered for individuals, they should not be considered for corporations either, except in the two circumstances noted previously. If an individual or sole proprietor is found guilty of an offence, not only is their reputation tarnished but their livelihood and business is likely to be destroyed beyond repair. If a large corporation engages in unlawful behaviour, it cannot go to jail so, why should it not suffer at least a commensurate consequence as the individual, the sole proprietor or the small private corporation? Their reputation and economic viability should be highly threatened and damaged, accepting prosecution and corporate conviction as their fate.

A large corporation usually has the best professional advice at its disposal and the wherewithal to implement effective compliance programs. Usually those resources and expertise are not available to individuals and smaller enterprises. The DPA proposal creates a double standard between individuals/smaller businesses, and large public corporations. If large corporations can pay their CEOs and executives millions of dollars in salaries and bonuses, then their shareholders should hold them to account to implement effective internal compliance programs. If shareholders don't insist on effective compliance programs, then they should also bear the consequences. They are not blameless. Shareholders should also due their due diligence before investing in corporations. Corporations should

[1] The Canada Revenue Agency's Voluntary Disclosure Program provides an example of a program that encourages compliance, and if all conditions are met, penalties are not imposed, and no prosecution is pursued.

be accountable for detecting their own unlawful breaches and come forward to authorities when they detect such breaches or are detected by enforcement authorities.

Compensation to victims and other costs

The victims are the corporation's competitors and the public. Competitors who have lost bids because of bribery incur substantial costs in preparing bids, losing market share and potentially risking their future existence because of corporate cheaters. They may have had to let go staff, keep salaries low or let go staff because they lost the bid. The honest bidders should be compensated for their losses, with interest. The public that ends up paying higher costs for public infrastructure, in the case of collusion or bribery, should be compensated by a return of those added costs to the public treasury, with interest.

In the case of corporations that **voluntarily** come forward (**prior to the commencement of any investigation** or enforcement action) to disclose non-compliance or unlawful behaviour, a DPA **should** be offered if all conditions are met. The corporation should still be subject to paying penalties for contravening the law, and reimbursing the costs noted above. The corporation would not face prosecution if all conditions are met.

However, where an **investigation has been launched by authorities** and the corporation fully, quickly and cooperatively works with the authorities to disclose all required information and helps prosecute its corporate wrongdoers, a DPA **may** be offered. The costs associated with the investigation, and interest, should be repaid by the corporation, in addition to the costs noted above. The corporation would not face prosecution if all conditions are met.

In all other cases, DPAs should not be available and laws should require compensation to victims for costs and inflated prices, interest, and stiff penalties. The consequences should also include debarment and corporate and individual prosecutions.

Enact national whistleblowing legislation

Protect private sector individuals through whistleblower legislation. Engage employees in keeping their corporations honest and protecting them with compensation in case of retribution or loss of employment and legal defence if necessary. This alone should ensure more disciplined corporate behaviour.

Contact

If you have any questions, please contact

To whom it may concern,

I am Deputy General Counsel for the PCL family of companies. PCL is Canada's largest general contractor with offices across Canada and the United States. We possess a strong culture of corporate ethics and compliance, supported by a strong internal compliance training and monitoring program. As such, we have a significant interest in the Federal government's current consideration of Deferred Prosecution Agreements in Canada. I am writing on behalf of the PCL family of companies to provide our input on the government's consultation paper entitled "Expanding Canada's toolkit to address corporate wrongdoing: The deferred prosecution agreement stream discussion guide."

I will provide responses to the 13 questions in the consultation paper under separate headings below. Prior to providing those specific responses, I wish to provide our position on these issues, generally:

(1) PCL places a high degree of importance on ethical conduct and legal compliance. Canada's existing legal framework contains a various offences and penalties that are aimed to ensure that corporations act legally and ethically. These include changes to the criminal code following the Westray Disaster to ensure that the law sufficiently covers corporate misdeeds.

(2) PCL would not support any changes that undermine that legal system and the intended goals of holding corporations accountable for their illegal activities.

(3) However, evidence in other jurisdictions has shown that DPA's have an appropriate place in a properly functioning criminal or regulatory system.

(4) In fact, DPA's can often improve overall corporate compliance and ethical behavior by encouraging the development of appropriate corporate social responsibility and ethics programs. DPA's can also provide great flexibility to crown prosecutors in structuring resolutions to issues. This flexibility can enable the crown prosecutors to structure settlement agreements that benefit society and to focus their limited resources on the cases that truly warrant further action.

(5) We expect that the implementation of meaningful obligations associated with a DPA is necessary to ensure public confidence in the system. Moreover, in considering the potential use of DPA's, and in order both to promote strong corporate ethics and compliance and to maintain public confidence in the Canadian legal system, we believe:

   (a) that DPAs not be used with corporations that display a culture of unethical behavior and have blatantly violated well-established ethical conduct. Rather, they should be used for isolated circumstances within a corporation that demonstrates and supports sound ethical conduct.

   (b) that DPAs not be used by the state to strong-arm and/or threaten corporations that behave ethically and maintain sound code of conduct practices.

Within this broad framework, we feel that a DPA system would benefit Canadian society.

Question 1

In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

- Advantages: as set out above. Moreover, we understand that Canada faces challenges with limited white collar crime resources in the RCMP and crown prosecution offices. A DPA may offer creative solutions for our limited police and crown prosecution resources
- Disadvantages: as set out above. We have encountered reports from the US where there is some suggestion that DPA's may be overly leveraged by prosecuting authorities to advance cases where the evidence against the corporation is quite weak. This should be guarded against in the criteria that might inform Canadian crown prosecutors over whether a DPA should be considered.

Question 2

For which offences do you think DPAs should be available and why?

- Criminal Code offences, CFPOA offences, Competition Act offices, and similar federal criminal offences.
- A DPA may be less useful in strict liability offences, but it may also be appropriate in certain circumstances to expand the concept into those offences

Question 3

What role do you think the courts should play with respect to DPAs?

- The UK system, where the Court acts as a guard against inappropriate use of a DPA, is appropriate in the Canadian context

Question 4

What factors should to be taken into account in offering a DPA?

- The factors set out in the discussion paper are largely appropriate, with the following two caveats:
    - there have been challenges in the US where federal prosecutors have required parties to waive privileged information in order to avail themselves of certain prosecutorial leniency opportunities. Parties should not be required to turn over privileged communications with their counsel
    - we acknowledge the importance of individual accountability for corporate wrongdoing. That concept is now currently the focus of US prosecutors since the Yates Memorandum a number of years ago. While this is important, individual and corporate accountability should be assessed on a case by case basis. A myopic DPA program that tends to fixate on individual accountability rather than corporate accountability may not be the most effective system for promoting overall corporate ethics and compliance.

Question 5

When would a DPA not be appropriate?

- With corporations that display a culture of unethical behavior and have blatantly violated well-established ethical conduct. Rather, they should be used for isolated circumstances within a corporation that demonstrates and supports sound ethical conduct

Question 6

What terms should be included in a DPA?

- We believe that all of the terms and legal effect/consequences considerations set out in the discussion paper are appropriate with the exception of the following:
    - the breach of the DPA could be considered as a separate offence and be added to the charges for which the company could be prosecuted in a reinstated prosecution – this is probably unnecessary given the other aspects of the proposed program and may create unneeded distraction for crown prosecutors

Question 7

What factors should be taken into account in setting the duration of a DPA?

- Seriousness of the offence, markets and geographies that the corporation operates within, the time necessary to implement the changes and to ensure that the changes have positively impacted corporate culture

Question 8
Under what circumstances should publication be waived or delayed?

- PCL has no position on this issue at this time

Question 9
How should non-compliance be addressed?

- This should depend upon the seriousness of the non-compliance (material/non-material) and the reasons for the non-compliance (negligence versus willful non-compliance). Some discretion should be left to the crown prosecutors to assess these and similar factors.

Question 10
When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

- Always

Question 11
How should compliance monitors be selected and governed?

- These will need to be qualified accountants, lawyers, or other professionals with expertise in the matters at issue. They should be hired by and report directly to the crown prosecutors and should be paid by the corporation.

Question 12
What use should be made of compliance monitoring reports?

- Reviewed by crown prosecutors to assess compliance with the DPA.

Question 13
Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

- Assessed on a case by case basis.

We trust that you will find these submissions helpful. Please contact me if you require any additional information.

Regards,

November 17, 2017

Government of Canada
Portage III, Tower A 10A1
Laurier Street
Gatineau, QC K1A 9S5

Re: Comment in regard to the Government of Canada's Consultation: *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream*

To Whom this May Concern:

Consulting Engineers of Ontario (CEO) appreciates the opportunity to make comment in regard to the Government of Canada's consultation examining the merits of creating a Deferred Prosecution Agreement (DPA) regime in an effort to more adequately address corporate wrongdoing. We recognize the inherent complexities associated with corporate crime, the increasingly sophisticated nature of such activity and the strain this can place on government's efforts to try and fight corporate corruption and other criminal activity. This letter serves to offer support for the position taken by our national organization, the Association of Consulting Engineering Companies – Canada (ACEC).

Consulting Engineers of Ontario fully agrees that corporate criminal activity must be subject to the full force of the law. We recognize that DPAs can be a potentially effective resource for federal prosecutors, supporting increased enforcement of anti-corruption laws and increased self-disclosure and compliance by corporations. Along with ACEC, we:

> *"also agree in principle that a DPA regime may also mitigate unintended consequences associated with a criminal conviction for blameless employees, customers, pensioners, suppliers, and investors whereas in some cases, a criminal conviction could lead to job losses and broader economic consequences."*

Consulting Engineers of Ontario also agrees with the research published by Transparency International Canada, concluding that should the federal government decide to adopt a DPA regime, that regime ought to be enacted and empowered through specific legislation. Such legislation should provide for legal and operational transparency and prescribe the use of DPAs as but one element of enforcement making up an effective legal system and not permit such a regime to evolve into a uniquely distinct means for prosecuting corporate wrongdoing.

With this in mind, CEO wishes to reinforce the following points detailed in the submission made to the department by ACEC:

- DPAs may be able to offer wronged parties a prudent option for more timely resolution than that presently offered through the civil court system;

- DPAs may present a more cost-effective and flexible option for prosecutions than presently exist;
- Should a DPA not provide for victims and wronged parties to receive damages as a result of wrongdoing, these parties should be enabled to pursue damages through the civil courts;
- Should the federal government decide to create a DPA regime, it is important that such a regime is empowered to assess each individual case of wrongdoing when determining whether the offering of a DPA is appropriate and the mitigating factors of that wrongdoing when determining the terms and conditions of that DPA so as to ensure that it is appropriate for the circumstance in question;
- CEO strongly agrees with ACEC's position addressing when the offering of a DPA would not be appropriate. A DPA should not be offered if:
  - ❖ Significant harm is done to the public, or to victims of the alleged wrongdoing;
  - ❖ There are previous wrongdoings by the corporate entity, especially if it had not taken substantive action to address the harm created by previous wrongdoing and/or effectively deter future wrongdoing;
  - ❖ Available actions, compensation and/or remediation that would not adequately address the harm created by the wrongdoing and/or effectively deter future wrongdoing; and,
  - ❖ The corporate entity does not accept responsibility for its actions.
- Non-compliance of a DPA should be assessed on an individual case basis and take into consideration factors such as corporate proactive reporting of non-compliance and incidents of non-compliance that are beyond the control of the corporation. Any system to address non-compliance with a DPA should be overseen by the courts, provide for explanation, and include options for consequences as a result of non-compliance that could include:
  - ❖ Financial penalties
  - ❖ Additional or alternate terms/conditions
  - ❖ Extension of the expiry date of the DPA
  - ❖ Termination of the DPA and prosecution of all charges
  - ❖ Partial termination of the DPA and prosecution of select charges

We trust that this input will be useful to the government's deliberations on the creation of a Canadian DPA regime. Should you have any questions or require any further information regarding our commentary, please do not hesitate to contact me at bsteinberg@ceo.on.ca or 416-620-1400 ext. 224.

Sincerely,

Barry Steinberg

Barry Steinberg, M.A.Sc., P.Eng.
Chief Executive Officer

About Consulting Engineers of Ontario

Consulting Engineers of Ontario (CEO) is a not-for-profit advocacy association representing approximately 200 consulting engineering firms across Ontario collectively employing nearly 20,000 individuals. Professionals in these firms represent not only engineers, but also technicians and technologists, geoscientists, architects, and planners. Our member firms range in size from sole proprietors to large multidisciplinary and multinational engineering companies providing a wide range of consulting services to government and private sector clients.

CEO promotes the important contribution that the consulting engineering sector makes to the social, economic and environmental quality of life in Ontario.

CEO is a member organization of the Association of Consulting Engineering Companies – Canada (ACEC). ACEC is a federation of 12 provincial and territorial associations representing over 400 companies that collectively employ over 60,000 Canadians. Over three-quarters of ACEC member companies have fewer than 50 staff. Most of these firms are family and/or employee owned and play an active role within their communities.

November 17, 2017

ontario chamber of commerce

To Whom It May Concern,

On behalf of the Ontario Chamber of Commerce (OCC), which represents 60,000 employers across the province, I am writing this letter in support of the submission from the Canadian Chamber of Commerce (CCC) on Deferred Prosecution Agreements (DPA).

Ethical conduct has become an issue of considerable importance to businesses in many sectors, and rightly so. It is in everyone's interest to ensure that our businesses are committed to respecting the rule of law. It is a public and consumer trust issue, but also a question of reputation of our companies and, by extension, our reputation internationally.

In recent history, there have been several instances where businesses were hit very hard by the reprehensible behaviour of executives or employees. These companies were taken to court and lost their reputation and their contracts, and many were even forced into bankruptcy. The communities where they operated lost economic activity, quality jobs and, in some cases, head offices.

For those reasons, the OCC welcomes the opportunity to provide input to the Federal Government's consideration of introducing a DPA. The DPA forces the company to recognize its wrongdoings, collaborate in good faith with competent authorities and adopt fair and equitable remedial actions. Evidence suggest that this procedure, limits negative impacts like job losses and saves taxpayers time and money by avoiding legal proceedings.

DPAs and similar mechanisms are now part of the business environment in a growing number of countries. In Canada, we lag far behind as one of the only developed countries without them. We believe governments should adopt DPA-style measures if we want to ensure that our businesses remain truly competitive, here and abroad.

The following is our response to the twelve questions posed in your consultation document entitled Expanding Canada's toolkit to address corporate wrongdoing: The deferred prosecution agreement stream. For much of this information the OCC relies heavily on the expertise and leadership provided by the CCC.

Question 1: *In you view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?*

Advantages

1. **DPAs reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors.**

   Crimes are committed by individuals, not corporations. The emphasis of any effort to address corporate crime should be on holding specific individuals in the corporation who commit the crimes liable.

2. **DPAs seek to improve corporate governance via mandatory reforms.**

   Given the flexibility of DPAs compared with the traditional prosecution route, corporations are more likely to notify the authorities when they become aware of employees engaged

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in wrongdoing. This would benefit the public good since corporations will be incentivized to disclose corporate wrongdoing voluntarily. The company is forced onto a remedial path that minimizes the risk of future criminal activity, without harming innocent employees and shareholders.

Question 2: *For which offences do you think DPAs should be available and why?*

At a minimum, DPAs should be available for all offences which can result in debarment under the Integrity Policy, including Competition Act offences.

Question 3: *What role do you think the courts should play with respect to DPAs?*

Courts can ensure the integrity of the DPA process and provided confidence to victims and taxpayers. The parties to a DPA should be required to demonstrate to a court that the imposition of a DPA in lieu of prosecution is fair, appropriate, impartial, and transparent.

Question 4: *What factors should be taken into account in offering a DPA?*

The most important factor is whether the DPA is in the public interest. For a DPA to be in the public interest, the corporation must accept responsibility for the conduct and demonstrate that it genuinely seeks to reform its business practices and corporate culture and mitigate the damage caused by the relevant conduct.

Question 5: *When would a DPA not be appropriate?*

The government should have discretion to determine when a DPA may not be in the public interest. Consideration should also be given to a corporation's previous wrong doing. If the corporation is a repeat offender it is questionable whether they should be afforded the benefit of the DPA regime.

Also, if a corporation is not a bona fide business and exists only for the purposes of illegal conduct a DPA should not be offered.

Question 6: *What terms should be included in a DPA?*

The factors set out on page nine of the discussion document appear to be reasonable terms and conditions for DPAs.

Question 7: *What questions should be taken into account in setting the duration of a DPA?*

The nature of the wrongdoing should determine the appropriate duration of the DPA. The government should be flexible in determining how long a DPA should last based on the corporation's actions to respond to the wrongdoing.

Question 8: *Under what circumstances should publication be waived or delayed?*

The transparency of process and result is critical in upholding public confidence in DPAs as a valid criminal law enforcement mechanism.

The presumption should be that the implementation of a DPA and its terms would normally be published and publicly available to ensure transparency and public confidence in the DPA, however there should be exceptions that are considered on a case-by-case basis. For example, exceptions should be considered to protect proprietary and commercially sensitive information where the disclosure of such information could cause an adverse impact on the economy or distort the marketplace. Flexibility regarding the details disclosed publicly would encourage corporations to engage in DPAs.

Question 9: *How should non-compliance be addressed?*

The government and courts should have discretion in addressing non-compliance with a DPA as an instance of non-compliance may not be material. In addition, due process is important when determining whether non-compliance has occurred. The organization should have a right to be heard where the government is determining whether the corporation has breached the terms of the DPA.

Serious instances of non-compliance that demonstrate lack of corporate resolution to comply with the relevant legislation may warrant criminal charges or termination of the DPA. However, isolated technical violations may warrant less onerous measures, such as warnings or renegotiated terms of the DPA.

Question 10: *When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?*

The possible use in court of admissions made during a DPA negotiation is a sensitive matter. If a DPA is not reached, the government should not be entitled to use statements made in the negotiation process against the company. An ability to do so would be a significant disincentive for corporations engaging in the DPA regime.

Question 11: *How should compliance monitors be selected and governed?*

Selection of monitors should be made based on a mutually agreed set of criteria/terms in a similar fashion in which arbitrators are selected during alternative dispute resolution between parties.

However, active monitors may not always be required and periodic certified reports subject to audit may be sufficient. Therefore, the chosen system must ensure that it is flexible to fit the circumstances of each individual case.

Question 12: *What should be made of compliance monitoring reports?*

Compliance monitoring reports would presumably be material to any determination of non-compliance. However, active monitors may not always be required and periodic certified reports subject to audit may be sufficient. Therefore, the chosen system must ensure that it is flexible to fit the circumstances of each individual case.

Question 13: *Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?*

As a general principle, it would seem appropriate to include victim compensation where applicable, recognizing that not all offences have a victim.

It may also be appropriate to limit victim compensation under the DPA to persons who suffered direct harm. The DPA should not become a tool for broad-based class actions seeking to profit from the wrongdoing.

Sincerely,

Richard Koroscil
Interim President & CEO
Ontario Chamber of Commerce

NORTON ROSE FULBRIGHT

Barristers & Solicitors / Patent & Trade-mark Agents

November 17, 2017

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Dear Sir/Madam:

Deferred Prosecution Agreements – Response to the Government of Canada's Consultation Paper

Norton Rose Fulbright Canada LLP and many of its clients welcome the Government of Canada's interest in exploring the introduction of a Deferred Prosecution Agreement (**DPA**) mechanism in Canadian law. Should this initiative be pursued, it will offer Canadian courts, law enforcement officials, and businesses with an additional tool for addressing corporate wrongdoing that has been used to great benefit by other jurisdictions, including two of our major trading partners. We further welcome the Government of Canada's invitation to provide thoughts and insight on the important considerations identified in the Discussion paper for public consultation entitled *Expanding Canada's Toolkit to Address Corporate Wrongdoing*. Norton Rose Fulbright Canada LLP, together with the following entities: **Bombardier Inc.**, **CAE Inc.** and **CGI Group Inc.**, thank the Government for this opportunity and offer the comments below for its consideration:

1 **Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?**

There are many advantages to employing DPAs as tools to address corporate criminal liability in Canada. First, and most importantly, by providing a structure, method and framework whereby an entity receives credit for self-disclosure and the possibility of moving forward as a viable business (along with remediation structures and oversight), DPAs create an environment that encourages corporations to come forward and disclose wrongdoing. In other words, by providing a possible "solution" to the entity's problem, DPAs help create a corporate culture that is inclined to proactively address anti-corruption issues and other laws and regulations aimed at promoting and enforcing corporate social responsibility, as opposed to having to consider whether it is in the best interest of the entity to do so, given the potentially disastrous consequences of a criminal conviction. When corporations self-disclose wrongdoing, it encourages responsibility, as they are recognizing that improper conduct has occurred and that it must be remedied.

DPAs will also have a beneficial impact on third parties such as employees, shareholders, and members of the community, including the wider sector in which the corporation operates. Terms of the DPAs such as compliance programs, monitors, and the removal of management involved in the wrongdoing place

an emphasis on proactive change in corporate culture and practice that will be mirrored by the sector as a whole.

Second, the use of DPAs in order to settle allegations of corporate wrongdoing will lead to greater certainty in the area of corporate criminal liability, both for the corporations and the Crown. It will also allow the Crown to hold the corporation itself accountable for institutional wrongdoing without penalizing innocent parties such as employees, shareholders, pensioners, and commercial partners. The public is thus protected from further wrongdoing by the corporation, as well as from any collateral harm that may otherwise result from a full investigation, criminal trial, and any consequential impacts of a guilty plea or a finding of guilt. The corporation's actions are denounced through the publication of the DPA, subject to exceptions as discussed below, and the terms of the DPA, such as a significant monetary penalty and the obligation to follow strict compliance terms and changes to corporate behaviour and culture, further the objectives of deterrence and rehabilitation.

Third, the use of DPAs will lead to a better allocation of governmental and judicial resources. Indeed, the Crown will not have to expend significant investigative and prosecutorial resources and will dispose of more time and resources to prosecute other cases where there has been no recognition of wrongdoing or desire to remedy past errors. Cases where a DPA is concluded – which will often be in relation to large and complex matters – will be diverted away from the courts, freeing up precious court time and alleviating existing backlogs. DPAs may thus assist in addressing concerns which are at the heart of the *R. v. Jordan* decision thereby contributing to a more efficient administration of justice and greater access to justice generally. For example, the use of no contest settlements by the Ontario Securities Commission has contributed to freeing up the Commission's resources and resulted in significant fines paid by corporations in investor compensation.

From the corporation's perspective, avoiding a lengthy criminal trial allows it to focus its resources and energy on implementing and observing a vigorous compliance regime, while continuing to conduct its business to the benefit of employees, investors and shareholders, and the community.

Fourth, where appropriate, DPAs may also include terms for victim compensation. This presents two advantages: (i) avoiding potential additional litigation; and (ii) the possibility of compensating victims who may not be able to pursue their claims before Canadian courts.

That said, the use of DPAs can also present certain disadvantages. To begin with, in the event that DPAs are not reserved for appropriate cases, or the public is not sufficiently informed as to their purpose and public interest objectives, some members of the public may perceive the DPA as a mechanism allowing big corporations to purchase a license to breach the law and avoid "true" punishment. As discussed below, appropriate judicial oversight and transparency will assist in ensuring the legitimate use and public acceptance of DPAs.

A further disadvantage will result where, for some reason, negotiations do not lead to the execution of a DPA. In such cases, the Crown must return to square one and decide whether it is appropriate or viable to conduct a full criminal investigation and prosecution. As a result, the efforts and resources of both the prosecution and the corporation in respect of the failed DPA will have been thrown away.

2 **Question 2: For which offences do you think DPAs should be available and why?**

DPAs should be available for any offence where a finding of guilt may have a disproportionate deleterious impact on innocent third parties such as employees, shareholders, pensioners and commercial partners. As a general matter they will most often be used in relation to economic crimes, such as those offences set out under the *Competition Act* or the *Corruption of Foreign Public Officials Act* and various provisions of the *Criminal Code*. However, to ensure that a DPA regime produces optimal benefits, whether a DPA is an appropriate option in respect of any particular offence, including

instances of repeat offences or offences committed prior to the coming into force of the DPA regime, should be a matter of prosecutorial discretion.

3 Question 3: What role do you think the courts should play with respect to DPAs?

It is important that the courts have an oversight role with respect to the approval of DPAs in order to depoliticize the process and ensure its legitimacy and transparency in the eyes of the public. As is the case with the United Kingdom system, the Crown should apply to the courts for approval of all DPAs. When approving or rejecting a DPA, the court should provide reasons that address the criteria and factors set out in the applicable legislation as well as the general public interest in approving or rejecting the DPA. A DPA should be approved by the court when it furthers the interests of justice and its terms are fair, reasonable, and proportionate.

In the United Kingdom, courts must hold a preliminary *in camera* hearing to approve the proposed terms of a DPA under negotiation. A further hearing is held to approve the DPA itself if and when the prosecution and the defendant reach an agreement as to its terms. This two-step process has some advantages in that the initial preliminary approval enables the parties to engage fully with the negotiation process under the knowledge that it can lead to a positive outcome, namely full final approval by the court.

4 Question 4: What factors should to be taken into account in offering a DPA?

The following factors should be taken into consideration by the Crown in offering a DPA:

- Whether a DPA is in the public interest. For example, whether it is in the public interest to avoid spending the governmental and judicial resources required for a lengthy trial in exchange for the payment of a significant fine by a corporation and an agreement to abide by stringent standards and compliance regimes.
- Whether a DPA is in the interest of the administration of justice.
- Whether a criminal conviction is likely to have unduly disproportionate consequences for the corporation, such as under the laws of another jurisdiction.
- Potential collateral consequences of prosecution and conviction, including harm to blameless third parties such as employees, shareholders, pensioners, commercial partners, and other members of the community.
- The nature and gravity of the offence at issue.
- The corporation's criminal record.
- Timely and voluntary disclosure and cooperation by the corporation. Evidently, this factor can only be relevant once a DPA regime is adopted and comes into force. It would be unreasonable to expect prejudicial disclosure and cooperation in circumstances where criminal prosecution was the only possible outcome of such disclosure and cooperation. Moreover, it also seems evident that the corporation must have sufficient knowledge of the offence for disclosure and cooperation to be a relevant consideration.
- Whether the corporation has undertaken remedial actions of its own accord.

The factors taken into account in offering a DPA, as well as the DPA process and the approval criteria should be set out in the governing legislation or regulations. Any additional guidelines or policies

governing prosecutorial discretion and the negotiation of DPAs ought to be publicly available. Evidently, prosecuting authorities should also be free to consider DPA proposals proactively submitted by corporations, subject to further negotiation where required.

5 **Question 5: When would a DPA not be appropriate?**

Offering a DPA would not be appropriate in cases where it is not in the public interest or in the interest of the administration of justice.

6 **Question 6: What terms should be included in a DPA?**

As is required in the United Kingdom, the terms of any DPA ought to be fair, reasonable and proportionate. The terms of each DPA should be tailored to the individual case. That being said, DPAs should include an agreed set of facts. They ought also to include terms relating to (i) any financial penalty; (ii) the appointment of a monitor where appropriate; (iii) the creation of review mechanisms and/or compliance programs to prevent repeat offences; (iv) the length of the deferral period; and (v) the consequences of failure to comply with its terms. All DPAs should include a term to the effect that no lawful privilege held by the corporation is waived, including solicitor-client privilege. Furthermore, the terms of the DPA should not seek to compel the corporation to breach its indemnification obligations to any director, officer, or employee of the corporation. The terms can also include a negotiated resolution on how to deal with assets or contracts implicated in the agreed set of facts. Where appropriate, provisions providing for victim compensation can also be included as a term of the DPA.

7 **Question 7: What factors should be taken into account in setting the duration of a DPA?**

The length of a DPA should be determined on a case-by-case basis. The duration of the DPA must, for example, be sufficient to implement the cooperation and corporate compliance obligations. The duration of a DPA may also be a function of other factors such as the time required to pay the agreed financial penalties, or to complete investigations and trials of other parties to the offences covered by the DPA. The duration must also be lengthy enough to deter other corporations from committing similar offences. In this regard, the average range of deferral periods in the United States is 12-36 months, while the four DPAs concluded in the United Kingdom to date have imposed durations between 3 and 5 years.

In the event that there are legitimate reasons why the corporation has not been able to meet all of the DPA's conditions within the timeframe of the original deferral period, it should be able to apply to the approving court to request an extension of the DPA's deferral term. Where necessary and appropriate, the approving court ought to have the power to afford the corporation a further reasonable opportunity to comply with its DPA obligations.

8 **Question 8: Under what circumstances should publication be waived or delayed?**

In accordance with the open court principle and to ensure transparency, the application to approve a DPA should, as a general matter, be brought in open court and the approval hearing should be open to the public. The judgment approving the DPA should, of course, be public as well. On the other hand, negotiations and documents exchanged up to the bringing of the approval application must remain confidential so as not to jeopardize ongoing negotiations or discourage parties from entering into a DPA process. Appropriate mechanisms ought to permit the redaction or sealing of information or portions of a DPA where justified to preserve the rights of third parties (including fair trial rights), or for reasons of national security or international relations.

9 Question 9: How should non-compliance be addressed?

The approach to non-compliance should be flexible, in order to respond to the myriad of circumstances that may constitute or give rise to non-compliance. If the prosecutor believes that there has been non-compliance, notice should be provided to the corporation, and the latter ought to be given an opportunity to clarify or resolve the issue with the prosecutor. If the alleged non-compliance is serious or complex, an application for relief ought to be brought by the prosecutor before the approving court. The court should then have the power to determine whether any non-compliance has actually occurred and to remedy any such non-compliance in a just and reasonable manner. In this respect, the applicable legislation should clearly set out the court's remedial powers which may include the power to issue reprimands, modify the DPA, award costs, issue injunctions, find a corporation in contempt, or, where necessary and appropriate, revoke the DPA.

10 Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

Information and facts disclosed in the course of negotiating and/or cooperating with respect to a DPA that is not concluded or approved should never be disclosed or admissible in a subsequent prosecution against the corporation or any of its employees. In order to promote forthright disclosure by corporations and productive discussions with the Crown, these discussions and negotiations must remain strictly confidential and be categorized as without prejudice to those involved. Indeed, the mere possibility that such information may be used in the event a DPA is not concluded will have a very significant chilling effect on the willingness of corporations to enter into DPA discussions such that the very viability of any DPA regime might be threatened. This approach is consistent with the treatment of agreed statements of fact contained in plea resolution agreements of plea bargains, which are considered to be protected by settlement privilege, such that the information exchanged during the plea bargaining process cannot be used or enforced against either the accused or the prosecutor (see *R. v. Nestle*, 2015 ONSC 810, at para. 37; *R. v. Larocque*, (1998), 124 CCC (3d) 564 (Ont. Gen. Div.), at para. 12).

11 Question 11: How should compliance monitors be selected and governed?

A monitor should only be appointed with the agreement of the parties and approval of the court. The appointment and mandate of a monitor must be fair, reasonable, and proportionate. Selection of a monitor ought to be a collaborative process between the parties, subject to ultimate approval by the court. Where the appointment of a monitor is required and/or appropriate, the terms of the appointment will vary depending on the particular circumstances of the case. The monitor may be instructed to focus on a range of aspects of the business, including the corporation's policies and procedures and procurement, contractual, and other arrangements. The monitor should be allowed full access to the relevant aspects of the corporation. All costs associated with the monitor ought to be borne by the corporation entering into the DPA.

12 Question 12: What use should be made of compliance monitoring reports?

Monitors' reports should be treated as confidential. As is the case in the United Kingdom, the disclosure of such reports should, in principle, be restricted to the prosecutor, the corporation, and the court. The report should then be used to assist the corporation in putting in place a robust compliance program and in enforcing procedures to prevent misconduct, thereby reducing or eliminating the risk of future wrongdoing. The potential use of any reports should be considered prior to engaging with the monitor in order to clarify the scope of the monitor's instructions.

November 17, 2017

NORTON ROSE FULBRIGHT

13 **Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?**

With the parties' agreement and where appropriate in light of the circumstances and the facts of the case, victim compensation can be included in the terms of a particular DPA. Nonetheless, it must be noted that the appropriate forum to engage in complex assessments of liability, causation, and quantum is not the DPA negotiation. DPAs are not designed to be a replacement for civil proceedings.

14 **Please add any other comments or suggestions regarding DPAs.**

The above comments take into account the experience of our Norton Rose Fulbright LLP colleagues practicing in other jurisdictions where DPA regimes exist.

Should you have any question concerning the above or would like to discuss our comments, please contact the undersigned.

Yours very truly,

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Date: November 17, 2017

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Dear Sirs/Mesdames:

Re: Joint Submission for the Public Consultation on Deferred Prosecution Agreements

I. Introduction

As counsel who advise corporations in a range of matters involving allegations of criminal and regulatory misconduct, we welcome this opportunity to provide our views on expanding the Government of Canada's (the "**Government**") toolkit to address corporate wrongdoing. We support the Government's initiative to develop better tools to identify and resolve corporate wrongdoing more effectively, and we encourage the Government to be as innovative as possible in developing its toolkit. In our view, this consultation on the possible adoption of deferred prosecution agreements ("**DPAs**") is a commendable first step.

The experience of the United States and other jurisdictions demonstrates that DPAs can be a highly effective and flexible tool in addressing corporate economic misconduct, preventing future wrongdoing and enhancing corporate best practices. DPAs have been particularly effective, but are not limited to, prosecuting and enforcing anti-bribery offences and other economic crimes under federal statutes in the United States.

DPAs allow law enforcement to quickly and efficiently resolve complex enforcement matters with corporate wrongdoers, freeing valuable resources needed to pursue other matters. The proven benefits of DPAs include: improving detection and enforcement of misconduct by facilitating self-disclosure of wrongdoing; obtaining cooperation from companies to assist future prosecutions; encouraging voluntary remediation; improving corporate culture and compliance; and ensuring that offenders are held to account while minimizing negative impacts on innocent third parties. The benefits of DPAs, and other tools which facilitate efficient and effective resolution of corporate criminal and regulatory offences, far outweigh potential downsides. An analysis of the legal tools from other jurisdictions, as well as decades of experience assisting corporate clients respond to regulatory issues and enforcement proceedings, support our position.

We believe that the development of an effective enforcement regime requires a robust dialogue with defence counsel, and would benefit from the establishment of a working group comprised of experts in this area.

We would be pleased to participate in such a working group to develop the legal framework for a new DPA regime. We offer these submissions as the beginning of a more fulsome dialogue with the Government.

II. Key Advantages and Disadvantages

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

In our view, the advantages offered by DPAs outweigh any perceived disadvantages. From our perspective, the key advantages offered by DPAs include as follows.

Increased self-reporting and cooperation with regulatory authorities

Upon discovery of potential wrongdoing, an organization needs to decide as part of its risk management strategy and often with the advice of counsel, whether and to what extent it will cooperate with regulatory authorities. Fear of the reputational and business repercussions of a criminal charge or conviction can often delay or inhibit a company from disclosing discovery of criminal activity or ongoing internal investigations. DPAs will encourage proactive and timely self-reporting of wrongdoing by providing organizations with an alternative to the risk of a criminal trial and conviction.

In addition, DPAs can facilitate the resolution of cross-border proceedings when an organization is facing possible conviction relating to the same issue in multiple jurisdictions. As noted above, the United States has a long-standing DPA regime which has been successfully used in several large corporate crime cases. Introducing DPAs in Canada would provide Canadian companies the opportunity to report wrongdoing and cooperate with regulatory authorities in both jurisdictions, without compromising its position in Canada – a risk which currently exists.

Therefore, DPAs can provide a solution which furthers both the Government's goals of enforcing compliance and deterrence, as well as the organization's goal of avoiding the negative consequences of a formal conviction and the uncertainty of prosecution.

Voluntary remediation and improved compliance

There are a number of factors which make DPAs more effective than criminal prosecution in improving compliance and deterring future improper conduct. Since the conditions of a DPA are negotiated with the company, the compliance measures that form part of the agreement are developed collaboratively with and tailored to the specific organization. DPAs also encourage voluntary implementation of remedial measures, which are more likely to have corporate "buy-in" when developed and implemented by the company.

Holding wrongdoers to account

The absence of the DPA tool in the current prosecution regime often negatively impacts innocent third parties, such as employees, shareholders, investors and suppliers. Victim restitution, often part of a DPA, can help reduce the negative effects of corporate misconduct on third parties more quickly than through a restitution order as part of a criminal sentence.

Potential disadvantages

We have considered the arguments against DPAs – the main one being that they may not deter misconduct as they can allow corporations to buy their way out of misconduct through payment of a financial penalty. We believe such fears are overstated and any such risk would be minimized by a robust DPA regime in

which DPAs will be appropriate for certain cases and not others, with prosecutors and courts playing a gatekeeper role. Prosecutors, with the appropriate training and expertise, would have the responsibility to ensure that certain factors and conditions are met which justify a DPA, and to tailor the terms of a DPA to ensure an appropriate level of severity and deterrent effect is achieved in the circumstances. Our recommendations in this regard are discussed further in Sections IV and V.

III. Scope of Offences

Question 2: For which offences do you think DPAs should be available and why?

DPAs should be made available for economic crimes, including both those with domestic and international aspects, committed by corporate entities or other organizations, or by individuals whose crimes are committed on behalf of or in the course of their duties at such entities and organizations. Such crimes include but are not limited to money laundering, corruption, fraud and bribery. It should always be in the discretion of the government prosecutor whether or not to negotiate a DPA or to seek a full prosecution. Once Canada has successfully implemented DPAs for economic crimes, it should consider expanding the regime to include health and environmental crimes and other crimes related to public safety.

DPAs should be available for these types of crimes for a number of reasons. First, they have proven to be an effective tool in other jurisdictions, including the United States and the United Kingdom, whose similar legal systems have often influenced the development of Canadian law. In addition, DPAs have proven effective in dealing with complex economic crimes committed by organizations which are often difficult and costly to prosecute in the traditional trial by jury process. This is particularly the case where elements of additional legal tests regarding the directing minds and other aspects of corporate and vicarious liability are in play. The trials of such complicated offences can go on for many years, in a legal system which is already burdened with delays that have impacted the administration of criminal justice in Canada. This is particularly evidenced by the *R v. Jordan* decision, which has caused many criminal cases to be stayed for no reason other than delay. In circumstances such as these, the Government should consider other means of ensuring that justice is effectively and efficiently served. DPAs are a proven method of doing so.

While DPAs should generally be considered as a viable and readily available tool for economic crimes, they should not be used for crimes related to terrorism or national security, due to the gravity of those crimes. In this manner, the Canadian DPA regime should mirror those of the United States and the United Kingdom, each of which permit DPAs for wide-ranging economic crimes.

IV. Role of the Courts

Question 3: What role do you think the courts should play with respect to DPAs?

The courts should have a supervisory role over DPAs – every DPA should be reviewed and approved by a court before it may be finalized. The Government, with the aid of working groups with expertise as defence counsel, should articulate a clear framework for the involvement of the courts and the particulars of the test for when DPAs are to be approved.

Judges should not be involved with the fact-finding processes underlying the negotiation of a DPA, nor with the negotiation of the DPA. Before a DPA is approved, the court should be satisfied that it is fair, just, reasonable and proportionate in the circumstances. The court should also be satisfied that from the perspective of a reasonable and objective observer, the DPA will not bring the administration of justice into disrepute. The onus should be on the prosecutor to demonstrate that there is a public interest justification. The court has an important gatekeeper role and should be not be seen as a 'rubber stamp'. In this manner, Canada should borrow more from the United Kingdom's regime than from that of the United States.

In deciding whether to approve a DPA, the court should not engage in an inquiry as to whether the offender in question is likely to be found guilty in the traditional trial process, nor should it apply other legal tests outside the scope of the DPA. The court should also refrain from revising the terms or considering the applicability of additional offences which are outside of the scope of the proposed DPA, instead trusting in the prosecutorial discretion conferred on the prosecutor.

In the event of an alleged breach of a DPA, recourse should lie to the court to determine whether or not such a breach has occurred. The impact and consequences of such a breach should be reasonably addressed in each draft DPA, and where a judge does find a breach has occurred, the prosecutor should have the ultimate authority for determining the appropriate remedy for the breach.

It may be appropriate for a judge to provide their views on a draft agreement, particularly with reference to enforceability or impact of the provisions of the DPA, in an effort to pre-emptively address potential issues that may arise if there is in fact a future alleged breach. In this manner, the finalization of a DPA can benefit from the objectivity and expertise of the court. Nonetheless, the DPA should ultimately be subject to the approval of the parties to it – the prosecutor and the organization in question.

In order to ensure that the judges tasked with reviewing DPAs have helpful expertise in the matter, the Government should consider whether to assign these decisions to judges with specific training or expertise, akin to the Commercial List in Toronto.

The use of a robust approval process by the independent judiciary will ensure additional certainty, transparency and public trust in the use of DPAs, which will be vital aspects to ensure the legitimacy of a DPA regime.

V. Conditions for Negotiating a DPA

Questions 4 and 5: What factors should to be taken into account in offering a DPA? When would a DPA not be appropriate?

The factors to be taken into account in offering a DPA should depend upon the circumstances and context of each case. Although general parameters and specific enumerated factors may be helpful, they need to be crafted in a manner that ensures that the prosecutor has sufficient discretion to respond and apply judgment to varied and unique circumstances, with a view to the proper administration of justice and the public interest.

As a general rule, DPAs should not be offered in circumstances where actual prosecution and conviction is unlikely. Rather, a DPA should only be considered when the prosecutor has reasonable grounds, based upon some admissible evidence, to believe that: (i) an accused has committed an offence; and (ii) that a continued investigation would yield further admissible evidence within a reasonable period of time, such that all of the evidence would support a realistic prospect of a conviction for that offence.

Once satisfied that there is a realistic prospect of a conviction, the prosecutor should then turn to a consideration of the public interest. In that regard, the prosecutor should consider relevant factors in assessing whether the public interest is properly served by entering into a DPA rather than prosecuting. These factors may include the following:

- the nature and extent of the misconduct, the culpability of the accused, the harm to the victim, and any significant harm caused to the integrity or confidence of the markets and local or national governments;

- any history of similar conduct or other wrongful conduct (including the history of its directors, partners and majority shareholders, as applicable), whether the alleged conduct is part of established business practices, and the pervasiveness of wrongdoing, including complicity in the wrongdoing by management, officers or directors;

- whether the company had an effective corporate compliance program at the time of the offence or has sought to develop such a program since the alleged conduct, the extent of compliance reforms undertaken, the timeliness and degree of self-reporting, the quality of the internal investigation, and whether cooperation was genuine and timely;

- whether the company is effectively a different entity from that which committed the offences (e.g. was taken over by another organization, no longer operates in the relevant industry or market, or organizational changes, including dismissal of culpable individuals, structures and processes changed to minimise risk of re-offending); and

- whether a conviction is likely to have disproportionate consequences for the company under domestic law or that of another jurisdiction, or collateral effects on the public, the employees, the shareholders or the pension holders of the company.

This list is not intended to be exhaustive, and certain factors may be relevant in one case but of little help in others. Ultimately, the prosecutor must have discretion to consider any factors that may be relevant in the circumstances of each particular case. Nevertheless, a non-exhaustive list of factors to be considered could be formalized in official guidance to prosecutors.

A DPA would not be appropriate where its terms are not fair, just or proportionate in the circumstances, where there is no public policy justification for a DPA in the circumstances, or where its execution would bring the administration of justice into disrepute. In determining the appropriateness of a DPA in each specific circumstance, the range of factors referred to above should be considered.

Examples of circumstances in which a DPA may not be appropriate include, but are not limited to:

- where there is a high likelihood of a successful prosecution in the traditional justice system, such as where it is readily apparent that the crime was directed by a single 'bad apple' who can be prosecuted traditionally and whose removal from their position at the organization can be expected to remedy the misconduct, or where the cooperation of the accused will not be necessary to obtain the evidence required to prosecute the offence;

- where the company has a history of criminal wrongdoing, it appears there is no contrition on the part of the offending organization, or it becomes apparent during the initial negotiation of a DPA that it has no interest in collaborating with the prosecutor;

- where a corporate or organizational entity has previously been warned of the inadequacy of its compliance mechanisms but failed to take the opportunity to remedy their compliance regime, and such remedy could have reasonably been expected to mitigate or prevent the offending conduct, or where previous efforts to prevent economic crimes, including the implementation of a robust and effective compliance department have failed; and

- where an organization has been warned or has previously committed or been accused of an economic crime, whether it was dealt with by a DPA or by a traditional prosecution.

In light of the suggested role of the courts outlined above, it is expected that as DPAs become more widely used, this area of the law would benefit from the development of the common law regarding when DPAs are and are not appropriate, which would provide further direction to future prosecutors.

VI. Content of a DPA

Question 6: What terms should be included in a DPA?

The working group proposed above, comprised of experts in both prosecution and defense of economic crimes, should work to determine an exhaustive list of the mandatory and recommended terms of a DPA. The working group should consider drafting an appropriate precedent DPA which would incorporate those recommendations and act as jumping-off point for negotiations of a DPA, to then be tailored to suit the specific circumstances.

As a preliminary starting point, a DPA should include the following, non-exhaustive terms:

- an agreed statement of facts;
- an acknowledgment of responsibility from the offender;
- the duration of the DPA;
- future steps to be taken in order to bring the offender into compliance, with staggered timelines as appropriate;
- obligation to cooperate with the government to ensure compliance, including to provide names of directing minds, turn over details of any unprivileged internal investigations, and cooperate in the case of any future investigations;
- if appropriate, financial payments including disgorgement, other financial penalties and compensation to victims;
- if appropriate, reimbursement of reasonable investigation and prosecution costs;
- impact and consequences of a breach of the agreement, including recourse to the courts in the event of an alleged breach in order to determine whether any breach has occurred;
- if appropriate, termination of agreement and prosecution of underlying crime in the event of future repeat offences;
- obligation to implement or bolster compliance regimes; and
- if appropriate, appointment of a monitor, timing and extent of monitor's involvement, and payment of monitor's fees.

VII. Duration

Question 7: What factors should be taken into account in setting the duration of a DPA?

While each DPA should have an end date to provide certainty to the public, the prosecutor and the accused, the specific duration should be within the discretion of the prosecutor, based on the circumstances of each particular case. The prosecutor could be guided by the range of the sentence that would be available upon

conviction for the offence in question, with attention to aggravating and mitigating factors, which would be varied and depend on the circumstances of each case.

VIII. Confidentiality and Transparency

Question 8: Under what circumstances should publication be waived or delayed?

Transparency as to process and result should be an underlying principle of any DPA regime. Indeed, public confidence in and the perceived legitimacy of a DPA regime as an appropriate enforcement tool will depend upon such transparency. At the same time, the protection of confidentiality is equally necessary if a DPA regime is to succeed. Confidentiality during the process of negotiation is essential to promote self-reporting and create an effective and meaningful DPA regime.

In the United Kingdom, the prosecutor must publish a DPA once it is approved by the court, along with the court's declaration that the DPA is likely to be in the public interest and that the proposed terms are fair, reasonable and proportionate. Australia, whose DPA regime has not yet been implemented, similarly plans to publish finalized DPAs in full, except in exceptional circumstances. In our view, this general approach is appropriate for Canada. As in the United Kingdom, any preliminary decision by the court should remain confidential as part of the negotiation process. However, such decisions should be published once final approval has been obtained, unless there is some extenuating circumstance which renders disclosure unjust.

In exceptional cases, the court should retain discretion to delay publication where disclosure could substantially risk prejudice to the administration of justice, such as where related proceedings are still ongoing. However, delayed publication should be the exception and not the rule. Moreover, any such delay should be finite, and ultimately publication must occur in order to ensure that public confidence and perceived legitimacy are achieved.

The role of the courts with respect to DPAs is discussed further in Section IV.

IX. Addressing Non-Compliance

Question 9: How should non-compliance be addressed?

To effectively address non-compliance, first there must be an objective process in place to determine whether the company has in fact breached its DPA with the government. Since this is a legal determination, it should be brought before the courts for impartial adjudication. This model is largely borrowed from the United Kingdom, where courts play an important supervisory role in overseeing the implementation of DPAs. Court supervision introduces an element of impartiality, which will enhance public confidence in the process. We prefer this approach to the one taken in the United States, where prosecuting authorities have wide latitude to make determinations on compliance.

When a company is found to have breached a DPA, the court should then defer to the prosecuting authority to determine the appropriate remedy. The appropriate response in each case will depend largely on the specific facts, and will involve a consideration of any mitigating or aggravating factors. Options for addressing non-compliance can include: increasing the fine the company is required to pay; imposing stricter terms regarding monitoring and internal controls; or, in the case of serious breaches, terminating the DPA and proceeding to prosecution.

It is important that the prosecuting authority have discretion to amend the DPA in order to fashion an appropriate response to a breach. For instance, where a company has a history of non-compliance, the

prosecuting authority may decide to amend the DPA to include the implementation of a robust monitoring system, as described further below in Section XI.

Therefore, the approach we propose entrusts the court with the legal determination as to whether a DPA has been breached, and the prosecution with determinations as to the appropriate response – consistent with the United Kingdom's approach.

X. Potential Use in Court of DPA Negotiation Material

Question 10: When should facts disclosed during DPA negotiations be admissible in a prosecution against a company?

Once negotiations have commenced, it may be appropriate to extend to the accused certain procedural protections with respect to confidentiality. In this regard, Canada would benefit from a careful consideration of the balance struck in the United Kingdom's regime. In particular, when a prosecutor initiates discussions with respect to negotiations that could lead to a DPA, the prosecutor is required to undertake to protect the facts provided by the accused during the course of negotiations. Nevertheless, in certain circumstances it may be necessary and appropriate to use certain facts disclosed during such negotiations in a prosecution against that company, including in the context of a prosecution for breach of a DPA, a prosecution following negotiations which do not result in a DPA, or a prosecution for other offences.

This approach would allow individuals and entities who qualify for a DPA to candidly enter negotiations without fear that sensitive facts will be used in a manner contrary to their intention and understanding at the time of disclosure, except in reasonable circumstances which are known to them at the outset.

Prosecution for breach of a DPA

Following successful negotiations, a company would be required to agree to a statement of facts and the content and meaning of key documents to support those facts, which together would support a finding of guilt (although no admission of guilt should be required). In the event that the company is prosecuted due to a breach of the DPA (as found by the court, discussed above), the content of the statement of facts and confirmation with respect to key documents will be sufficient to support a finding of guilt. Therefore, any other facts disclosed during DPA negotiations should not be necessary to support a prosecution.

Nevertheless, in the event that other facts disclosed during negotiations are useful, they may be admissible in a prosecution against the company. Such disclosed facts, however, cannot be relied upon as admissions. The two circumstances in which such facts may be particularly relevant are: (i) to prove perjury; and (ii) to impeach subsequent testimony.

Prosecution following inconclusive negotiations / other offences

In the event that the company is prosecuted after a DPA was not concluded or approved, or for other offences, there will be no agreed statement of facts or confirmation with respect to key documents to support a finding of guilt. As a result, the facts disclosed during negotiations may be necessary to support a finding of guilt, and thus may be admissible in a prosecution against the company.

However, as a general rule, materials which show that the accused entered into negotiations for a DPA (such as a draft DPA or a draft statement of facts) and materials created solely for the purpose of preparing the DPA statement of facts should not be admissible due to their highly prejudicial effect. Two exceptions to this rule may be where such materials are used: (i) to prove perjury; and (ii) to impeach subsequent testimony.

XI. Monitoring Compliance

Questions 11 and 12: How should compliance monitors be selected and governed? What use should be made of compliance monitoring reports?

There is no one-size-fits-all approach to compliance monitoring. The tools must be tailored to the specific circumstances and the company involved. Canada's DPA regime should have sufficient flexibility to allow for an appropriate method for compliance monitoring to be applied, consisting of a combination of one or more of the following: (1) terms in the DPA which require enhancement of internal controls, training or other measures to ensure future compliance; (2) in appropriate cases, appointment of an independent compliance monitor; and (3) judicial involvement when non-compliance is alleged. It is important that the prosecutorial team negotiating and monitoring DPAs has the necessary expertise to determine which of these compliance monitoring tools is appropriate in any given case.

Specialized prosecutorial team

In our view, effective monitoring and enforcement of DPAs will be dependent on the creation of a well-trained and consistently skilled prosecutorial team consisting of personnel with expertise in corporate crime and the negotiation and monitoring of DPAs. The team should have the skills necessary to effectively assess risk and appropriately tailor compliance monitoring measures.

Enhanced internal controls and policies

One of the key benefits of DPAs is that they facilitate and encourage corporations to evolve and grow from within – by enhancing internal controls, strengthening corporate policies, and improving corporate culture. In some cases, wrongdoing is discovered precisely because of effective internal controls and an effective whistle-blower policy. It would be inappropriate in those cases to impose a third party facilitator to take over supervision and monitoring of compliance with a DPA.

In other cases, where the wrongdoing is a result of the breakdown of internal controls or inadequate corporate policies and compliance regimes, it may be appropriate to require consultation with or appointment of a third party to assist with the establishment and monitoring of enhancement measures.

Independent monitors

In some jurisdictions, including Australia and the United States, DPAs require (or will require) defendant companies to implement or improve a compliance program under the supervision of an independent monitor ("**IM**") as a neutral third-party facilitator. The role of IMs – and their effectiveness – vary widely depending on the context. There is no research evidence or indication that DPAs using IMs are more effective at achieving corporate reform than DPAs not using IMs. In any case, corporate reform is a necessary result of a DPA, whether or not an IM has been enlisted.

In the United States, some of the tasks that IMs have been mandated to perform under DPAs include: overseeing the implementation of new and enhanced compliance and ethics programs; overseeing business activity restrictions; hiring and firing specific personnel, including board members and managers; training some or all employees responsible for compliance; conducting investigate interviews with employees; and approving or amending company strategic plans.

In performance of their duties, IMs are typically granted virtually unlimited access to business information and personnel. In the United States, courts have called for a broad reading of the jurisdiction, powers and oversight authority and duties granted to IMs. Failing to cooperate with an IM is often explicit grounds for

terminating a DPA, resulting in a subsequent criminal prosecution. From 1993 to 2013, approximately 45% of the DPAs issued in the United States enlisted the use of an IM. The number of DPAs using IMs peaked in 2007 and has steadily decreased since. In place of IMs, most DPAs simply require that defendants report their compliance improvements directly to the prosecuting authority that issued the DPA, usually being the Department of Justice.

In cases where the specialized prosecutorial team deems it appropriate, it could require that an independent monitoring system be established. In these cases, it is important that the terms of such engagement are agreed to in advance and that the IM's role balances the need for effective oversight while providing the organization with the appropriate autonomy to run its business and not incur disproportionate costs. It is also important that the organization be able to choose a suitable IM that possesses the necessary expertise to assist with the process.

XII. Victim Compensation

Question 13: Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

Victim compensation will often be an appropriate feature of a DPA. One possible exception could be where the accused would become insolvent if full victim compensation were provided. Even in those circumstances, however, creative arrangements should be made to ensure that victims are made whole.

The *Criminal Code* allows for restitution of readily ascertainable losses following a conviction, and broader victim compensation for certain criminal injuries is a matter addressed to varying extents by provincial legislation. Although, those who comply with a DPA would not be formally convicted, they should nevertheless be required to pay restitution as a general principle.

Given the nature of certain economic crimes, the victim may not be obviously identifiable, or may be a broader group (such as employees, competitors, or citizens of another country). Where it is difficult to determine how payments should be calculated, apportioned, or paid, increased fines, or donations to appropriate charities / funds may be appropriate.

XIII. Conclusion

We thank you for the opportunity to provide our comments. We look forward to providing our further comments on the specific elements of the new DPA regime, and would be pleased to provide additional input or assistance in the development of the legal framework for the regime.

We would be pleased to meet to discuss any of our comments, and to contribute in any way we can to the ongoing debates and discussions as you work to implement this important tool.

Yours very truly,

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Re: DPA Consultation

With lawyers having experience on both the defense and prosecutorial sides of the courtroom, McMillan LLP shares the following experience and insight with the hope that the Government of Canada (the "Government") will adopt deferred prosecution agreements (DPAs) as a new prosecutorial tool, but also that it will consider adopting other valuable alternative prosecution tools that can be used alongside DPAs to create a true "toolkit" of alternatives to traditional prosecution for corporate crime.

Indeed, looking at DPAs alone offers an incomplete picture of the ways in which corporate wrongdoing could be better addressed in Canada.

If we turn our attention to our neighbors to the South, we notice that American prosecutors have several alternatives to traditional prosecution at their disposal. Deferred prosecution agreements and non-prosecution agreements ("N/DPAs") are better known examples, but other tools also exist, such as declination letters used in the enforcement of the *Foreign Corrupt Practices Act of 1977* ("FCPA")[1]. Each of these tools offers American prosecutors the opportunity to better address each unique situation they face and overall, better serve the public interest with regard to addressing corporate criminal liability.

It is worth noting that in Canada, under section 34(2) of the *Competition Act*, a criminal court may already issue what is a known as a "prohibition order" against a person that "has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence". Similar to N/DPAs, prohibition orders issued under section 34(2) provide, *inter alia*, that an organization will be forbidden from committing further offences and that in exchange no criminal conviction will be sought. Certain prohibition orders have

[1] 15 U.S.C. § 78dd-1, et seq.

included conditions akin to those of N/DPAs, such as the disclosure of documents and information, the payment of a sum for the government's investigation costs, restitution and the implementation of compliance programs to prevent future offences. Though prohibition orders have seldom been used recently, they can be considered as an alternative prosecution tool that is already part of the "toolkit" to address corporate wrongdoing.

Throughout this submission, we refer to as "alternative prosecution tools" the various tool mentioned in the previous paragraphs and which are briefly summarized below. We suggest that the Government should consider reviewing these tools as a whole. The United States Department of Justice ("DOJ") has sometimes used "pilot projects" in order to test, control and evaluate the introduction of such new tools. We are of the opinion that the Government could emulate this approach for the introduction of such alternative prosecution tools.

Deferred Prosecution Agreements (DPAs)

A DPA is a formal written agreement between the accused and the prosecution. Pursuant to a DPA, the alleged offender promises to cease all illicit behaviour and agrees to cooperate and comply with a set of compliance terms in exchange of which prosecutors agree to suspend or defer prosecution against the accused. DPAs most often require an admission of guilt and the payment of a financial penalty by the accused. In some cases, an independent corporate monitor may be appointed to oversee and ensure the alleged offender's compliance with the terms of the DPA. If the accused breaches the terms of the DPA, prosecutors have the option to revive charges against the accused and proceed with the criminal prosecution that had been suspended. In such cases, the admission of guilt of the accused under the DPA can allow for accelerated proceedings and a prompt conviction.

Non-Prosecution Agreements (NPAs)

An NPA is also a formal written agreement between the accused and the prosecution. Largely similar to DPAs, NPAs differ in that they require no intervention from the courts, which ultimately gives even more discretion to prosecutors. Under the NPA process, charges are only filed if the alleged offender contravenes the conditions of the agreement. Ultimately, NPAs offer an even lighter administrative load, since they do not need to be processed by the court system.

Declination Letters

Declination letters have only been recently introduced in the Unites States, with the pilot project overseeing their introduction having been implemented by the DOJ in April 2016 for one year and extended in April of this year. Declination letters are meant to encourage voluntary disclosure of offences and cooperation with the authorities. When the organization meets the disclosure, cooperation and remediation standards of the declination letter program, prosecutors will consider declining criminal prosecution against the organization pursuant to the "declination letter", provided that the organization has also disgorged all profits from the violations.[2]

Considering this broader context, McMillan LLP offers the following comments.

[2] For more on the declination letters and the American DOJ pilot project, please refer to the following McMillan LLP bulletin.

Question 1 In your view, what are the key advantages and disadvantages of DPAs as a tool for addressing corporate criminal liability in Canada?

Alternative prosecution tools can offer several advantages over criminal trials in certain circumstances. Criminal trials can be very costly and time consuming to the state, and there is no guarantee that the prosecution will be able to meet the criminal burden of proof to obtain a conviction. Moreover, given the direct and indirect consequences of a conviction, indicted organizations are unlikely to fully cooperate with prosecutors, which might make it more difficult to obtain a conviction against them and their officers. Aside from substantial fines, a criminal conviction can notably result in a bar from governmental procurement contracts and significant reputational damage for organizations, and publicly held corporations can see their stock price drop significantly. Also, where an organization is convicted, uninvolved and innocent parties, such as shareholders and employees, are likely to suffer negative indirect impacts resulting from such conviction.

Plea agreements may be entered into between Crown and defence counsel in Canada, but these do not prevent the conviction of the organization and the negative consequences that derive from it, and do not present the enforcement advantages of alternative prosecution tools, as organizations may be less inclined to voluntarily self disclose the wrongdoing of their employees, officers and agents absent the possibility of fully avoiding criminal conviction.

Therefore, we argue that alternative prosecution tools are efficient in that they enhance enforcement by encouraging organizations to disclose offences which might not otherwise have been detected and to cooperate fully with prosecutors, while avoiding most of the negative collateral consequences that usually arise from the conviction of an organization. This disclosure and cooperation notably allow prosecutors to better identify individuals who were actively involved in the perpetration of the offences in questions, and to subsequently obtain convictions against them.

Overall, alternative prosecution tools are designed to prompt organizations to (i) voluntarily self-disclose the occurrence of offences, (ii) fully cooperate with prosecutors to provide evidence against the culpable individuals, and (iii) to remediate. Organizations are also usually required to disgorge any ill-gotten profits. Arguably, by doing so, alternative prosecution tools are able to meet the objectives of criminal law by punishing and rehabilitating offending organizations.

Question 2 For which offences do you think DPAs should be available and why?

Alternative prosecution tools should be available for a broad range of economic offences committed by organizations, including fraud, corruption of foreign public official, antitrust and competition offences.

We suggest that the offences listed in section 6 of Public Works and Government Services Canada (PWGSC)'s *Ineligibility an Suspension Policy* and in Schedule I of the Quebec *Act respecting contracting by public bodies*[3] could offer the Government good examples of economic offences for which alternative prosecution tools should be opened, as such offences may result in organizations being barred from the federal and provincial governments' public procurement processes.

For the reasons discussed under Question 1, we are of the opinion that alternative prosecution tools should be available to organizations for any offence which may result in the organization being barred from participating in governmental procurement.

Question 3 What role do you think the courts should play with respect to DPAs?

The Government should follow the U.S approach of limited intervention of the courts, rather than the U.K. approach.

Limited involvement of the courts will ensure that prosecutors have the discretion they need to reach agreements best suited to each situation, in an efficient and cost effective manner. Moreover, the courts being generally overburden in Canada do not need any additional work.

Question 4 What factors should be taken into account in offering a DPA?

Alternative prosecution tools do not represent a "free pass" for organizations. Rather they offer solutions better adapted to the reality of organizations, while also ensuring better prospects of prosecuting the guilty individuals within organizations.

The choice of prosecutors to use alternative prosecution tools should always be based on the public interest. In that regard, we offer the following considerations regarding (i) the choice of prosecutors to prosecute or not, (ii) the factors to consider and (iii) the eligibility criteria for organizations.

The choice of prosecutors: the PPSC Deskbook prosecution "test"

The Public Prosecution Service of Canada Deskbook ("PPSC Deskbook") indicates that prosecutors should consider a twofold test when deciding whether to prosecute or not.

The prosecutor must first ask, "**Is there is a reasonable prospect of conviction based on evidence that is likely to be available at trial?**"

If there is not, then no charge should be laid and recourse to an alternative prosecution tool is not appropriate.

[3] chapter C-65.1.

If there is, prosecutors must then ask **"would a prosecution best serve the public interest?"**

Again if it is not, no charge should be laid and recourse to an alternative prosecution tool is not appropriate.

As it is, the test affords prosecutors only the choice of full prosecution or nothing at all. In this context, alternative prosecution tools should be envisioned as the third element to the PPSC's Deskbook prosecution test, where organizations are concerned.

For example, if after asking "is there is a reasonable prospect of conviction based on evidence that is likely to be available at trial" and "would a prosecution best serve the public interest", the prosecutor's answer is "yes", then prosecutors should also have to ask themselves, when considering criminal proceedings against an organization, "could the use of an alternative prosecution tool best serve the public interest?"

Depending on the facts of each case, and for all the reasons discussed under Question 1, the answer may very well be "yes", in which case an alternative prosecution tool should be used.

Factors to consider

When determining whether or not the public interest would be best served by having recourse to an alternative prosecution tool, prosecutors should refer to the same factors considered when evaluating whether a prosecution would best serve the public interest. These factors include the level of culpability and circumstances of the accused, the nature of the harm caused by or the consequences of the alleged offence, confidence in the administration of justice (including "[w]hether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive"), and the impact of prosecution on employees and others innocent of any misconduct.

The *Criminal Code*[4] offers a series of sentencing principles[5] applicable to organizations, which can also provide useful guidelines for prosecutors when electing to use an alternative prosecution tool.

For instance, when evaluating whether or not an alternative prosecution tool might be appropriate in a given situation, prosecutors could take into consideration the following factors outlined in Section 718.21 of the *Criminal Code*:

- the impact that prosecution and an eventual sentence would have on the economic viability of the organization and the continued employment of its employees;

[4] R.S.C., 1985, c. C-46.
[5] S. 718.21.

- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organization in respect of the conduct that formed the basis of the offence;
- any penalty imposed by the organization on a representative for their role in the commission of the offence;
- any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Eligibility Criteria

One of the great benefits of alternative prosecution tools is the idea that they might promote self-reporting by organizations. What behaviour should we then expect from organizations requesting the benefit of an alternative prosecution tool?

We suggest three eligibility criteria that should be upheld before and throughout any alternative prosecution process:

1. First, the fact than an organization voluntarily self-discloses the misconduct or offence should greatly militate in favour of the use of an alternative prosecution tool. This step permits the identification of organizations whose offences may have otherwise fallen under the radar, and allows law enforcement agencies to save resources spent in the detection of such wrongdoing.

2. Second, the organization must fully and proactively cooperate with prosecutors throughout the entire alternative prosecution process, on a timely basis.

3. Third, the organization must appropriately remediate. This includes, notably, the implementation of an effective compliance and ethics program and appropriate discipline of employees, including those involved in the violations. The organization would also be expected to disgorge all profits stemming from the violations.

Failure to cooperate or to remediate should be considered a default under the terms of the N/DPAs, declination letters or prohibition orders.

Question 5 When would a DPA not be appropriate?

Alternative prosecution tool would not be appropriate when there is no reasonable prospect of conviction and/or when a prosecution would not best serve the public interest.

Question 6 What terms should be included in a DPA?

There is no limited set of terms that should be available to prosecutors to include when negotiating an alternative prosecution agreement. If these tools are to be truly adaptable to the endless number of situation that may arise, it would be counterproductive to try and impose pre-established terms.

That being said, the following terms should be considered and could be included in alternative prosecution agreements depending on the circumstances:

- admit to facts that would constitute the offence and to provide full and accurate representations throughout the alternative prosecution process;
- agree to implement measures to ensure future compliance and to prevent further misconduct, which may include enhancing internal controls and providing training to employees;
- recover profits from the misconduct, compensate victims in the form of anticipated restitution, garnish executives' wages and bonuses;
- pay a monetary penalty in an amount proportionate to the seriousness of the facts of the offense; and
- reimbursement of the cost of the investigation.

Question 7 What factors should be taken into account in setting the duration of a DPA

The duration of an alternative prosecution agreement should be the same as that of a probation order pursuant to section 732.2 of the *Criminal Code*. Such agreements should have terms of no more than three years.

Question 8 Under what circumstances should publication be waived or delayed?

Publication should only be delayed in cases where publication would compromise the administration of justice; and it should only be waived in cases where the consequences of the publication would be disproportionately harsh.

Question 9 How should non-compliance be addressed?

Non-compliance should be addressed first with the opportunity to cure the non-compliance within a reasonable delay. If the event of non-compliance is beyond the organization's control, the agreement existing between the organization and prosecutors should be reviewed in order to see if it is possible to adapt it better to the organization's situation.

If non-compliance persists or is deliberate, then prosecutors should have the ability to terminate the agreement and elect whether to pursue a criminal prosecution.

Question 10 When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

The agreed statement of facts necessarily included in any alternative prosecution agreement should be admissible in subsequent prosecution against the organization.

Question 11 How should compliance monitors be selected and governed?

PWGSC's *Ineligibility an Suspension Policy*, referred to in a previous answer, provides for the appointment of an independent and qualified third party[6] to monitor the activities of a given "supplier" and periodically report to PWGSC as part of the *Ineligibility an Suspension Policy*'s "administrative agreement"[7] program.

The procedure could be emulated for the nomination of compliance monitors as part of the implementation of alternative prosecution agreements for organizations.

Question 12 What use should be made of compliance monitoring reports

We are of the view that these reports should remain confidential, notably to ensure the protection of the legitimate economic interests of organizations.

Question 13 Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

Organizations should be expected to disgorge any profits resulting from the violations perpetrated. Yet, it is unclear that victim compensation would not be better left to civil suits, such as class actions. Civil courts might indeed be better suited to evaluate damages and properly compensate victims.

Any admission of facts obtained as part of the alternative prosecution process could be considered and used in a civil court.

Yours truly,

Guy Pinsonnault

[6] S. 18.
[7] S. 14.

Baker McKenzie

Response to Government of Canada
Deferred Prosecution Agreement Consultation

This submission has been prepared in response to the Government of Canada's Deferred Prosecution Agreement (DPA) consultation. We support the expansion of Canada's toolkit to address corporate wrongdoing through the implementation of a DPA scheme.

Baker McKenzie operates in 47 markets around the world across 77 offices. We have deep experience with government enforcement actions in multiple jurisdictions, including matters resolved through DPAs. Over the past few years, we have written and spoken on this topic in a variety of venues and publications (see: here, here, and here). We are pleased to be able to provide this submission.

Consideration 1: Usefulness of deferred prosecution agreements as part of the Canadian criminal justice system

Question 1

In your view, what are the key advantages and disadvantages of DPAs as a tool for addressing corporate criminal liability in Canada?

It is our view that DPAs with judicial oversight would be an important option for Canadian prosecutors in their efforts to combat corporate criminal conduct. Permitting DPAs in the right circumstance helps avoid the collateral damage often associated with a corporate criminal conviction for innocent employees, and suppliers and, potentially, the wider industry, while at the same time enabling prosecutors to ensure strict compliance and restitution measures are put in place to reduce the risk of a repeat of the relevant conduct and to target the individuals responsible for the misconduct.

A DPA system also encourages self-reporting by corporations who discover wrongful conduct in their operations by providing an alternative to a full criminal prosecution that is available to companies who come forward to report wrongdoing and remediate the source and impact of the misconduct. The presence of a DPA system incentivizes companies are to regularly assess their compliance programs and to institute risk mapping and appropriate procedures, including conducting adequate due diligence on business partners and training of employees and third parties.

At present, corporate governance leaders have little incentive in Canada to report misconduct to the proper authorities. If they do so, the primary option available to the authorities would be to charge and prosecute the offending corporation, which could lead to a conviction and debarment. While it is theoretically possible that an organization could currently self-report in the absence of a DPA system and then seek a declination from the prosecuting authority, it is highly unlikely to occur and would only ever be applied unevenly if done on an ad hoc basis. Arguably, the lack of a formal DPA process, particularly as global enforcement become more commonplace, provides a perverse incentive for corporate leadership to cover up and conceal misconduct once discovered.

The introduction of a DPA system in Canada would help resolve these issues by incentivizing self-reporting, remediation, and compliance, while at the same time removing the burden on the RCMP and Canada's Public Prosecution Service to conduct lengthy, complex corporate criminal trials at a particularly challenging time for criminal justice resources (see *R. v. Jordan*). Such a system is not completely foreign to Canadian regulators or businesses given a similar regime already exists for antitrust violations under the Competition Bureau's Leniency Program.

In addition, a just and effective system would return hefty fines paid by corporate wrongdoers to public coffers. A DPA program would also bring Canada in line with key trading partners, which have already determined that such a system is preferable to a system with no flexibility, in what is becoming an increasingly globalized investigation, enforcement and settlement arena. As other developed nations move toward promoting self-reporting and compliance through DPAs, to the extent a Canadian company considers self-reporting in another jurisdiction, then the company will likely need to self-report in Canada. In these circumstances, in Canada the company gets no benefit for turning itself in, and, in this way, the current Canadian system may undermine the efforts of other non-Canadian government enforcement authorities to promote self-reporting and cooperation by corporate governance leaders.

Under a strictly operated DPA regime, enforcement authorities gain the benefit of internal investigations that are funded by industry and disclosed voluntarily, which saves significant government resources and brings to light misconduct that would likely otherwise never become public.

Consideration 2: Scope of offences

Question 2

For which offences do you think DPAs should be available and why?

Canada should follow the UK model and only allow DPAs for certain enumerated commercial offences. These offences should be primarily economic in nature such as bribery, fraud and money laundering. DPAs should only available to corporate entities, partnerships or unincorporated associations.

Adopting a similar approach in Canada and limiting DPAs to white-collar crime is aligned with the goal of incentivizing the implementation of robust organizational compliance mechanisms. The Australian DPA consultation considered whether DPAs should be available for other crimes (such as environmental crime, tax offences and competition offences). However, a limited scope is likely an appropriate starting place for the Canadian regime.

Consideration 3: Role of the courts

Question 3

What role do you think the courts should play with respect to DPAs?

Canada should follow the UK model and require an active role for the judiciary in the DPA process. Despite some clear successes in terms of enforcement and the promotion of internal compliance and ethics, the US DPA system, with its lack of judicial oversight, is open to criticism for either allowing corporations off too easily in non-transparent resolutions with prosecutors, or alternatively allowing prosecutors to become "judge, jury and executioner" over an organization's fate, the former of which creates public scepticism due to the perceived lack of transparency and independent oversight. The UK system, however, blunts these criticisms by requiring a judge to review any potential DPA arrangement to ensure that it is in the public interest and that its terms are fair, reasonable, and proportionate. Specific judges with expertise in the area of corporate crime are appointed in the UK to deal with DPAs. Specifics

pertaining to the test for judicial approval are set out below in response to Consideration 4. Ultimately, the courts should have a robust role in any Canadian DPA process, providing essential oversight and final approval to any proposed DPA.

Consideration 4: Conditions for negotiating a deferred prosecution agreement

Question 4

What factors should be taken into account in offering a DPA?

Question 5

When would a DPA not be appropriate?

DPAs should only be available to corporate entities, partnerships or unincorporated associations – they should not be offered to individuals. In the UK only certain proscribed prosecutors have the power to enter into DPAs. It may be appropriate to similarly designate a specific Crown unit to be responsible for DPAs in Canada. The power to initiate the DPA process should rest with a senior member of the Crown, not an individual trial Crown. The senior Crown would be responsible for inviting a company to enter into DPA negotiations.

We recommend closely following the UK legislation and guidance, which sets out a clear process that must be followed for a DPA to be agreed. First, the relevant prosecution authority must be satisfied that both conditions of a two-part test are satisfied: (a) an evidential test; and (b) a public interest test. If both conditions are satisfied, then the prosecutor may invite the company that is the subject of a criminal investigation to enter into negotiations for a DPA.

After negotiations have begun between the prosecutor and organization, the prosecutor must apply to the Court, in private, for a declaration that entering into a DPA is likely to be in the interests of justice and that the proposed terms are "fair, reasonable and proportionate." In the event that such a declaration is made by the Court, a formal agreement can then be reached between the prosecutor and the corporation. A public hearing is then necessary for the court to declare that the agreement is in the interests of justice and that the terms (no longer proposed, but agreed) are fair, reasonable and proportionate. The DPA becomes effective once it has been approved at the public hearing. The Canadian Government should consider implementing a similar system for judicial oversight of DPAs

The UK DPA Code of Practice sets out a list of public interest factors to be assessed when deciding whether a DPA should be offered. These factors are instructive and should be considered in developing the Canadian regime. The UK public interest factors include:

- A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against the organization and/or its directors/partners and/or majority shareholders).
- The conduct alleged is part of the established business practices of the organization.

- The offence was committed at a time when the organization had no or an ineffective corporate compliance program and it has not been able to demonstrate a significant improvement in its compliance program since then.
- The organization has been previously subject to warnings, sanctions or criminal charges and has failed to take adequate action to prevent unlawful conduct, or continued to engage in the conduct.
- Failure to notify the authorities of the wrongdoing within a reasonable time of the offending conduct coming to light.
- Reporting the wrongdoing but failing to verify it, or reporting it knowing or believing the report to be inaccurate, misleading or incomplete.
- Whether a significant level of harm was caused directly or indirectly to the victims of the wrongdoing or if there has been a substantial adverse impact to the integrity or confidence of markets, or governments.

The UK DPA Code of Practice also lists a number of additional public interest factors which militate against prosecution:

- Considerable weight may be given to a genuinely proactive, co-operative approach adopted by the organization's management team when the offending is brought to their attention. Considerations may include whether the conduct was reported within a reasonable time of the offending coming to light; whether the organization's offending was otherwise unknown to the prosecutor; and whether the organization has taken remedial actions including, where appropriate, compensating victims.
- A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the organization and/or its directors/partners and/or majority shareholders.
- The existence of a proactive corporate compliance program both at the time of offending and at the time of reporting but which failed to be effective in this instance.
- The offending represents isolated actions by individuals, for example by a rogue director.
- The offending is not recent and the organization in its current form is effectively a different entity from that which committed the offences – for example it has been taken over by another organization, it no longer operates in the relevant industry or market, the organization's management team has completely changed, disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending.
- A conviction is likely to have disproportionate consequences for the organization, under domestic law or the law of another jurisdiction, bearing in mind the seriousness of the offence and any other relevant public interest factors.

While there is a good amount of overlap with the factors listed above, it would also be appropriate to look to factors considered in the Criminal Code sentencing context to determine whether a DPA would be appropriate. One final consideration is the extent of any potential collateral effect of a conviction on blameless third parties.

A DPA would be inappropriate on a high standard where the underlying conduct is so particularly egregious and the corporation involved has failed to adequately respond and take remedial action, including terminating responsible individuals, and to cooperate with the investigating authorities, such that it would be counter to public interest and bring the administration of justice into disrepute.

Consideration 5: Potential deferred prosecution agreement terms

Question 6

What terms should be included in a DPA?

Question 7

What factors should be taken into account in setting the duration of a DPA?

Allowing for a wide range of potential DPA terms will give the Crown and corporate entities the flexibility to craft individualized, tailored DPAs. The terms of a DPA may relate to duration, financial penalties, agreed facts, monitoring, remediation, and co-operation with the investigations and trials of individuals or organizations. The terms of a DPA should be assessed on a case-by-case basis.

The terms should set the scope of the DPA, providing recourse for the Crown where an organization provides inaccurate, misleading or incomplete information, and setting continuing disclosure obligations to for the organization. The following types of terms may also be appropriate to include in a DPA:

- the payment of the reasonable costs of the Crown;
- prohibiting the organization from engaging in certain activities;
- financial reporting obligations;
- a mandatory compliance or monitoring program;
- co-operation with sector wide investigations.

Under a DPA, criminal charges against a corporation are held in abeyance for a set period of time during which a corporate accused is expected to comply with probation-like terms, such those listed above. If the corporation complies with the terms of the DPA, upon expiry, the charges would be withdrawn. The length of a DPA will need to be sufficient to be capable of permitting compliance with terms such as financial penalties paid in instalments, monitoring and co-operation with the investigations and trials into individuals. It may be appropriate to refer to existing sentencing principles to inform a determination of the duration of a DPA.

Consideration 6: Publication

Question 8

Under what circumstances should publication be waived or delayed?

If the DPA is reached and finally approved, then the DPA (including the statement of facts) and the relevant judgment approving the DPA should generally made public after the final hearing. In that way, the entirety of the process becomes public and transparent, enhancing the goal of ensuring that justice be seen to be done in these cases. In the UK, under certain circumstances, the prosecutor may publish orders made in relation to a DPA on its website. Additionally, prosecutors are required to publish a report where a breach of the DPA has occurred. However, it may be appropriate to establish a procedure for obtaining publication bans where such an order would be in the public interest, or where publication might create a substantial risk of prejudice to the administration of justice.

In the UK immediate publication may be prevented by an order that postponement is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings. The option for such publication bans may help to mitigate reputational risks and the economic impacts flowing from concerns of a public prosecution. This publication ban may be lifted when the risks of publication subside. In general, publication and transparency should be encouraged.

Consideration 7: Process of addressing non-compliance

Question 9

How should non-compliance be addressed?

The breach of a DPA should be addressed both through the overarching legislative regime, as well as through the specific terms of each individual DPA. While there should be a measure of freedom for the parties to decide what constitutes a breach, and to address non-compliance, judicial oversight will provide a useful means for assessing whether a breach has occurred. These submissions support the adoption of a model similar to the UK process for addressing breach of a DPA, as described below.

The UK DPA Code sets a process for determining whether a breach has occurred and the process for termination of the agreement following a breach. if, prior to the expiry of the DPA, it is believed that the organization has breached the agreement, where possible the prosecutor should ask the organization to rectify the alleged breach immediately. Where the breach is minor, it may be possible to reach a solution without the need for judicial intervention. The prosecutor will nevertheless still be required to publish details of the breach. If the parties cannot find a way to resolve the issue, the prosecutor may apply to the court to seek a finding that the organization is in breach of the agreement, and seek an appropriate remedy. Where the court finds that a breach has occurred, it may ask the parties to determine an appropriate remedy. The court may approve a variation of the agreement proposed by the parties, so long as the variation meets the interests of justice, and the fair, reasonable, and proportionate tests.

Variation of a DPA may also be necessary where a breach has not yet occurred, but is likely to without a variation of the agreement. The UK courts use a foreseeability test to determine whether the situation is one where a variation should be allowed. The bar for variation should be set high to help maintain public confidence in the process and ensure that DPAs are not effectively subject to constant renegotiation.

Where a more serious breach has occurred and the parties cannot agree on an appropriate remedy, the court may order that the DPA be terminated. Where a court orders the termination of a DPA, the agreement will cease to have effect and the prosecutor may apply to resume the prosecution of the organization. An organization that has failed to comply with the terms of a DPA is not entitled to the return of moneys paid under the DPA.

Consideration 8: Potential use in court of deferred prosecution agreement negotiation material

Question 10

When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

An appropriate balance must be struck between encouraging parties to negotiate freely, and the risk that the organization may attempt to enter into a DPA on the basis of inaccurate, misleading or incomplete information. Appropriate evidentiary rules for the use of negotiations materials will need to reflect the choices made regarding the procedure to be followed in entering into DPAs. One consideration worth noting is the Crown's disclosure obligations, which may require disclosure in related proceedings of documents and information obtained through the DPA process.

The UK model provides a mechanism for the prosecutor to commence new proceedings against an organization where the organization attempted to induce the prosecutor to enter into a DPA on the basis of inaccurate, misleading or incomplete information. Where the DPA has been approved by the court, the UK model allows the statement of facts contained in the DPA to be used in subsequent criminal proceedings as admitted. The use of this statement is limited where the DPA has not been concluded.

Materials other than draft DPAs and agreed statements of fact may also be used in subsequent proceedings – this includes:

- pre-existing contemporary key documentation such as contracts, accounting records including payments of any kind, any records evidencing the transfer of money, emails or other communications etc. provided to the prosecutor by the organization;
- any internal or independent investigation report carried out by the organization and disclosed to the prosecutor prior to the DPA negotiation period commencing;
- any interview note or witness statement obtained from an employee of the organization and disclosed to the prosecutor prior to the DPA negotiation period commencing;

- any document obtained by the prosecutor at any time obtained from any source other than the organization; and
- any information obtained by the prosecutor as a result of enquiries made as a result of information provided by the organization at any time.

Consideration 9: Compliance monitoring

Question 11

How should compliance monitors be selected and governed?

Question 12

What use should be made of compliance monitoring reports?

Imposing a neutral compliance monitor as a term of a DPA will help to ensure that the terms of the agreement are followed, and that the goals of DPAs are advanced. One suggested consideration for entering a DPA is whether the organization has implemented its own corporate compliance program. The costs of imposing a monitor should be born by the organization. The monitor will be responsible for assessing and reporting on the organizations internal controls, to ensure that the necessary changes are being made to reduce the risk of future harmful conduct. The monitor should have complete access to the business throughout the duration of the appointment period. The DPA regime should address the issue of legal privilege where a monitor has been appointed. Given the monitor's position of power, and the organization's responsibility to pay the costs of the monitor, it may be appropriate to allow the organization to give some input into the selection of the monitor. The appointment of a monitor should be approached with care and should reflect the specific factual circumstances of each individual case.

The UK model allows the organization to suggest three potential monitors along with details of appropriate qualifications, specialized knowledge and experience, relevant associations that may raise issues pertaining to conflicts of interest, and an estimate of the costs of the monitorship. Where the prosecutor, or the court, finds that a given monitor is inappropriate, they may reject the proposed appointment.

It may be appropriate to set out additional guidelines for selection of a monitor in the terms of the DPA. The DPA may also address the duration of the appointment, options for the termination or suspension of a monitor's appointment where the monitor is satisfied with the organization's progress, or, in the opposite situation, a mechanism to extend the duration of the appointment.

Additional DPA terms pertaining to a monitor may include:

- a code of conduct;
- an appropriate training and education program;
- internal procedures for reporting conduct issues which enable officers and employees to report issues in a safe and confidential manner;

- processes for identifying key strategic risk areas;
- reasonable safeguards to approve the appointment of representatives and payment of commissions;
- a gifts and hospitality policy;
- reasonable procedures for undertaking due diligence on potential projects, acquisitions, business partners, agents, representatives, distributors, sub-contractors and suppliers;
- procurement procedures which minimise the opportunity of misconduct;
- contract terms between P and its business partners, subcontractors, distributors, and suppliers include express contractual obligations and remedies in relation to misconduct;
- internal management and audit processes which include reasonable controls against misconduct where appropriate;
- policies and processes in all of its subsidiaries and operating businesses, and joint ventures in which it has management control, and that P uses reasonable endeavours to ensure that the joint ventures in which it does not have management control, together with key subcontractors and representatives, are familiar with and are required to abide by its code of conduct to the extent possible;
- procedures compatible with money laundering regulations;
- policies regarding charitable and political donations;
- terms related to external controls, e.g. procedures for selection of appropriate charities;
- policies relating to internal investigative resources, employee disciplinary procedures;
- and compliance screening of prospective employees;
- policies relating to the extent to which senior management takes responsibility for implementing relevant practices and procedures;
- mechanisms for review of the effectiveness f relevant policies and procedures across business and jurisdictions in which P operates;
- compensation structures that remove incentives for unethical behaviour.

Consideration 10: Victim compensation

Question 13

Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

Victim compensation, where accurately quantifiable, should be available under a Canadian DPA regime. DPA terms related to victim compensation must reflect the specific factual circumstances of the case, including the nature of the wrongdoing, as well as the actual harm suffered.

Allowing the Crown and the organization to set out a mechanism through the terms of the DPA, will let the parties tailor the compensatory scheme to the particular facts of the case, while still subjecting the scheme to judicial scrutiny. Any compensatory scheme should take into account any prior, pending or future civil settlements with victims. It may also be appropriate to appoint a neutral party to oversee the compensatory scheme in certain circumstances.

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RE: Comments in Response to Government of Canada's Discussion Paper on Deferred Prosecution Agreements

We are pleased to submit the comments below in response to the Discussion Paper, *Deferred prosecution agreements consultation: Expanding Canada's toolkit to address corporate wrongdoing* (the "**DPA Discussion Paper**").

Responses

1. ***In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?***

In our respectful view, the introduction of DPAs would have an overwhelmingly positive impact on Canada's ability to establish and maintain an effective regime for tackling corruption, money laundering and similar economic crimes. We also consider that, *provided an appropriate framework is established for the use of DPAs,* there is little, if any downside to their introduction. We elaborate below.

A. Advantages

(i) Enhancing resources to tackle serious corporate wrongdoing

Canada has implemented a substantial body of legislation in pursuit of its international commitments to tackle corruption, money laundering, and similar financial crimes. However, investigations into the breach of such laws often entail the gathering and review a vast amounts of electronic and paper records, involve the analysis of complex data, and to the extent they are international in scope (as many are), also require co-ordination with foreign law enforcement agencies, some of whom may be either partially or entirely uncooperative. In short such investigations are lengthy and consume vast amounts of resource. As a consequence, Canada's ability to enforce its extensive legal framework has been limited by the finite resources available to meet the very substantial demands of investigating and prosecuting such cases.

This has not gone unnoticed by the various international organizations tasked with monitoring compliance with Canada's anti-corruption and anti-money laundering commitments. For example, in a recent review of Canada's anti-money laundering and anti-terrorist financing regime, the Financial Action Task Force working group considered data compiled by Canada's Department of Finance in its National Risk Assessment of inherent anti-money laundering risks (the "**NRA**")[1], and made the following observations:

> According to the NRA, fraud, corruption, counterfeiting, drug trafficking, tobacco smuggling, and (although a recent phenomenon) third-party ML pose very high ML threats in Canada...on the face of the statistics and cases provided as well as of the discussions held on-site, it was not established that Canada adequately pursues ML related to all very high-risk predicate offenses identified in the NRA.[2]
>
> Overall, while there are exceptions, law enforcement efforts are not entirely in line with Canada's NRA risk profiles. As previously noted, LEAs' prioritization processes place strong attention to National Security investigations, OCGs, and, to a lesser extent, more recently third-party ML in an international context. Other instances of high threat predicate offenses, especially fraud, corruption, counterfeiting, tobacco smuggling, and related ML, as well as laundering activities in Canada of the proceeds of foreign predicate offenses, third-party ML and ML schemes involving corporate structures are not adequately ranked in the prioritization process and, consequently, are not pursued to the extent that they should.[3]

Similarly, OECD Working Groups reporting on Canada's compliance with the OECD *Convention on Combating Bribery of Foreign Public Officials* have previously expressed concerns about the level of resources available to the RCMP and Crown Prosecutors. For example in their 2011 Report, the OECD Working Group noted:

> The lead examiners are concerned that the level of resources for investigating CFPOA cases in the two RCMP International Anti-Corruption Teams may not be adequate, especially when they are deployed to address other national priorities...
>
> ...The lead examiners are also concerned that the PPSC is considering options to handle the expected substantial case-load of CFPOA prosecutions at such a late stage, and recommend that a solution be found urgently[4].

In fairness, the same OECD Working Group subsequently noted in its 2013 Follow-up Report that Canada had taken steps to address these resourcing concerns.[5] However, the fact is Canada's

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[1] *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*, July 2015

[2] *Anti-money laundering and counter-terrorist financing measures in Canada, Financial Action Task Force Mutual Evaluation* – 2016, at paras. 135-7

[3] Ibid., para 140

[4] See e.g. OECD Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada, March 2011, pp.37-38

[5] OECD Follow up to Phase 3 Report and Recommendations, May 2013

last conviction under the CFPOA came in 2014[6], and some of the momentum generated by successful enforcement actions between 2011 and 2014 has since been lost. In this regard, it is worth noting that Canada reported to the OECD Working Group in 2013 that it had 35 ongoing foreign bribery investigations[7], yet very few of these appear to have resulted in charges being laid in the four and a half years since then.

Moreover, there remain strong indications that the law enforcement resources earmarked for corruption and money laundering investigations have, in recent years, frequently been diverted to or otherwise consumed on terrorism-related investigations. While the priority afforded to terrorism-related investigations is entirely understandable and reasonable, it nonetheless depletes the resources that would otherwise be available for corruption, money laundering and similar financial crime cases.

It is respectfully submitted that DPAs would ameliorate the apparent resource shortages. *First*, DPAs would enable the Crown to resolve corporate prosecutions without having to bear the enormous resource demands associated with pursuing every case through to trial. *Second*, as the resolutions reached under DPAs typically entail very substantial financial penalties being paid by the corporate party, such sums could (at least in part) be re-invested in:

a.) enhancing investigative and prosecutorial resources necessary to handle a larger case load;

b.) developing and enhancing the Government's compliance infrastructure, including technology resources for detection and monitoring of money laundering, terrorist financing, and corruption;

c.) Compensating victims of crime, and/or funding awareness raising and compliance promotion initiatives.

In this regard, the experience of the U.K. since introducing a DPA regime in 2014 is worthy of note - as the Director of the U.K. Serious Fraud Office, David Green, recently noted in an address:

> Over the period April 2014 to date, the SFO has cost the taxpayer £216m. Over the same period, we have generated £676m in DPA receipts and costs. That is a net contribution of £460m to the Treasury over four years, equivalent to approximately £1m per member of SFO staff.[8]

The level of penalties paid under DPAs in the U.S. relating to Foreign Corrupt Practices Act matters dwarves the figures cited above. We note there has been criticism from some quarters in the U.S. of the extensive use of the U.S. DPA regime as a means of simply generating vast revenues through fines rather than through the proper enforcement of laws; however, regardless

[6] *R v Karigar*, 2014 ONSC 3093

[7] See note 4 supra, p.5

[8] David Green CB QC, Director, Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge, September 4, 2017 – see https://www.sfo.gov.uk/2017/09/04/cambridge-symposium-2017/

of whether one accepts criticism as valid, it is respectfully submitted that concerns regarding the overuse (and abuse) of DPAs could be alleviated by ensuring a substantial supervisory role for the Courts, as detailed below.

(ii) Promoting a Corporate Culture of Compliance

In addition to facilitating the enhancement and more efficient utilization of enforcement resources for financial crime, the introduction of DPAs has the potential to promote a stronger corporate compliance culture. This may occur in several ways, as described below.

First, the factors to be considered by the Crown for the purposes of determining whether to offer a DPA in a given case should be tailored to promote robust corporate compliance standards. More specifically, the extent to which a company had in place relevant *pre-existing* compliance measures should be a relevant factor for the Crown to consider when deciding whether to offer a DPA, and in determining the amount of the financial penalty. In this regard, it should be noted that both the U.S. and U.K. specifically recognize the presence or absence of pre-existing compliance programs as a relevant consideration within their DPA regimes.[9]

Second, the nature and extent of a corporations' *post-event* efforts to investigate, remediate and even self-report potential violations of relevant financial crime laws should also be explicitly recognised as a relevant factor for prosecutors to consider. Again, both the U.K. and U.S. regimes explicitly recognise the nature of a corporation's remediation efforts, and the extent of its co-operation with government investigations, as important factors.

As an adjunct to, or feature of, a Canadian DPA regime, the government may wish to consider providing explicit guidance for companies as to the standards of compliance expected. In this regard, we note substantive official guidance on anti-corruption compliance programs has been published by the U.S. Department of Justice within of the FCPA Resource Guide[10], and more recently through its statement on the "*Evaluation of Corporate Compliance Programs*"[11]. Such official guidance is currently lacking in Canada, and the introduction of DPAs in Canada represents an excellent opportunity to fill this gap.

Finally, it should not be overlooked that arguably the single most powerful driver of compliance is an active and visible enforcement regime. The introduction of DPAs may reasonably be expected to result in a tangible increase in the number of enforcement actions, not only because Canada's limited investigative resources would be less stretched, but also because a DPA regime should encourage fulsome co-operation with government investigations (or even directly incentivize self-reporting by companies). In turn, this dynamic is likely to result in an increased awareness many Canadian businesses of the need to implement truly effective compliance programs to mitigate the increased risk of enforcement action. The media attention that invariably accompanies

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[9] See: U.K. Serious Fraud Office/Crown Prosecution Service Deferred Prosecution Agreements Code of Practice (the "**U.K. DPA Code**"), at 2.8.1(iii) and 2.8.2(iii); and *U.S. Department of Justice/Securities and Exchange Commission: A Resource Guide to the U.S. Foreign Corrupt Practices Act* (**the "FCPA Resource Guide"**), *p.53*

[10] See FCPA Resource Guide, *Hallmarks of Effective Compliance Programs* , at p.57-62

[11] See https://www.justice.gov/criminal-fraud/page/file/937501/download

corruption and money laundering cases should also drive regular and meaningful compliance discussions within corporate boardrooms. In support of this position, we note that it is unlikely to be a mere co-incidence that the amount of resource dedicated to pro-active compliance programs is typically far more pronounced in the case of companies subject to the U.S. *Foreign Corrupt Practices Act*, which has by far the most active enforcement regime behind it.

(iii) Achieving an Equitable Result and Avoiding Collateral Economic Harm to Innocent Parties

As noted in the DPA Discussion Paper, when a company is charged with corruption, money laundering or a similarly serious financial crime, there are immediate and severe collateral consequences. *First*, the company will face suspension under Public Works and Government Services Canada's (PWGSC) Integrity Framework. *Second*, the reputational damage done by such charges will likely significantly impair the company's ability to access capital markets and potentially compromise its ability to compete for contracts and other business opportunities. These direct economic consequences to the business will typically significantly impact employees and shareholders in the near term, the vast majority of whom will have no knowledge of or involvement in the alleged conduct. Such consequences are compounded by the length of time that financial crime cases take to get to trial. It is worth bearing in mind that these near-term collateral consequences flow to the company even if it successfully defends the charges and is acquitted.

DPAs provide a mechanism for a corporation to achieve a (relatively) swift and certain outcome, while accepting responsibility for wrongdoing and being sanctioned in a proportionate manner. Indeed, a substantial financial penalty and a commitment to extensive remediation efforts will often achieve the key policy objectives underpinning corporate criminal liability, without causing disproportionate collateral damage to innocent employees and shareholders. Moreover, any concerns as to DPAs being a means for wrongdoers to "buy their way out of trouble" can be assuaged by ensuring that the Crown retains the ability to pursue the individual wrongdoers (both within and outside the company) after a DPA is signed with a company. Indeed, the co-operation provided by a corporation as part of the DPA process is likely to furnish valuable evidence against such individual wrongdoers, which should make it easier for prosecutors to hold them accountable through prosecution. In this regard, David Green, Director of the U.K. SFO stated in a recent address:

> DPAs have been a real success, enabling cooperative companies to account for conduct to a court in a transparent way without sustaining a criminal conviction, or the collateral damage (including disbarment), that may well follow. The company is able to draw a line under the past and radically to overhaul compliance and removing the board on whose watch the conduct took place.
>
> Once a DPA is completed, the investigator/prosecutor can then move or concentrate resource on human suspects and on new investigations. It should never be thought that a

DPA with a company somehow lets culpable former senior management off the hook: far from it.[12]

As noted above, provided the DPA regime is formulated to allow for individuals to be prosecuted even where the corporate action is resolved, it is difficult to see how the interests of justice could be meaningfully impaired. In this regard, it is worth noting the recent policy initiatives of the U.S. Department of Justice to incentivize companies to identify individual wrongdoers within (or formerly within) their organizations[13], and furnish evidence of their complicity in the wrongful acts. Whether or not Canada decides to adopt similar policy positions as part of its DPA regime, it nonetheless serves as an example of how DPAs may be used as a tool to help secure convictions of wrongdoers rather than preclude or impair them.

B. Disadvantages

The DPA Discussion Paper notes that the chief argument against DPAs is that they may not deter misconduct, and allow companies to buy their way out of trouble. This concern is substantially addressed in the discussion above.

Additionally, the DPA Discussion Paper notes that confidence in the criminal justice system may be undermined if DPAs are applied inappropriately or too leniently. This appears to be a concern that is directed not at the *concept* of DPAs, but rather at the manner in which they are *administered*. These concerns are addressed in response to the questions that follow, which relate to the framework surrounding the administration of DPAs. In essence, however, we submit that the concerns can be addressed primarily by the incorporation of appropriate judicial oversight into the DPA regime, in addition to the development of clear written policies as to the circumstances in which DPAs may be used.

Finally, we submit that confidence in the administration of justice is far more likely to be impaired by a lack of vigorous enforcement than by any element of a properly-drafted DPA regime. Indeed, by facilitating an *increase* in enforcement as described in Section A. above, DPAs should promote rather than undermine confidence in the administration of justice as it relates to financial crime.

2. For which offences do you think DPAs should be available and why?

The DPA Discussion Paper indicates an understandable desire to ensure that DPAs are not available for offences resulting in bodily harm (seemingly precluding its application of Occupational Health & Safety offences) or to offences that compromise national security or public safety. Instead, the focus appears to be on introducing DPAs for economic crimes.

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[12] See supra note 8, at p.

[13] See e.g. U.S. Deputy Attorney General Sally Yates' *Memorandum on Individual Accountability for Corporate Wrongdoing*, September 9, 2015; see also U.S. Department of Justice (Criminal Division) - *Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance,* April 5, 2016

In terms of the types of offences that should be captured, we note the U.K. and Australian DPA regimes apply to specific economic crimes. If the Government of Canada is inclined to adopt a similar approach of specifying particular offences, it may consider capturing at least those economic crimes specified in PWGSC's Integrity Framework as triggering ineligibility to bid on public contracts. To these specific offences, the Government of Canada may wish to consider including an offence as a party to a violation section 122 of the *Criminal Code* (Breach of Trust by Public Officer), which is of a similar category to other domestic corruption offences specified in the Integrity Framework. In addition, the Government may consider including certain offences under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA), under the *Special Economic Measures Act* (SEMA) or under the *United Nations Act (*UN Act*)*. In this regard, we submit that in many cases of a corporate violation of PCMLTFA, SEMA, the UN Act or ESTMA will be no less appropriate for resolution under a DPA than the types of offences identified in the Discussion Paper.

In summary, we respectfully suggest that the Government consider adopting a broad approach to the inclusion of economic crimes within the DPA regime, as this approach would provide the Crown and the supervising Court with a significant degree of flexibility to judge whether they are appropriate (or not) in a given case in light of the specific facts and circumstances.

3. ***What role do you think the courts should play with respect to DPAs?***

As noted in the Discussion Paper, the U.K. provides for a substantial role for the Courts in overseeing the administration of the DPA regime, whereas the U.S. leaves divisions largely in the hands of the Department of Justice attorneys.

We submit that the U.K. approach represents a better fit for Canada's legal traditions and should be preferred. While it is entirely appropriate for the Crown to initiate, negotiate and finalize the terms of a DPA, the Courts should hold the power to approve or reject them so as to ensure DPAs are being applied in a manner that is consistent with the legal and policy framework that surrounds them. Conferring a supervisory role on the Courts should also serve to enhance the level of transparency in the administration of the regime, and should also address concerns that a DPA regime might be applied either too softly (i.e. in a manner that unduly favours corporate defendants), or alternatively in an over-zealous or discriminatory fashion.

The precise role of the Court, including the procedure surrounding the exercise of its supervisory function, should be prescribed by clear rules. In this regard, the U.K. framework established under Schedule 17 of the Crime and Courts Act 2013[14], and the rules of procedure contained within Part 12 of Rule 7 of the Rules of Criminal Procedure[15] represents an excellent resource for the Canadian Government to draw from in crafting an appropriate framework, which could be adapted as necessary to accommodate differences in Canada's broader legal/constitutional framework.

In summary, the DPA framework should provide for, and encourage, meaningful and active judicial scrutiny of DPAs.

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[14] http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted

[15] http://www.legislation.gov.uk/uksi/2013/3183/pdfs/uksi_20133183_en.pdf

4. What factors should to be taken into account in offering a DPA?

While many aspects of the U.K. and U.S. DPA regimes differ significantly, both regimes recognize many of the same public interest factors as being relevant to the determination of whether a DPA is appropriate in a given case.[16] The degree of consistency between these factors appears to reflect some measure of consensus as to appropriate criteria, and accordingly the Government of Canada may wish to include a list of similar considerations.

More specifically, and as noted in the response to Question 1 above, in order to ensure that Canada's DPA regime encourages pro-active compliance by companies, we consider that it is critical that the government recognizes the extent to which a target company had *pre-existing* compliance measures in place as a relevant factor. For similar reasons, the nature and extent of post-incident remediation and compliance efforts should also be explicitly recognized as an important factor.

Furthermore, in order to ensure transparency in the administration of the regime, and to promote confidence in the fairness of DPAs and facilitate proper judicial supervision of their terms, the level of co-operation with any government investigation should also be recognized as an important consideration. It is essential that the pertinent facts surrounding the case to be resolved are accurately reported and recorded, so that the terms of the DPA can be appropriately crafted to fit the circumstances. Similarly, full and accurate disclosure are essential to ensure that individual wrongdoers are identified, and where appropriate pursued through prosecution.

We also note that the U.K. regime requires prosecutors to follow a prescriptive or formulaic two-part test to determine whether a DPA should be used, comprising an evidentiary phase (entailing the assessment of whether an evidentiary threshold has been met) and a public interest stage (applying various prescribed public interest factors). Requiring an evidentiary threshold to be met arguably supplies a layer of protection against the over-zealous use of DPAs, but it also adds a layer of complexity to the process (and a possible ground for challenge) and reduces the flexibility afforded to prosecutors. Moreover, it could be argued that the evidentiary aspect of the test is unnecessary: if the counterparty to the agreement is willing to enter into a DPA (which would presumably be on the basis of legal advice), why should the prosecutor still be required to show that the prosecution would meet an evidentiary test? On the other hand, the Government of Canada may consider that, as a matter of policy, an evidentiary threshold should be imposed, because the offering of a DPA implicitly or explicitly involves a decision by a prosecutor to pursue charges (which are then immediately suspended by the DPA process). In any event, if an evidentiary threshold is to be imposed under a Canadian regime, we respectfully suggest it provide a measure of flexibility beyond the standard evidentiary component of a Decision to Prosecute contained in the PPSC's Deskbook, just as the U.K. does not require its Prosecutors to be satisfied that the "Full Code Test" is met for a DPA to be pursued under its regime.[17]

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[16] See U.K. DPA Code, p.3-6 ; and FCPA Resource Guide, p.52-53

[17] The U.K. DPA Code, at para 1.2(i) provides that a DPA may be pursued if the Full Code Test is not met, provided the Prosecutor is satisfied that "*there is at least a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that*

5. *When would a DPA not be appropriate?*

See above, especially regarding the relative degree of consensus between the U.K. and U.S. regimes on the relevant public interest considerations.

Assuming the range of offences to which DPAs may be applied is defined by clear parameters, we would encourage the Government of Canada to avoid including absolute bars to the negotiation of a DPA. Instead, a list of factors *militating against* the offering of a DPA should be devised are clearly set out in the applicable policy documents, leaving prosecutors to exercise discretion on a case by case basis as the facts and circumstances dictate, with the Courts' supervisory role providing a check against the use of DPAs in inappropriate circumstances.

6. *What terms should be included in a DPA?*

The terms of a DPA should be a reflection of the policy aims behind the regime, and in particular those discussed in Part A of the response to Question 1, above.

More specifically, while terms may vary from case-to-case, DPAs should typically include a financial penalty commensurate with the nature of the offence and the specific facts surrounding it, but also taking account of pre-existing compliance efforts and the level of co-operation (including self-disclosure) provided to the RCMP and the Crown. In most cases, they should also contain specific and substantial remediation efforts, including, where appropriate, monitoring by an independent third party expert. In the interests of promoting a broader culture of compliance, and as noted elsewhere in this submission, we consider that remediation terms should be set out in detail, and in a manner that is consistent with current best practices for compliance programs relating to the offence charged. In this regard, we note that the content of DPAs entered into by the U.S. DOJ have become a valuable resource for companies and compliance professionals in understanding law enforcement expectations; they can, when drafted appropriately, make a valuable contribution to the compliance efforts by companies at large.

Specific requirements regarding ongoing co-operation and/or disclosure of newly discovered relevant information will also usually be appropriate and will be particularly important in cases where there is the prospect of individual wrongdoers being prosecuted. Warranties as to the accuracy and completeness of information provided to the RCMP/Crown should also be standard terms.

In the interests of ensuring transparency in the administration of the regime, and to maximize the usefulness of DPAs for broader compliance purposes, the DPA should include a detailed statement of facts. The statement of facts should accurately reflect the circumstances of the case, having regard to the evidence revealed by any RCMP investigation and the disclosures provided by the company. However, we caution strongly *against* a requirement that all DPAs require an explicit admission of facts comprising all the elements of the offence. While such admissions may be appropriate in cases where the facts as revealed by the applicable evidentiary record clearly demonstrate the relevant elements have indeed

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all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test".

been made out, in other cases the circumstances may not be as clear cut. In some cases there may be significant doubt as to one or more elements being satisfied; indeed, the less clear cut the violation, the more it may lend itself to a DPA rather than full prosecution. Moreover, it would be unfair (if not wholly unsound as a matter of policy) to impose a strict requirement that a company to admit facts not established by the evidentiary record, which the company might in good faith wish to dispute in a different context. There is real jeopardy to a company in requiring a comprehensive set of factual admissions which are not established by the evidentiary record, especially in cases where there is a prospect of related civil proceedings (such as shareholder actions against the company and its directors and officers, as well as international state-investor arbitrations), or even criminal proceedings in a foreign jurisdiction; we note that these kinds of related proceedings are not uncommon, especially in bribery cases.

Rather than making an admission of facts constituting all the elements of a relevant offence an absolute requirement, we respectfully suggest that a more flexible approach is preferable. An accurate record of the facts serves an important policy objective; a strict and uniform requirement to admit to facts that may not be established by the evidentiary record is both unnecessary and potentially hazardous.

7. *What factors should be taken into account in setting the duration of a DPA?*

In most cases, the DPA will need to be of significant (multi-year) duration to ensure that the remediation and compliance requirements are fully complied with, and also to ensure provisions around ongoing co-operation in related prosecutions do not expire before the appropriate time. We do not see a compelling need to set limits on duration, but rather suggest that the circumstances of a given case should govern the duration of the DPA.

8. *Under what circumstances should publication be waived or delayed?*

As noted above, transparency is an important part of maintaining confidence in the administration of the regime, as well as in promoting a broader culture of corporate compliance. Accordingly, publication of DPAs should only be delayed, or waived entirely, in compelling circumstances. The decision to delay or even waive publication should be a matter for the Courts to determine, with the clear presumption favouring publication. Compelling circumstances might include real, substantial prejudice to ongoing investigations or proceedings, or national security interests. Delay of publication is also preferable to waiver.

9. *How should non-compliance be addressed?*

In keeping with our position that the Courts should be afforded a significant role within any DPA regime, we also submit that instances of non-compliance with a DPA, and in particular the proposed consequences of such non-compliance, should be subject to judicial oversight. While the parties may seek to agree on the applicable consequences for a specific incident of non-compliance, and in particular make joint submissions to the Court as to variations or extensions to the DPA, the Courts should possess the ability to approve or reject such proposals.

Similarly, there may be a need to make determinations regarding disputed issues of fact relating to an alleged violation of a DPA, and given that there is potentially significant jeopardy for a company in such determinations, the Courts should be the arbiter of such disputed issues of fact.

10. When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

A case can be made that the entire process of negotiating a DPA should be treated as confidential and without prejudice, and unless the negotiations result in the execution of DPA, the information exchanged in furtherance of the negotiations should not be admissible in a prosecution against the company. One particularly sensitive issue arises where the company, purely to further DPA negotiations, has declined to assert privilege in certain documents (such as employee interviews and internal reports), possibly under direct or indirect pressure from the government. Moreover, adopting an approach under which the Crown has wide latitude to utilize information provided in the context of failed DPA negotiation could impair the effective functioning of the system by discouraging its use.

However, in practice, a strict approach precluding subsequent admissibility of information from a failed negotiation may be difficult to police reliably or effectively, and may give rise to fears, or even challenges relating to, improper derivative use of information.

Ultimately, the issue of subsequent use of material disclosed in failed DPA negotiations is a complex issue worthy of careful analysis and informed debate. We also respectfully suggest that the issue subsequent use of information gleaned from a DPA should be addressed by clear and detailed rules, so that both the company and the Crown have reasonable certainty as to the consequences of entering into negotiations and exchanging information for that purpose. As to the treatment of the issue under other DPA regimes, we note that the U.K. regime incorporates clear and specific rules into its regime, but we also note that these rules afford extremely broad latitude for Prosecutors to use material gleaned from failed negotiations (subject only to limited exceptions). We respectfully suggest that, prior to confirming any stance on this issue, the Government solicit further input from stakeholders and experts, perhaps on a draft set of rules, so that the full impact of the proposed approach (including matters such as constitutional protections against self-incrimination) can be fully canvassed and considered.

11. How should compliance monitors be selected and governed?

The identity of compliance monitors may be a matter for negotiation between the Crown and the corporation, but it should be left for the Court to approve the appointment. It is critical to the integrity of the process that the monitor possesses the necessary expertise and experience. Accordingly, it should be a requirement for the parties to furnish the Court with substantive details as to the expertise and experience of the compliance monitor, including supporting materials. It may also be prudent for the Court to have the power to require attendance of the monitor at the DPA hearing, and to answer such questions as the Court may have as to their expertise and experience.

12. What use should be made of compliance monitoring reports?

In order to ensure the quality, integrity and effectiveness of the monitoring process, the monitor is likely to need extensive access to the records and personnel of the company. Accordingly, the regime should avoid imposing requirements which might compromise the ability of the company, including its employees, to engage a full and frank exchange of information with the monitor. Moreover, the provision of full and frank disclosure to the monitor may engage privacy considerations, as well as concerns regarding the protection of commercially sensitive information.

As the primary function of monitoring report will be to enable the Crown to confirm compliance with the relevant terms of the DPA, it should be furnished to the Crown, but on terms of confidentiality. There may also be circumstances in which it is appropriate for the Court to be provided with a copy of a monitoring report, especially in circumstances where there is evidence of non-compliance by the corporation, which, as submitted above, should trigger the oversight function of the Court. In these circumstances, provisions could be made for filing of the report with the Court under seal.

Furthermore, as a DPA will only be entered into once the Crown and the Court are satisfied that improper conduct in question has been fully identified and stopped, and appropriate sanctions have been levied, the subject company should have a legitimate expectation of being allowed to move forward with its operations, provided it does so in strict compliance with the terms of the DPA. Publicizing monitoring reports could impair the company's ability to excuse this right.

As such, while transparency is important in the process leading up to and including the execution and approval of the DPA, the need for public access to the monitoring reports is less compelling, and must be balanced with the competing considerations described above. We note that such an approach is largely consistent with the treatment of monitoring reports under the U.K.[18] and U.S.[19] DPA regimes.

13. Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

Victim compensation should be a possible term of DPAs, but should be considered in the context of all the surrounding facts and circumstances. If victim compensation is regarded by the Government as a significant factor supporting the introduction of DPAs, one way of furthering such a strategic goal is to ensure that the applicable policy documents include guidelines to be applied, or considerations to be taken into account, to assess the viability and appropriateness of victim compensation in all DPA negotiations. Similarly, Courts may be afforded scope within the DPA framework to make enquiries as to the suitability of provisions relating to victim compensation in a given case, in the event they consider that victim compensation appears to have been inadequately or inappropriately dealt with on the facts presented.

[18] See U.K. DPA Code, at para 7.20

[19] See *United States v. HSBC Bank USA*, N.A., 863 F.3d 125 (2017)

s.19(1)

We trust the responses described above are useful, and we would be pleased to provide further information or participate in any follow-up discussion as may be required or desired by the Government of Canada.

Yours truly,
Dentons Canada LLP

Anthony Cole

AJC/eb

s.19(1)

Analysis of the desirability of deferred prosecution agreements as part of the Canadian justice system.

By

On November 17, 2017

In response to the public consultation "Expanding Canada's toolkit to address corporate wrongdoing"

Consideration 1: Usefulness of deferred prosecution agreements as part of the Canadian criminal justice system

This paper is intended to elicit views as to whether an additional prosecutorial tool (in this case, a DPA) could support the achievement of the following objectives:

- more corporate criminal activity identified (that is, through greater self-reporting), investigated and successfully brought to justice;

- more flexibility for prosecutors to secure effective, proportionate and dissuasive penalties for corporate wrongdoing while reducing the negative impact of prosecutions on innocent third parties;

- improved corporate culture and enhanced compliance;

Question 1. In your view, what are the key advantages and disadvantages of DPAs as a tool for addressing corporate criminal liability in Canada?

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I first thank you for the opportunity to comment on such an important topic. As a Canadian citizen, I am most concerned about the possibility of adopting DPAs in our legal environment, especially given what we have learned from the experiments of other jurisdictions.

I will first assess the alleged

advantages of DPAs, and then review the seven main reasons why the government of Canada should reject them. I mostly argue that there are better alternatives to improve corporate criminal justice and its enforcement. I mainly focus on anti-corruption topics, although my conclusions could be generally applicable to other kinds of corporate wrongdoing. I make some references to the available documentation and literature, which now amounts to the hundreds of sources. Only the most comprehensive sources for my analysis are selected and provided in a bibliography. I address some of the other questions mentioned in the consultation in passing only, as I consider that this government should reject a DPA system. The opinions expressed below

PART 1 - ALLEGED ADVANTAGES

A. DPAs would allow prosecutors to preserve the interests of innocent third parties

At the heart of the DPA debate is the hope that accused could prevent an admission of guilt or a conviction that would restrict their business opportunities. Such restrictions would arise through suspension of the ability to obtain public contracts or through outright debarment. These restrictions would in turn affect the revenues and the profitability of the convicted entities, which in turn, implies job losses. Therefore, the most compelling argument in favour of DPAs is the claim that they protect innocent parties. A restriction on business opportunities for a guilty entity would affect employees, but also the revenues of subcontractors and sometimes, even the health of the national economy (so the logic goes). For instance, the HSBC DPA in the U.S. involved such considerations while invoking the shadow of the Arthur Andersen case; a common symbol for the tenants of DPAs who would have the merit of being "proportional" and "flexible". In this section, I further analyze and deconstruct this misplaced faith in DPAs compared to other already available instruments in our toolkit. I also discuss the straw man that has become the Arthur Andersen case.

Proportionality and Flexibility Without DPAs

One striking feature of most reports that propose adding DPAs to our toolkit is their limited analysis of the other tools that are already available in matters of corporate criminal justice. The claim that DPAs offer more flexibility to prosecutors in obtaining proportional justice must absolutely be studied in relation to: (1) the files they receive further to investigations (2) their discovery process (3) the immunity agreements available to collaborators (4) the way prosecutors presently drop charges (5) the negotiation of plea agreements, and (6) the availability of trial in case of a disagreement.

In the face of all these dimensions, the public must understand that the DPA debate comes down to the possibility for an entity to evade a formal admission of guilt, or a conviction, without going to trial or signing a formal plea agreement. Again, the other and outmost goal of indicted entities is to obtain a DPA and escape suspension from public contracts or debarment. To complicate things further, even when DPA guidelines require detailed admissions of facts on the misconduct that led to the criminal charges, such admissions do not amount to a formal admission of guilt. Both the government and the public must therefore carefully consider if it is a good thing to open a breach in the recognition of guilt and – for some cases - in the debarment process.

Moreover, there is an implied false dilemma between the alleged proportionality of the terms of a DPA and the proportionality of the terms of a plea bargain or a sentence. Like the terms of a DPA, a plea bargain and a sentence could also be adjusted if the entity is a first offender. A plea bargain and a sentence could lead to retributive and dissuasive financial penalties (in addition to confiscating the proceeds of corruption). A plea bargain and a sentence could even lead to the supervision by a corporate monitor. And in some countries, a plea bargain can suspend the application of the debarment process, although the admission of guilt and the terms of the plea should be public to be properly formalized as such, and not fall in a *sui generis* category that is more closely comparable to DPAs (Corruption Watch, 2016).

The real legal issue therefore seems to be in what conditions can charges be dropped and if they are not, in what conditions should the entity be debarred upon sentencing. The important point is that both plea bargains and sentences could theoretically lead to the objectives listed in the bullet points 2 and 3 of the Consideration #1 of this consultation. Namely, the present system offers enough flexibility for prosecutors (and judges) to secure effective, proportionate and dissuasive penalties for corporate wrongdoing while also preventing negative impacts of prosecutions on innocent third parties (point 2). And as such, the present system can improve corporate culture and enhanced compliance (point 3) if formal pleas and sentences are properly used.

The proponents of DPA, however, could and do counter that the available tools may not lead to these results fast enough, especially in the rarer cases where trials are involved. Ultimately, their proposal is to insert a middle ground option between the possibility for the prosecutors to simply drop the charges, on one part, and the negotiation of a plea agreement with a formal recognition of guilt, on the other part. I will discuss in a section on the Rule of Law why such middle ground would be problematic for both business organizations and the public interest. In the meantime, while reminding that proportionality can be achieved without DPAs, I quickly summarize one of the reasons why those are misleadingly associated with a better protection of third parties.

The Shadow of Arthur Andersen and Non-Prosecute Agreements

DPA proponents often illustrate their proportionality claim with the Arthur Anderson case, one of the accounting giant that collapsed in the wake of the Enron scandal, after being indicted of charges that could limit its capacity to obtain public contracts. A crucial element for the debate is that the firm was on its route towards failure while the trial and appeals were underway. Most partners walked away before and during the process. Clients disappeared and the low-mobility employees ended up being the ones who suffered the most. I will not delve into the causes of why those employees lost their jobs, but suffice to say that the indictment of Arthur Anderson was only intervening in the chain of events that started with the negligent/criminal behaviour of their employer. Because of the fundamental causal inference problem, it is not clear that those jobs would have been saved with the use of a DPA. There is no way to go back in time and apply an alternative reality to clarify that point. It is also possible that the mismanagement at the heart of the indictment would have caused a market reaction large enough for the firm to collapse nonetheless (Steinzor, 2015).

Still, the proponents of DPAs, particularly those in favour of non-prosecute agreements (NPAs), often use the Arthur Andersen case to justify why a large entity should not even be indicted for

economic reasons. NPAs are basically the same thing as DPAs, except that they arise before an entity is even charged with a criminal offence. DPAs and NPAs therefore became the anti-collapse solution, notwithstanding the externalities it could provoke, when an entity is too big to jail (Garrett, 2014). The "logic" is most clear with the recent HSBC case. Assistant Attorney General explained that "[his] goal here [was] not to bring HSBC down, it's not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs." (CNNMONEY, 2012). Further to the decision not to indict HSBC, Attorney General Eric Holder also testified in front of the Senate Judiciary Committee that he was "concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy." (the New Yorker, 2017).

There are many problems with this logic, many of which are covered in the literature (e.g. Markoff, 2013; Garrett, 2014; Steiznor, 2014) When is there sufficient "indications" that a criminal charge would have such effect, and how much "negative impact" is enough to enter a DPA/NPA? What are the chances that these reasons will be invoked strategically to simply protect profitable industries, notwithstanding what the public interest would dictate? There are high risks that this kind of reasoning would lead to a moral hazard problem. With very little transparency to assess its extent and importance.

A key point here is that it is not clear how DPAs protect innocent third parties while there is no logic that suggests they do so more than other available tools. On the contrary, there could very well be much more innocent third parties who suffer from corporate crime and its many consequences if DPAs decrease the level of deterrence for entities, as discussed below. A debate also arises when the third parties could have foreseen the risks of criminal behaviour. It may also be that it's not for the criminal law to protect third parties, since the government can otherwise intervene to support an entity independently of an indictment or sentencing. In addition of being better positioned to assist the employees who are most affected with programs that help them re-allocate their skills. In any event, it is important to recognize, again, the false dilemmas and fallacies of the reasoning invoked in favour of DPAs and NPAs. Fortunately, I understand that NPAs are outside of the scope of this consultation because they are rejected by the government of Canada, just like they were rejected in the DPA model of the United Kingdom. I applaud this position and respectfully invite the government to apply to DPAs the same reasoning that led it to reject NPAs.

B. DPAs would lead to increased self-reporting

The first point listed in the Consideration #1 of this consultation echoes the optimistic views about DPAs, namely the hope that more corporate criminal activity will be identified (through greater self-reporting), investigated and successfully brought to justice. Unfortunately, this hope is not supported by empirical evidence of actual self-reports. Furthermore, I submit that the argument relies on dubious logical reasoning.

One debate between two renowned anti-corruption actors was reported in Legal Feeds and perfectly illustrate the issue (Brown, 2016). The lawyer in favour of DPAs declared the following:

> "You're not going to get companies coming forward and admitting they've had problems until they *know* there is a *solution available*". [...] For now [...] a good lawyer has to tell a client not to self-disclose *unless they know they are going to get caught*. That might sound bad, but that is the correct advice to give, *otherwise you're getting nothing for it"* [***emphasis added***].

This quote, albeit somehow controversial, has the merit of being honest and of showing how most entities assess both risks and consequences. Benevolent corporate entities that self-disclose are not the norm. In the logic explained above, companies will usually disclose if they expect disclosure to make more sense, i.e. if they can mitigate their losses. Most business entities are profit maximizers. All business entities are risk minimizers.

And that is where the logic fails for those who believe that entities who risk criminal liability would self-disclosed in the hope of obtaining a DPA. Especially if NPAs are not available (as they shouldn't be). To expand on the logic of the above citation, an entity that doubts it will get caught has no more incentive to trigger the indictment process in a system that now allows DPAs. Such entity won't disclose unless it *knows* that there will be a *solution*. If it can't be reasonably expected, the DPA will therefore not be a solution. It will not always be available depending on the offence discovered/committed by the entity. If it's prosecutors who decide whether to offer it or not, uncertainty will remain. In these situations of uncertainty, self-disclosing remains problematic, and based on the above-cited logic, against the entity's interests. Therefore, the more DPAs include measures to protect the public interest, the less are the alleged incentives to self-disclose. If we limit the scope of DPAs to certain "less egregious" criminal offences, as any DPA guidelines should do, the logic of self-disclosure will not apply outside this scope. If we limit DPAs for first-time offenders, as any DPA guidelines should do, we shovel forward the problems of non-disclosure. Without, again, touching upon all the other problems of DPAs.

To summarize, there are presently some instances in which entities will self-disclose, and there are probably much better solutions to increase self-disclose outside of DPAs. Following the logic cited above, an entity that values its liability risks (and knows it's about to get caught) could cooperate to help preserve its reputation, and perhaps even positively impact a plea bargain or sentencing. A review of prosecuting and sentencing guidelines could therefore accomplish as much if not more than DPAs to increase self-disclosure. Incentives and appropriate protection for whistleblowers would otherwise make more sense than welcoming DPAs in our criminal law process.

C. Why should Canada adopt DPAs, then? The remaining reason of national champions facing international competition.

The main empirical and logical reason why Canada would want to allow DPAs is then because other competing jurisdictions have done so. It is no secret that this public consultation has been requested by a national champion of Canada's and Quebec's economy, accused of corruption abroad and at risk of a national debarment (on national champions, see notably Saint-Martin, 2015). Foreign competitors of Canadian entities accused of criminal offences can indeed benefit from competitive advantages if their foreign country lacks –or does not enforce- corporate criminal laws. DPAs are an example of such limited enforcement of corporate criminal laws. And there are more and more jurisdictions that adopt, or consider adopting, DPAs in one form or the other, especially for anti-bribery laws.

However, as DPAs are rising, so are its critics. The United Kingdom has therefore adopted a highly restrictive DPA system compared to what originated from the United States. France has seen a difficult debate around the reform of the "Sapin II" law with much public opposition and a highly tempered French DPA process (convention judiciaire d'intérêt public). Again, compared to the United States who are now pressured to reform their own guidelines because of public criticism. To continue that movement, and based on the sound arguments against DPAs which we summarize only in part below, Canada should take leadership and reject their inclusion in its corporate criminal law proceedings.

PART 2 - KEY ARGUMENTS AGAINST DPAs

1. *Dangers to corporate compliance and threat to the dissuasive effect of Criminal law*

One of the main arguments invoked by the critics of DPAs is that they diminish the deterrence effect of corporate criminal law (Garrett, 2014; Steinzor, 2015). First, the DPA system in the U.S. has notably led to a decrease in prosecution of individuals and managers. Second, and most relevant for our purposes, a formal recognition of guilt also has a deterrent effect on the corporate crime level. Criminal law sends a message of blame and condemnation from the community. It can hurt the reputation of companies, much more than an administrative or civil settlement would. Accompanied with a suspension or debarment, it is the outmost deterrent to corporate crime.

Contrarily to the belief that DPA promote self-disclosure, empirical data supports these assertions. For instance, the Humboldt-Viadrina School of Governance in Berlin conducted an anonymized survey with 1000 anti-corruption experts from the public sector, the business sector and from civil society. It found that imprisonment of business representatives and restriction of business opportunities, such as debarment, are the best ways to deter corporate entities from corruption. About 70% of respondents thought that these two sanctions had a strong impact in motivating business against corruption, with approximately 5% believing it had "not much" impact. Conversely, criminal fines ranked 7th only with approximately 38% of respondents assessing that they have a strong impact and about 21% believing it has "not much" impact (Humboldt-Viadrina, 2014).

These numbers also demonstrate the danger that comes with relying too much on fines to deter corruption. For example, few researchers can document with enough certainty just how much profits can be derived from bribing. One study of reported bribery cases by public companies, however, concludes that the median bribe for the group was $2.5 million and that firms gained $11US for every dollar they spent in bribes (Cheung et al., 2012). There is therefore a risk that fines included in DPAs will not necessarily offset the expected marginal utility derived from bribes. Fines could also be highly limited compared to the profits of an entity. For instance, the HSBC case involved one of the biggest fine in the history of DPAs and NPAs ($1.9 billion). However, this amounts represented only 9% of HSBC's $20.6 billion in pre-tax profits for 2012 (HSBC, 2013).

2. *DPAs decrease the criminal law emphasis placed on the entity*

When allowing companies to evade formal recognitions of guilt and to limit the suspension or debarment procedures in certain cases, DPAs evidently limit the reach of criminal law on the corporate entities. For proponents of DPAs, the logic is usually to go against the individuals responsible for the criminal offences, although authors have demonstrated that, in practice, prosecution of individuals seldom happens with DPAs (Garrett, 2014; Koehler, 2015). Sometimes, DPA proponents even question the merit of prosecuting conceptual entities, arguing that only responsible individuals should be charged. These abolitionists are the first to believe in the theory of the "few bad apples".

However, the most reliable social science – and the overwhelming majority of anti-corruption experts- demonstrate that entities have a big role to play in incentivizing or preventing corporate crimes. Everyday people are more vulnerable to corrupt practices than what we would normally believe. They can make counterproductive (reflexive) decisions under pressure (Darley, 2004). Such pressure may come from peers, superiors, groupthink phenomenon and various forms of socializations based on the norms of a given organization (Anand et al. 2005; Sims, 1992). In other words, criminal behaviour can be caused, or highly induced by an entity and its features. It follows that criminal law should rightfully target the most negligent ones. And anti-corruption experts agree. Other results from the survey quoted above show that 92% of respondents think that "legal sanctions are most effective when targeted at a business *as an entity* as well as at its representatives" (Humboldt-Viadrina, 2014, p. 17, *emphasis added*).

DPAs allow corporate entities to escape formal recognition of guilt and the consequences that ensue. They are also associated with fewer individual convictions. Even if the statistics improved on that latter front, it is problematic to put too much pressure on individual liability, especially in the numerous cases where such liability would in fact target scapegoats while the entity is really at fault.

3. *DPAs are designed for a respondeat superior model, not for the Canadian corporate criminal law.*

A debate on DPAs makes even less sense in the Canadian system of criminal law given how high it sets the bar for criminal prosecution of entities, which is also why there have been so few prosecutions in Canada compared to the United States. There, a corporation may be liable if one employee committed a criminal act in the exercises of its functions (*respondeat superior* model). In some cases, it could be useless or counterproductive for a corporation to be held liable in addition to the employee. This is one of the reasons why DPAs have been so popular with prosecutors (Khoelher, 2017; see also Pieth & Ivory, 2011). In Canada, however, criminal liability for the entity would require a criminal conduct by a high-level / senior official within his or her functions. This test is already high enough. Opening the DPA exception would consequently lead to under-enforcement of the criminal law against entities.

On the other hand, if Canada wants to increase the enforcement of criminal law to deter corporate crime, maybe it could think about also increasing the scope of the criminal law itself and apply it to less stringent situations of corporate behaviour. Without necessarily adopting a *respondeat superior* standard, there may be situations where serious criminal violations are performed by a

group of individuals large enough to impute collective knowledge to the management. Furthermore, there are only a handful of Canadian legal decisions (and corporate prosecutions altogether) on corporate crime, so these questions are under-explored by the courts. Ultimately, it would be highly problematic to allow DPAs in Canada without addressing these legal standards, and arguably, without increasing the scope of corporate criminal law.

4. *DPAs leave pressure off prosecutors and may provide them with too much discretion*

A more recent line of research and investigative financial journalism on DPAs focuses on the crucial role of prosecutors in limiting corporate indictments and trials. Eisinger (2017) notably demonstrates in a recent book that prosecutors take great comfort in DPAs. They shy away from pursuing long, risky, yet necessary discovery process and trials, satisfying themselves with the settlement money as a fast and tangible result for their track record. They are also depicted as being highly influenced by the protectiveness of corporations in the legal profession, and American politics in general. Where revolving doors between the government and private defence firms are common.

We desperately need more data and research about Canadian prosecutors to extend Eisinger's observations to our side of the border. Yet, it therefore seems highly premature -and quite possibly counterproductive- to allow DPAs based on the pretext that prosecutors need more flexibility in their toolkits. I will be looking forward to analyze the prosecutor's preferences in the context of this consultation, yet other objective indicators should be made available by the government. What are the human and financial resources dedicated to the investigation of corporate criminal conduct, in addition to basic compliance enforcement? Once the investigations are completed, what are the human and financial resources available to prosecutors who work on corporate criminal law? How many do so full-time? Are they able to properly conduct the discovery process? What kind of pressure do they receive to drop charges or to enter into dissatisfying plea bargains? These are all questions that must be answered to improve enforcement of corporate criminal law. The answers to these questions might very well lead to promising results compared to the DPA, which could be counterproductive in this regard.

5. *DPAs hinder the Rule of Law and can as such be detrimental to both public and business interests*

Critics of DPAs come from all sides of the progressive/conservative spectrum and they usually unite on one crucial point: the use of a DPA is a threat to the Rule of Law. On the side of those who hold dear the regulation of businesses, DPAs again provide too much discretion for prosecutors who are too easily influenced by corporations. The lack of deterrence effect is also often invoked as companies settle criminal accusation for a limited portion of their profits (Steinzor, 2015; Wasserman, 2015). On the other side of the debate, many critics of corporate criminal law (and even of regulations) will view DPAs as an unfair bargain that allow prosecutors, with the enormous powers that the State confers on them, to obtain unfair conditions out of businesses. Following this logic, indicted businesses, and in particular those that already signed a DPA, would have almost no other choice but to accept what prosecutors dictate. Including accepting, in some

cases, the intrusion of corporate monitors that extend the reach of the government in the affairs of businesses (Copland, 2012; Griffin, 2011).

While the most convincing research should minimize worries that the prosecutors are being too harsh on businesses, the important takeaway is that critics on both sides have legitimate concerns on the checks and balances that come with the DPA system, and the bending it can exert on the Rule of Law. If prosecutors don't have enough to indict or pursue charges, they should not go forward. When they do have enough, they should not settle for less than what the public interest deserves. It can, indeed, be as simple as that. There should not be a large and opaque grey zone in between those situations where businesses can evade formal recognition of guilt and its ensuing consequences, or where prosecutors can force their hand when they in fact have a weak case (Garrett, 2014, pp. 270-284).

6. *Allowing DPAs could erode the public faith in the justice system and in the Canadian institutions*

As stated above, one of the main reasons why Canada would want to allow DPAs is because its national champions are at an unfair disadvantage compared to competitors who have access to such DPAs. Or compared to competitors who are established in jurisdiction with lower development and enforcement of corporate criminal law. Of course, allowing DPAs for that reason would trigger legitimate concerns from public watchdogs and informed citizens.

Recent political events have demonstrated that the public trust in institutions is vulnerable, and challenged when businesses get what is perceived as preferential treatment. Citizens around the globe are concerned by the absence of criminal sanctions on large financial institutions and businesses further to the financial crises of 2007-2008 and by the revelations of the different waves of panama papers. Canadians also have their own debates about what some perceive as the undue influence of business interests in a variety of situations. These situations range from tax breaks or subsidies in favour of national champions and foreign investors alike, to the numerous corruption scandals relating to public contracts. Allowing DPAs in Canada could further damage the public trust in its institution if they perceive these instruments as a counter-productive way for businesses to evade criminal convictions. Our example of the HSBC case, for instance, raised international attention and disgrace as it was found that the money laundering at issue aided terrorists, rogue states and drug lords (Guardian, 2012).

7. *Creating a balanced DPA system is impossible if both business and public interests are to be satisfied*

As a rule of thumb or a telling paradox, the more a Canadian DPA system will be designed to protect the public interest, the less it will be advantageous for businesses. A form of such tension is even recognized by the government of Canada in the text of its Consideration #3:

> [...] with greater judicial involvement comes less certainty as to whether in fact companies could be approved to enter into a DPA, which could deter companies from self-reporting.

The same goes for many other Considerations, and in particular Consideration #2 on the scope of offences for which DPAs could be available. At this stage, we do not comment in detail on these

other considerations, although I would favour a limited scope for DPAs if they are unfortunately included in our criminal law process. I would also favour a large and frequent overview of the DPA process by the courts and the public administration. Yet, these balancing features, on paper, would not necessarily lead to the desired safeguards, in practice. DPAs have proven to be quite controversial even in the more restrictive U.K. system where recent cases appear to derogate from the established guidelines.

EXECUTIVE CONCLUSION

This short analysis of the non-desirability of DPAs as part of the Canadian justice system concludes that these instruments present:

1. Dangers to corporate compliance and threat to the dissuasive effect of Criminal law;
2. Decreased emphasis on the criminal liability of corporate entities;
3. An ill-designed solution for the Canadian corporate criminal law vs. the U.S. respondeat superior model;
4. A risk that prosecutors will have too much pressure and discretion to settle cases they shouldn't settle;
5. A threat to the Rule of Law that can be detrimental to both public and business interests;
6. A threat to the public trust in the justice system and in the Canadian institutions;
7. An impossibility to balance a DPA to satisfy both business and public interests.

It also asserts that:

A. DPAs does not necessarily protect the interests of innocent third parties, especially when compared to available tools;
B. There is no empirical data or logical reasoning to support the claim that DPAs would lead to increased self-reporting;
C. The main reason to allow DPAs would be to protect national champions facing international competition (with the associated consequences stated at point 6 above).

DPAs could therefore create more problems than they would solve, in particular when compared to other reforms. The Canadian government should apply the precautionary principle and reject their use in our criminal proceedings. If the Canadian government chooses otherwise, we hope to participate in a concluding round of consultation and in any parliamentary commission on the subject.

Truly yours,

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November 17, 2017

DPA Consultation
Government of Canada
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11 Laurier St
Gatineau QC K1A 9S5

To Whom It May Concern:

On behalf of Toronto Region Board of Trade (the Board), I am writing to provide input to the Federal Government's consideration of introducing a Canadian Deferred Prosecution Agreement (DPA) regime as an additional tool for prosecutors, to be used in appropriate circumstances, to address corporate crime. As supported by the Canadian Chamber of Commerce, the Ontario Chamber of Commerce, the Fédération des chambres de commerce du Québec, the Association of Consulting Engineering Companies – Canada and Transparency International Canada (TI Canada), we believe that the best way forward is for Canada to adopt the DPA to combat corporate economic crime for the following three reasons:

First, this approach will encourage self-reporting by companies and/or their employees and improve compliance and corporate culture. According to TI Canada, DPAs are intended to be a tool to encourage self-reporting by offending corporations, enable greater compliance overall and incent corporations to turn over individual wrongdoers to law enforcement. Moreover, DPAs if properly designed and implemented, have the potential to increase enforcement of anti-corruption laws and self-disclosure and compliance by corporations.

Second, this approach does not penalize stakeholders, employees, investors and other third parties who had no involvement in the wrongdoing and saves time and money for taxpayers and the legal system. As highlighted by the Ontario Chamber of Commerce and the Fédération des chambres de commerce du Québec[1], a DPA offers a way forward that lets everyone win. It forces the offending company to acknowledge its wrongdoing, collaborate with competent authorities in good faith and implement corrective measures that are fair and equitable. The company is forced onto a remedial path that minimizes the risk of future criminal activity, without harming innocent employees and shareholders.

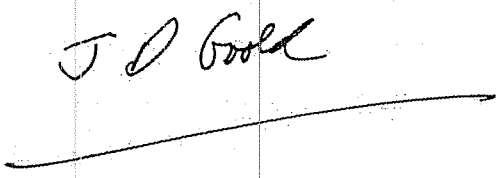
[1] "Should the actions of a few bad apples ruin an entire company?" The Globe and Mail, April 20, 2016.

Another positive aspect of a DPA is that it reduces negative fallout, such as job losses, and saves time and money for taxpayers and the legal system.

Finally, this regime will help to level the playing field for Canadian companies vis-à-vis its global competitors in the UK and the US, among other countries, that are looking to implement a DPA.

In summary, introduction of a new tool to combat economic crime that provides an alternative dispute resolution mechanism should be welcome by the Federal Government. Should you have any questions, please contact me directly at dgoold@bot.com or 416-862-4501.

Sincerely,



Douglas Goold, PhD
Vice President, Policy

About the Toronto Region Board of Trade:
The Toronto Region Board of Trade is one of the largest and most influential chambers of commerce in North America. Our constant flow of ideas, people and introductions to city-builders and government officials firmly roots us as connectors for—and with—the business community. We act as catalysts for the region's growth agenda. Backed by more than 12,000 members, we advocate on your behalf for policy change that drives the growth and competitiveness of the Toronto region. We want Toronto to be recognized as one of the most competitive and sought after business regions in the world, and we believe this reputation starts with you and your business. To learn more, visit us at bot.com and follow us @TorontoRBOT.

Federal Consultation Paper on Deferred Prosecution Agreements
OPP Response - November 17, 2017

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool for addressing corporate criminal liability in Canada?
Corporate fraud investigations in Canada face significant challenges related to lack of effective encouragement and incentive for whistle blowers, witnesses and confidential sources to come forward with information that may afford evidence of an offence. As a result, the police are often unable to properly investigate alleged fraud related crimes and corporate wrongdoing. The option of Deferred Prosecution offers a unique potential means by which corporations could voluntarily accept accountability and reasonable consequences. DPA offers a significant opportunity to redirect the deterrence and prevention of corporate wrongdoing into the corporate community itself by means of compliance monitoring and breach-related enforcement.

Question 2: For which offences do you think DPAs should be available, and why?
Financial crimes at a corporate level are complex to investigate and often require significant time and resources. There is a lack of incentive and cause for witnesses and whistleblowers to cooperate with police investigations relating the financial crimes because it often raises a potential personal risk to individual livelihood and employment. Evidence collection and truth seeking is often impaired by lack of co-operation and participation in police investigations relating to economic crimes. A DPA regime offers a unique mechanism by which corporations have a third option aside from Guilty or Not Guilty. The DPA provides a transparent and accountable way out of corporate wrongdoing and has the potential to reduce strain on the judicial system as well as mobilize corporate communities towards good law abiding corporate citizenship.

Question 3: What role do you think the courts should play with respect to DPAs?
The UK DPA model has achieved success in relation to judicial oversight and approval of DPAs. The US model with a lack of judicial oversight has attracted criticism relating to the lack of transparency and potential for prosecutors to exploit the significant leverage and discretion during the DPA process. Judicial oversight has the potential to assist in simplifying the breach-related investigations and prosecutions in the event of non-compliance with a DPA.

Question 4: What factors should be taken into account in offering a DPA?
This question has limited impact or implication for law enforcement / OPP in so far as DPA's are likely to fit naturally within the realm of prosecutorial discretion and therefor it will not be within the decision making power of the police to offer or not offer a DPA. This approach is logical and ensures the impartiality of the DPA process which is inherently separate from law enforcement and investigative functions. In the event a Canadian DPA implementation favours police involvement in the screening or referral of cases to DPA, then a clearly defined set of factors must be enshrined in legislation as opposed to just policy. Relevant factors would likely include previous history of compliance with DPAs for example. Section 717 of the Criminal Code of Canada relating to alternative measures provides some factors to be considered in relation to a potential DPA provision.

Question 5: When would a DPA not be appropriate?
Canadian's place a very high value on constitutional rights and freedoms as well as the transparency and integrity of government. Given this social and political landscape, corruption, disobedience and bribery offences in both Federal and Provincial Statutes would likely offend the average Canadian's sense of public morale. Good rationale exists for reserving DPA solely for corporations and not individuals (see UK and US DPA-related policies & legislation at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ and https://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.325). This ensures individuals who are personally culpable for crimes do not escape prosecution by virtue of the corporate DPA. It is widely accepted and well supported that DPA's are not appropriate for any crimes against persons and are reserved specifically for financial crimes and offences against property as opposed to any crimes against persons, terrorism, public order etc. DPA's would be inappropriate in the event the corporation involved has no demonstrated means to compensate victims.

Question 6: What terms should be included in a DPA?
Victim compensation / restitution must take priority, and further sanctions should match sentences for the offence(s) giving rise to the DPA. Prevention of future misconduct by way of compliance measures will ensure the DPA regime achieves the highest level of positive influence in mobilizing corporate communities to comply with laws and regulations. Flexibility to modify and customize terms of potential DPA's depending on the unique circumstances of each case should be valued and fostered such that the penalty is restorative, meaningful, timely and deters future misconduct.

Question 7: What factors should be taken into account in setting the duration of a DPA?
This question has limited impact or implication for law enforcement / OPP except if further police involvement is required at the time of non-compliance and/or related investigations. Relevant considerations may include recent R vs Jordan case law relating to reasonable lengths associated with court processes, and any Federal and Provincial statutes of limitation relating to the substantive offences giving rise to the DPA.

Question 8: Under what circumstances should publication be waived or delayed?
In the event a DPA is intertwined with related or interconnected ongoing police investigations, the discretion to delay or waive publication would ensure the integrity of the investigative process. Similarly in the event publication of a DPA may have an impact on the safety and security of the public, victims, accused persons and police officers alike, a priority must be placed on safety over publication.

Question 9: How should non-compliance be addressed?
There are significant challenges associated with resuming the original substantive offence prosecution (and/or investigation) in the event of non-compliance with a DPA. These challenges arguably would serve to undermine the very goals and reasoning for implementation of DPA system in the first place which includes avoidance of lengthy and complex investigations and prosecutions relating to corporate wrongdoing. Non-compliance must be enshrined in the Criminal Code and/or Provincial Offences Act such that a breach or fail to comply offence is readily accessible and supported by admissible evidence.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?
From a policing perspective, clear definition through legislation (and policy as applicable) on the admissibility of facts disclosed during DPA negotiations will be required. If facts disclosed during DPA negations afford evidence of a related (or unrelated offence), police will require a clear understanding of how this information could be lawfully obtained and/or used in a subsequent police investigation. One of the primary potential advantages of a DPA provision is the ability to uncover facts relating to corporate wrongdoing and permit acceptance of accountability which would otherwise invoke a lengthy and potentially challenging criminal investigation and collection of evidence. In the absence of a DPA option, corporations must choose a guilty or not-guilty position. If not-guilty is favourable from a risk management perspective, the defense of this plea may outweigh admissions of truth. If a DPA regime is sought in Canada, a legislated decision model for prosecutorial agencies must be developed and defined relating to the admissibility of facts disclosed during DPA negotiation. The model must also address the contingencies upon which the prosecution & the corporation(s) balance and influence the success or failure of a DPA negotiation. The UK's SFO Deferred Prosecution Agreements Code of Practice (see https://www.sfo.gov.uk/?wpdmdl=1447) provides a good example of a DPA model. Section 717(3) of the Criminal Code of Canada defines that no facts disclosed during alternative measures are to be admissible in subsequent prosecutions, however, the purpose and substance of a DPA is significantly different. SNC Lavalin has publicly provided input to this question stating that facts should be admissible and why (see http://www.snclavalin.com/en/files/documents/publications/dpa-consultation-submission-october-13-2017_en.pdf).

Question 11: How should compliance monitors be selected and governed?
mpliance monitors and governance reasonably must be within the financial and logistical responsibility of the corporation that has voluntarily entered into ıne DPA. The question of what if any role the police and/or law enforcement may have in the event of a compliance breach against a DPA must be addressed in legislation. Presumably any "breach" of a DPA will be referred from the compliance monitoring mechanisms directly to the prosecutorial agency, however if the police are required to engage in any compliance monitoring and/or breach investigation, it will require significant additional and dedicated resources to meet this requirement. There are currently no units or facets of the OPP that are equipped, positioned or could be adapted to conduct or engage in DPA compliance monitoring.

Question 12: What use should be made of compliance monitoring reports?
The primary goals of a DPA regime is to enhance and facilitate financial compensation/restitution, initiate compliance reform and encourage accountability of corporations and individuals who engage in wrongdoing. Deterrence and prevention of future wrongdoing is the ultimate goal through compliance programs and
monitoring systems that may originate with DPAs. Good corporate citizenship is achieved when corporations make decisions and perform actions that are transparent, accountable and law abiding. For this reason, compliance monitoring reports, if made public, would enable individuals, corporations, regulators and law enforcement alike to judge the integrity of a corporation that has entered into a DPA.

Question 13: Under what circumstances should victim compensation (anticipatory restitution) be included as a DPA term?

Victim compensation is in many ways a priority and causal factor for adopting a DPA regimen in so far as one of the challenges of lengthy criminal proceedings is the lack of ability to effectively compensate victims in a timely manner. In the event of the victim being a group, agency or members of a corporation, effective and measurable compensation must be considered on a case by case basis. The flexibility of the DPA regime to impose a variety of restitution measures adopted will determine how effective victim compensation can and will be. Victim compensation should be included as a DPA term whenever a victim or group is readily identified as having suffered a tangible loss as a result of the misconduct. Section 718 of the Criminal Code refers to the purposes of sentencing which includes providing reparations for harm done to victims or to the community. If DPA is to offer a voluntary acceptance of accountability for wrongdoing (quasi-guilty plea), the terms of the DPA must flow harmoniously from the sentencing section of the Criminal Code.

In order for the public (and directly impacted victims) to see the particular remedy of "victim compensation" included as a DPA term in a useful and productive way should Canada enact such a process, it should set out to mirror the purpose as set out in the 2015 Canadian Victims Bill of Rights: Right to Information, Right to Participation, Right to Protection and the Right to Restitution. The Right to Restitution would be most applicable in that any DPA term that directs compensation to individuals, reinforces this right enshrined in the Canadian Victims Bill of Rights.

Restitution should be to individuals who have suffered a direct loss (financial and securities frauds, injury/death of a loved one due to the act/negligence of acting by a corporation/individual of a corporation, etc.) and should be in addition to any other victim compensation funds that are in existence. For example, provinces may have their own individual scheme such as in Ontario; the Criminal Injuries Compensation Board provides compensation for specific circumstances, but not all criminal acts are covered. As well, proceeds of crime that are recovered by police agencies are never directly accessed by "victims" as per the legislation, and can only be utilized through grants to law enforcement agencies in certain circumstances – Civil Remedies and Illicit Activities (CRIA) and Proceeds of Crime (POC).

A timely and transparent mechanism where victims would be directly reimbursed, even if it is only at a fraction of the loss sustained is more relevant to victims than another separate and distinct "Victim Fund". An approach requiring some portion of the funds to be diverted to the administration of such a fund, which does not directly reimburse victims might only create more animosity and the belief that companies are just paying "to get out of jail".

Pages 96 to / à 97

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17 November 2017

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Deferred Prosecution Agreement and Integrity Regime Consultation:
Expanding Canada's toolkit to address corporate wrongdoing

Dear Minister,

On behalf of CAE, I welcome your Government's initiative to engage in consultations on potential enhancements to the Integrity Regime and on the possible adoption of a deferred prosecution agreement (DPA) regime in Canada.

CAE is a global leader in training for the civil aviation, defence and security, and healthcare markets. Backed by a 70-year record of industry firsts, we continue to help define global training standards with our innovative virtual-to-live training solutions to make flying safer, maintain defence force readiness and enhance patient safety. We have the broadest global presence in the industry, with over 8,500 employees, 160 sites and training locations in over 35 countries.

In particular, with respect to our Defence & Security business, we are a world-class training systems integrator offering a comprehensive portfolio of training centres, training services and simulation products across the air, land, sea and public safety market segments. We serve our global defence and security customers through regional operations in Canada, the United States/Latin America, Europe/Africa, and Asia-Pacific/Middle East, all of which leverage the full breadth of CAE's capabilities, technologies and solutions.

CAE is proud to have achieved an enviable reputation in its industry for doing business with the highest ethical standards. We have achieved this by fostering a mentality of excellence and integrity, backed by an anti-corruption policy, ongoing training and vetting process of business partners that are constantly updated.

However, CAE consistently faces an unlevel playing field with its international competitors. For instance, and as explained further, Canada does not have a DPA regime and its Integrity Regime could benefit from certain enhancements.

CAE

In this context, you will find enclosed answers to your questions related to the Integrity Regime consultation. With respect to the DPA consultation, please note that CAE joined the submission filed by the law firm Norton Rose Fulbright dated November 17, 2017, a copy of which is enclosed for reference purposes.

Should you have any questions, please do not hesitate to communicate with the undersigned.

Sincerely,

Joe Armstrong
Vice-President & General Manager
CAE Canada Defence & Security
Tel: 613-247-0342, Cell: @cae.com

Encl.: -CAE's submission regarding Canada's integrity regime consultation.
-Norton Rose Fulbright's submission (joined by CAE) regarding Canada's DPA consultation.

Integrity Regime

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

The decision to render ineligible or suspend an organization, and the duration, should be commensurate with the public interest and proportionate with the seriousness of the misconduct. On the duration of ineligibility and/or suspension, Public Services Procurement Canada's Integrity Regime current rules do not appear to be aligned with other countries, namely our key trading partners. The current duration rules leave the Canadian business community at a distinct competitive disadvantage as compared to other suppliers of services and procurement in other countries. Also, the impact to a Canadian company losing access to the Canadian government market is much greater than a foreign company losing the same access.

There should be more flexibility built into the sanctions part of the regime. An automatic 5-10 year disbarment is a heavy consequence, and there are multiple possible crimes (and degree of corporate culpability, or not in the case of rogue employees acting in defiance of well-articulated company policies) that can trigger application of the Integrity Regime. There should be a measure of discretion in applying disbarment to ensure that the punishment fits the actual crime.

The Government of Canada should align its procurement ineligibility and suspension duration guidelines to that of its major trading partners and specifically to the United States. As indicated in the discussion document, discretion allows for an organization in the United States to be excluded from bidding on procurement contracts for up to three years, with the possibility of extension. This also means that discretion allows for a zero debarment time period. There should also be a clearly delineated process put in place for the ineligible organization to reduce the period of ineligibility. Perhaps Performance Integrity could be a rated evaluation criterion in bid evaluations, which assess the company's recent record and would impose an evaluation penalty without prohibiting competition.

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

Rendering an organization ineligible is a very serious action, and it should clearly be in the public interest to take such action. The causes for declaring an organization ineligible should be outlined in the Integrity Regime but it does not necessarily mean that the organization should in fact be rendered ineligible. The seriousness of actions by the organization or omissions of remedial measures or mitigating factors should be considered in making any ineligibility decision. The following factors should be considered in determining whether a supplier should benefit from discretion:

- Has the organization put in place effective standards of conduct and internal compliance controls, including review procedures as well as ethics and compliance training programs.
- Did the organization bring the alleged misconduct as a cause for ineligibility to the attention of the Government of Canada in a timely manner?
- Did the organization engage in a full investigation of the circumstances associated with the cause of the ineligibility?
- The degree of cooperation by the organization with the Government of Canada.
- Whether the organization has agreed to make restitution related to the offending activity.
- Whether the organization has taken action against the individuals responsible for the alleged misconduct.
- Whether the organization has put in place remedial measures, including those recommended by the Government of Canada.
- Whether the organization's senior management acknowledges the seriousness of the misconduct and put in place measures to prevent recurrence, eg, tone from the top, whistle blowing actions, etc.
- Mitigating factors that should be taken into account, as proposed by the organization.

Consideration should be given to a revision mechanism, whereby a debarred organization can ask for a revision after a certain time, if it believes that the above factors have evolved since the debarment was imposed upon the organization.

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

Other offences that call into question the integrity of the supplier should not necessarily be specifically included in the Government's Ineligibility and Suspension Policy.

There is reason to be concerned with the possible extraterritorial reach of the Government of Canada in this regard. An integrity regime that takes into account civil or provincial offences, other federal offences related to corporate wrongdoing, allegations, or debarment decisions in other jurisdictions could be made without full regard for the systems of jurisprudence associated with the other jurisdictions, leniency provisions or other rules therein. The focus of the Government of Canada should remain within the realm of Canadian government(s) and specifically, with respect to the procurement of goods and services.

Question 4: What factors should be considered in determining whether new offences should be included?

The Government of Canada should consider including in its policy the right to render ineligible or to suspend any supplier who has engaged in misconduct that indicates a lack of business integrity that seriously and directly impacts the responsibility of the Government of Canada as a contractor or subcontractor.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The Government of Canada should not consider actions regarding corporate wrongdoing on the basis of allegations, or when under investigation, to determine whether to suspend or render ineligible an organization. Assessment of future risks is not the primary principle upon which to render such serious actions. Rather, such actions could be contemplated when it has been concluded/determined that immediate action (in the present) is required to protect the public interest.

A key question before the Department of Public Services and Procurement is whether it has the administrative capacity to engage in such actions.

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

Integrity Regime determinations of ineligibility should only be applied to procurement related federal services. Such determinations should not be applied to non-procurement federal services. The criteria for the determination of ineligibility differs across various government agencies. Best practices should be shared between the , Public Services Procurement Canada and various Canadian government agencies who conduct due diligence and their own assessments of eligibility.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

Debarment decisions made in other jurisdictions by another organization should have no impact on a supplier's status under the Integrity Regime. This is an especially questionable practice that would sacrifice the jurisdictional independence of Canadian federal agencies.

If an organization is debarred by a provincial jurisdiction or agency using similar criteria as the Government of Canada, then it makes sense to at least examine with greater scrutiny such actions viz. the organization's relationship with the Government of Canada. However, the reverse is also true. If a provincial agency, such as the Autorité des Marchés Financiers, makes a decision not to debar an organization, utilizing its own criteria, then the Government of Canada should take this provincial action into consideration as it relates to the supplier's status under the Integrity Regime.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

There are very limited measures that can or should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement. The Government of Canada should generally not take actions to preclude, suspend or debar on the basis of allegations, or associations.

However, if there is enough evidence that the public interest could be negatively impacted by the award of such a federal contract or agreement, then the Government of Canada should consider giving itself the discretion to preclude such an award/agreement (if it does not already have such discretion).

Steps could be taken in the procurement process, as well in the descriptions of suppliers found in relevant government data bases, to be as up to date as possible with respect to known membership and associations with organized crime.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

and

Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

Amendments are required to the Integrity Regime, including some that are mentioned in this submission, before consideration to apply the Integrity Regime on a broader basis, to include federal entities beyond departments and agencies, or to achieve other social, economic or environmental policy objectives. The Integrity Regime needs to be brought into alignment with similar regimes in other countries. It needs some adjustment so that the Government of Canada can truly "use its purchasing to positively and uniformly influence corporate behavior."

As constructed, the existing regime does not promote self-disclosure. The punitive consequences of the Integrity Regime – 5-10 years' disbarment from bidding or working on Federal contracts (with cascading effect on provincial governments, foreign governments and private sector contracts) - are sufficiently draconian to preclude most if not all companies from ever self-reporting acts of misconduct under the current Integrity Regime. The Integrity Regime does not allow a company to purge itself of an offence by, for example, coming forward to the government to say "these 2 employees engaged in misconduct, we have fired them as their acts are inconsistent with our policies, we have tightened processes to make their misconduct more difficult in future, etc..."

Effectively, companies should be allowed to properly disclaim individual acts of misconduct as not reflecting the "mens rea" or true intent of the company. In such cases, there should be little or no consequence to the company if the latter has clearly demonstrated by its behaviour, promptly after the misconduct is discovered and investigated, that it completely disclaims such conduct and itself substantively punishes and/or dismisses without compensation or reward the individual perpetrators of the misconduct. The company can send no clearer signal to all its other employees that it means what its policies say and will not condone or reward misconduct. If there is to be any penalty in such circumstance, it should be proportionate to the negligence, if any, of the company in publishing its

compliance program, training staff on the compliance program, and enforcing its compliance program. If the company has not been so negligent, (per a previous answer) then no punishment of the company is necessary as its own behaviour is self-correcting.

By not having a self-disclosure safe-harbour, the Integrity Regime actually makes it harder for companies to dismiss staff for misconduct – the consequences to the company of proving in court the employee misconduct, where the misbehaving employee disagrees he/she is being dismissed from their employment for cause, expose the company to potentially 5-10 years of debarment and the resultant impact to the company's eligibility to compete for Canadian government and other customer contracts. If the company quietly dismisses the employee and pays them compensation (as it must) because cause cannot reasonably be proven publicly in court due to the disbarment risk under the Integrity Regime, that can be made to look as though the company is rewarding a bad employee for their misconduct. Finally, that absence of a safe-harbour for self-disclosure may expose companies to blackmail by their current or former employees who are aware of misconduct – their own or that of another employee.

In sum, the Integrity Regime should have a safe-harbour provision for self-disclosure, and should not lead to punishment of companies that have legitimately disavowed their employee's misconduct in ways that make it clear the company itself had no criminal intent to commit the misconduct.

SNC·LAVALIN

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October 13, 2017

The Honourable Carla Qualtrough, P.C., M.P.
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Deferred Prosecution Agreement and Integrity Regime consultation:
Expanding Canada's toolkit to address corporate wrongdoing

Dear Minister,

On behalf of SNC-Lavalin, I welcome your Government's decision to engage in consultations on expanding Canada's toolkit to address corporate wrongdoing through a Deferred Prosecution Agreement (DPA) and further enhancements to the Department of Public Services and Procurement Canada's Integrity Regime.

Founded in 1911, SNC-Lavalin Group Inc., a Montreal-based company, provides end to end engineering services in a variety of industry sectors, including mining and metallurgy, oil and gas, environment and water, infrastructure and clean power. With approximately 54,000 employees, the Company has a strong foothold in North America (45%) but is also represented in Europe and the Middle East/Africa (20% each) and in Asia (15%).

SNC-Lavalin has lived through one of the greatest challenges of its 106-year history. We believe that the company has been able to emerge from this difficult period as a result of the unrelenting commitment of its employees to excellence in ethics and integrity. We have taken many concrete steps to entrench the values and principles espoused in our Ethics and Compliance Program deep into the culture of our company.

In the spirit of one of our core principles, we want to collaborate as fully and extensively as possible as it relates to these important consultations. Only through high quality and exemplary levels of cooperation will the Government of Canada be able to achieve its overall objectives to take "action against corporate wrongdoing and to hold companies accountable for such misconduct." In this regard, the capacity to be able to self-report remains at the heart of both sets of consultations.

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The time is right to address especially the DPA, as well as the IR. But time is also of the essence. The international playing field is not level between Canadian and foreign engineering and consulting competitors from the United States, the United Kingdom, France and soon from Australia. SNC-Lavalin fully supports the need to take the time to conduct a credible, fair, open and transparent consultation process. However, Canada is clearly behind in terms of using all possible tools to deal as effectively as possible with corporate economic crime. In particular, Canada does not have the DPA tool at its disposal and the IR needs further enhancements to align with our key global trading partners. Accordingly, we urge the Government of Canada to move forward as expeditiously as possible.

It is in this spirit that you will find enclosed answers to questions associated with each consultation. These sets of responses, and appendices, will hopefully demonstrate that SNC-Lavalin shares the Government of Canada's commitment to uphold the highest ethical business practices and, as a result, for the present and in the future will remain a trusted supplier to PSP Canada.

I would be pleased to answer any questions you or your staff may have on the attachments. Importantly, I would appreciate the opportunity to discuss SNC-Lavalin's recent structural and operational changes, improvements to its governance, its world class compliance and integrity regime as well as our short and long term strategic objectives to grow and prosper from our Canadian base in Montreal, Quebec.

Until such time, I wish you best of luck with this important consultation and to the work that must follow.

Sincerely,

Neil Bruce
President and Chief Executive Officer
SNC-Lavalin

c.c. The Honourable Scott Brison, P.C., M.P., B.Comm.
President of the Treasury Board
Treasury Board of Canada

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development
Innovation, Science and Economic Development Canada

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The Honourable William Morneau, P.C., M.P.
Minister of Finance
Finance Canada

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Justice Canada

The Honourable Chrystia Freeland, P.C., M.P.
Minister of Foreign Affairs
Global Affairs Canada

The Honourable James G. Carr, P.C., M.P.
Minister of Natural Resources
Natural Resources Canada

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of International Trade
Global Affairs Canada

Encl.: (2)

October 13, 2017

Submission to the DPA/Integrity Regime Consultation
DPA Submission

Serious cases of corporate economic crime should be dealt with severely. However, it is unfair that the actions of one or more rogue employees should tarnish a company's reputation, as well as jeopardize its future success and its employees' livelihoods. While the commercial organization bears some responsibility for its employee's misconduct, prosecution with a guilty plea could preclude it from doing business with key public and private sector customers, in Canada and abroad. The best course forward is for Canada to adopt the deferred prosecution agreement (DPA) to combat corporate economic crime. DPAs already are used or being developed in several countries (Appendix 1). This leaves Canada at a distinct competitive disadvantage. Investors may be reluctant to expose themselves to an uncertain enforcement regime in Canada, resulting in additional legal risks. Canadian companies have already lost significant contracts abroad because global competitors have been able to impugn the integrity of the firm, despite comprehensive remediation actions, while corruption charges are pending.

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Arguments in favour of DPAs:

- Encourage self-reporting by companies (Canada's Integrity Regime discourages reporting – the consequences are potentially dire while there is no specific safe-harbour regime for coming forward).
- Improved enforcement outcomes – prosecution costs/risks avoided, justice served by deterrence effect of fines and criminal prosecution of corporate officers, monitorship akin to a probation period.
- Improve compliance and corporate culture.
- Avoid undue negative consequences for stakeholders, including employees, investors and other third parties who had no involvement in the crime.

Arguments against DPAs: The most common cited arguments against DPAs are:

- Could weaken the deterrent effect of prosecution.
- Perception that DPAs can allow companies to 'buy their way out of trouble'.
- Do DPAs provide sufficient incentive to companies to encourage self-reporting misconduct?

These arguments against have no merit. DPAs negotiated in the USA, and recently in the UK, have highlighted the importance of transparency, self-reporting and cooperation as it relates to such offences. Without the DPA tool, there would be far fewer cases of misconduct brought to the public's attention. The Canadian DPA is recommended as an additional tool, not as the only tool, in the combat against corporate economic crime. It's a more efficient and effective way of holding organizations accountable without the cost and uncertainty traditionally associated with criminal trials.

Question 2: For which offences do you think DPAs should be available and why?

- Initially, DPA's should be available in alleged cases of economic crime by organizations. This includes offences such as fraud, false accounting, corruption, foreign bribery and money laundering (or dealing with the proceeds of crime), exportation and/or importation of prohibited or restricted goods, and related offences.

- Why? So the Government of Canada can focus on an area where Canada could really use another tool with respect to prosecuting economic crime by organizations.

  However, the Government of Canada should have the flexibility to expand the scope of use of DPAs to a broader set of offences by organizations. For now, a narrower scope is appropriate with the flexibility to expand as Canada becomes more comfortable and experienced with this new tool to combat corporate economic crime.

- In principle, the DPA tool can be applied in other areas of corporate offenses, such as: health and safety, environment, other regulatory offences, or even other prosecuting authorities.

- Generally, DPAs should not be made available to individuals. Companies seeking DPAs should be required to cooperate fully with authorities to bring the individuals who engaged in the alleged misconduct to justice. The authorities should be tough on individuals who engaged in the alleged misconduct. Companies do not act on their own – they can and do only act through individuals and those individuals ought to be held to account for their breaches of both law and company policy.

Question 3: What role do you think the courts should play with respect to DPAs?

There is a role for the courts with respect to DPAs. The overall question for the courts is whether the proposed or draft DPA would bring the administration of justice into disrepute. For example, some US courts have rejected US DPAs where the company was to pay a sanction but there were no consequences for the individual employees who caused the company to breach US law – it was felt by those US judges that letting the individuals in those cases escape justice was unacceptable. Also, the courts should provide their views on whether the draft terms and conditions of the DPA are fair, reasonable and proportionate.

- The courts involvement in the DPA process should be to provide 'judicial scrutiny' that is independent, fair, impartial, and transparent.
- The involvement of the courts/of a judge should instil confidence and certainty into the DPA process.
- There should be oversight that the final agreed upon terms between the public prosecutor and the organization appropriately address the alleged wrongdoing by both individuals and the corporate employer.
- It is not the role of the courts to sentence or to try the offence.

It is appropriate for a court to provide their views to the public prosecutor on ways and means to amend the draft DPA (before the court), subject to final approval of both the public prosecutor and the company.

Question 4: What factors should to be taken into account in offering a DPA?

- To maintain and uphold independence, the offer to enter into DPA discussions should be at the discretion of the public prosecutor. However, sole discretion should not just rest with the public prosecutor. There should be an administrative process by which an organization can proactively submit a DPA or settlement proposal without prejudice to any future proceeding, or to the independence of the public prosecutor. This would not only enhance self-reporting, but it would deal with an obvious gap in the current public administration of such matters. Additionally, there is merit to explicitly acknowledging the possibility of retrospective application of a DPA.
- An offer to enter into such discussions should not be construed as a commitment of the public prosecutor to provide a DPA to the organization.
- If the public interest would be met by entering into a DPA with an organization, then the public prosecutor should give such action its full consideration.
- The public interest choice to enter into DPA negotiations should be based on the following (non-exhaustive) factors:

- Degree of pro-active cooperation with the Crown.
- Degree of self-reporting.
- History of similar conduct prior to the alleged wrongdoing, ie, regulatory, financial, etc.
- The existence of a corporate compliance programme, or substantive evidence that the organization has engaged proactively in remediation by building or improving a credible and effective compliance programme since the alleged misconduct.
- Whether the offending conduct represents the actions of individuals or is sanctioned by company policies and practice (as approved by the board of directors) and whether those individuals who engaged in the misconduct are still with the organization.
- Whether the organization engaged in structural organizational reforms to improve its reporting structures and to take steps to avoid any future alleged misconduct.
- The existence of credible and effective steps to change the culture of the organization.
- That a criminal conviction is likely to have disproportionate negative impacts on innocent people, ie, shareholders, pension plan holders, employees, suppliers and other stakeholders.
- That the impact of prosecution leads to substantive economic/commercial damage to the organization, such as the inability to provide services in Canada, in North America and in global markets with government contracts, lower revenues from debarment by governments and/or exclusion by key clients, impairment of competition in contested markets, negative impacts on the Canadian supply chain, negative impact on governments' procurement, defence and infrastructure markets, and substantive redundancies of innocent personnel.

- That there was substantive economic/commercial damage to the organization in the intervening period between the alleged misconduct and the decision to enter into DPA negotiations.
- Other existing or newly created forms of guidance for the public prosecutor may also be taken into account in the offering of a DPA to an organization.

Question 5: When would a DPA not be appropriate?

A DPA would not be appropriate if it is not in the public interest for the public prosecutor to engage in such an action. The factors that may contribute to a DPA as not appropriate include:

- The seriousness of the alleged misconduct...the most important factor in the decision to prosecute or to not prosecute and offer a DPA negotiation.
  - A significant level of harm is done to the public, or to victims of the alleged wrongdoing.
  - A substantial negative impact on the integrity/confidence of markets, or of governments.
  - There are severe aggravating features to the misconduct, eg, multi-jurisdictional, took careful planning (pre-meditated), involved several senior executives and elements of board approval in the organization.
- A history of similar conduct – repeat offender.
- Failure to prosecute for similar or for more serious breaches of the law.
- The organization either had no (or an ineffective) compliance organization, or has not made significant progress to establish an effective compliance program since the alleged misconduct.
- The organization has been previously warned, sanctioned, or criminal charges have been laid with no substantial changes to prevent such conduct in the future.
- Complete lack of collaboration with authorities.

Question 6: What terms should be included in a DPA?

A DPA should include some or all of the following, depending upon the specific case or situation (non-exhaustive and flexible):

- A statement of facts relating to the offence.
- A time period for the duration of the DPA (a reasonable period for the government to become satisfied that remediation steps are complete and the likelihood of a recurrent offence is slim to non-existent).
- Acknowledgement of responsibility for the conduct and that if similar conduct recurs during the DPA term that the company may be prosecuted for the original as well as the new crime.
- Obligation to cooperate with any investigation and prosecution of company staff.
- Disgorgement of profits made from the misconduct, through payment of fines (Appendix 2).
- A financial penalty that takes into account penalties imposed on competitors and the seriousness of the crime, and factors such as collaboration with authorities. This is perhaps done as in the UK and US DPA models -- with the application of a discount to the financial penalty.
- An obligation to replace implicated individuals who may be still with the organization.
- An obligation to cooperate with any current or future investigation of the alleged past offence
- The consequences for the defendant if it engages in further misconduct
- Implementing or improving a company compliance program.
- Imposition of a monitor for a period of time, where appropriate, to audit compliance.
- A public statement from the Crown and the company about the DPA.

The benefits of a DPA scheme for Canada will be achieved with a model that does not require the negotiation of an admission to criminal liability for alleged misconduct.

Question 7: What factors should be taken into account in setting the duration of a DPA?

- The maximum/minimum duration of a DPA should depend upon the circumstances of the alleged misconduct and the facts provided during the negotiation
- Each DPA should have an expiry date, where the DPA no longer has effect.
- An expiry date provides clarity as to the duration of the DPA for both the public prosecutor (the Crown) and the organization's leadership.

Question 8: Under what circumstances should publication be waived or delayed?

- A careful balance needs to be maintained between ensuring public confidence in the DPA as a tool to combat economic crime with the need to provide organizations and their representatives with a high level of certainty and confidentiality to negotiate the DPA. Organizations with alleged misconduct are less likely to come forward to negotiate a DPA if their negotiating position might be compromised with early publication of facts, etc. Therefore, there should be no publication in the initial stages of the DPA negotiation.
- Should Canada choose court oversight for the Canadian DPA, then it is likely that a sitting judge will provide a reasoned explanation for their satisfaction and the appropriateness with the negotiated DPA. This reasoning should remain private until the DPA is approved and then generally should be made available to the public.
- Where such a judicial reasoning, or agreed upon statement of facts, should be waived or delayed is where there may be restrictions that are necessary to protect the credibility and process of other ongoing or future prosecutions against the organization, or former employees. This should also apply to the actual publication of the announcement of a DPA between the public prosecutor and a commercial organization.

Question 9: How should non-compliance be addressed?

The public prosecutor should provide the organization with an opportunity to address the non-compliance.

If there are repeated examples of non-compliance, beyond the organization's control, the organization should have the opportunity to address the non-compliance and to renegotiate the terms of the DPA with the public prosecutor.

The court should determine, upon advice of the public prosecutor, whether non-compliance has taken place.

There should be a factual finding as to the degree of the non-compliance.

There should be consequences for non-compliance of a DPA, including possibly: a financial penalty, additional terms/conditions, extension of the expiry date of the DPA, or even termination of the DPA

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

See Question 8. Facts disclosed during DPA negotiations should be admissible in a future prosecution against a company for other similar crimes, subject to any necessary protections associated with the credibility and process of the other ongoing or future proceedings against the company, or former employees. Further, on the presumption that Canada will consider a made-in-Canada DPA that is somewhat or closely aligned with the UK/Australia models, then disclosure obligations that are reflective of our mutual common law traditions should apply to the entire DPA process, including when facts disclosed during the DPA negotiation should be admissible as evidence in another proceeding.

Question 11: How should compliance monitors be selected and governed?

Independent compliance monitors should report directly to the office of the public prosecutor but be engaged by the organization in accordance with the DPA between the public prosecutor and the organization.

Selection of independent monitors should be made on the basis of a mutually agreed set of criteria/terms. The monitorship selection process used in the Integrity Regime by the Department of Public Services and Procurement could serve well as a model for the Public Prosecutor.

There should be a terms of reference for the engagement of the independent monitor between the organization and the public prosecutor, and then a letter of engagement between the monitor and the organization. The terms of reference and engagement of the independent monitor for the public prosecutor should take into consideration the mandates of other monitors that may already be in place with the organization.

Question 12: What use should be made of compliance monitoring reports?

Compliance Monitoring reports should provide an effective review of the implementation and effectiveness of the ethics and compliance programme of the organization, measured against the integrity guidelines/principles or other criteria of the public prosecutor, and the organization's compliance with its other obligations under the DPA. The monitor's report should provide recommendations for future improvements to the ethics and compliance programme of the organization, and to the organization's compliance with the DPA, and implementation of these recommendations should be made in a timely manner by the organization. Implementation plans to action the monitor's recommendations should be made by the organization in writing.

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

In the case of economic crime, the "victim" may not be an identifiable individual. It may be difficult to determine how restitution should be calculated, apportioned among and/or paid to victims. Further, broader victim compensation generally falls within provincial jurisdiction, and may not be applicable in the case of a foreign-based offence.

Any anticipatory restitution as part of the terms of a DPA should take into account other actions and proceedings before the courts (to the extent possible given differing jurisdictions).

If the Government of Canada imposes a material fine, such as a penalty reflecting the profit earned from the misconduct, it may not be appropriate to impose a further restitution obligation for an offence.

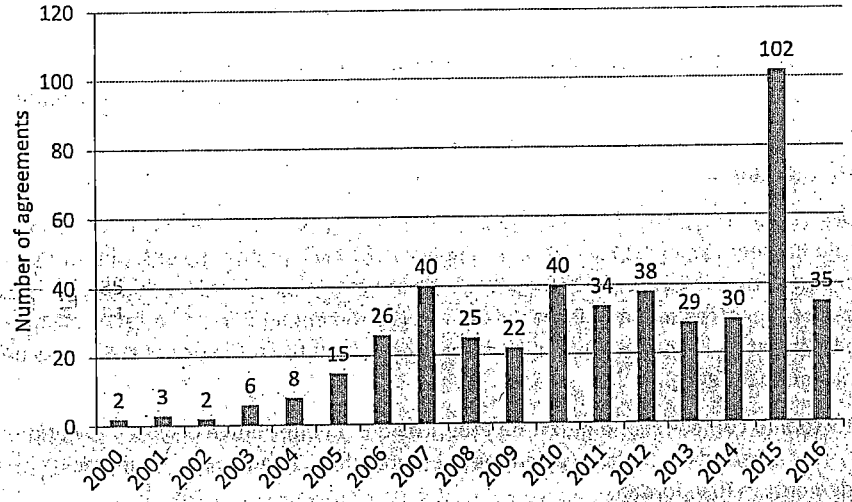
Generally, appropriate restitution for an alleged victim needs to be proven separately in the most appropriate jurisdiction. The calculation of the amount of restitution is generally quite burdensome and is perhaps best left to other proceedings.

Other Comments or Suggestions

A made in Canada DPA should clearly apply when charges are pending before the courts at the time of entry into force of legislation. Parliament can enact legislation to apply as of a time prior to its entry into force. While retrospective application of new laws are not the norm, there are many exceptions to that rule. Retrospective application in the case of the introduction of DPAs for Canada is a recommended and effective way of adjusting for the transition into a DPA regime. There would not be interference with the functions of the courts nor any impairment of judicial independence.

Introduction of a new tool to combat economic crime that provides an alternative dispute resolution mechanism should be welcome. This is especially the case given the pressures that Canada's courts are facing in light of the Supreme Court's judgments in R. v. Jordan.

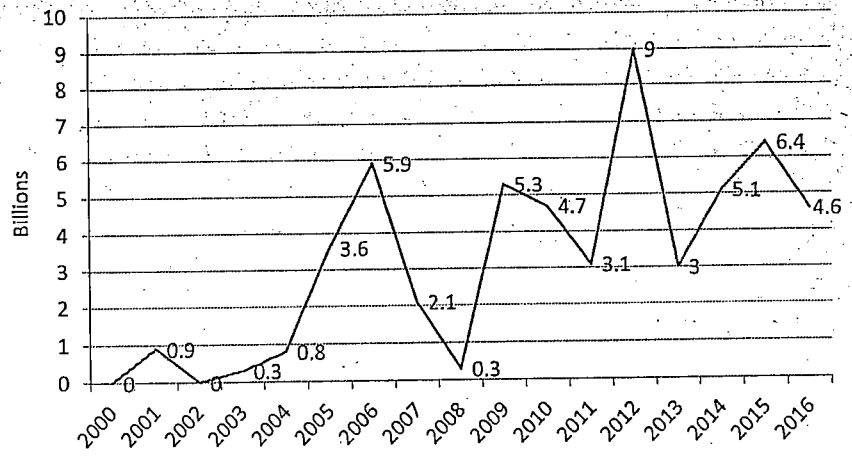
Appendix 1: US Corporate DPAs and NPAs, 2000-2016



Note: Includes both DOJ and SEC DPAs and NPAs. Also, UK has entered into 2 DPAs so far in 2017.

Source: Gibson & Dunn, 2017 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAS) and Deferred Prosecution Agreements (DPAS), July 2017

Appendix 2: Total US monetary recoveries related to DPAs/NPAs, 2000-2016



Note: Includes both DOJ and SEC DPAs and NPAs. Also, UK has entered into 2 DPAs so far in 2017, with financial penalties, disgorgement of profits and other compensation valued at more than 1.16 billion British pounds.

Source: Gibson & Dunn, 2017 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAS) and Deferred Prosecution Agreements (DPAS), July 2017

October 13, 2017

Submission to the DPA/Integrity Regime Consultation
Integrity Regime Submission

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

The decision to render ineligible or suspend an organization, and the duration, should be commensurate with the public interest and proportionate with the seriousness of the misconduct. On the duration of ineligibility and/or suspension, PSP's Integrity Regime current rules do not appear to be aligned with other countries, namely our key trading partners (per case studies in discussion document). The current duration rules leave the Canadian business community at a distinct competitive disadvantage as compared to other suppliers of services and procurement in other countries.

There should be more flexibility built into the sanctions part of the regime – an automatic 5-10 year disbarment is a heavy consequence, and there are multiple possible crimes (and degree of corporate culpability, or not in the case of rogue employees acting in defiance of well-articulated company policies) that can trigger application of the Integrity Regime. There should be a measure of discretion in applying disbarment to ensure that the punishment fits the actual crime of the organization (see answers to questions 9 and 10).

The Government of Canada should align its procurement ineligibility and suspension duration guidelines to that of its major trading partners and specifically to the United States. As indicated in the discussion document, discretion allows for an organization in the United States to be excluded from bidding on procurement contracts for up to three years, with the possibility of extension. This also means that discretion allows for a zero debarment time period. There should also be a clearly delineated process put in place for the ineligible organization to reduce the period of ineligibility.

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

Rendering an organization ineligible is a very serious action, and it should clearly be in the public interest to take such action. The causes for declaring an organization ineligible should be outlined in the Integrity Regime but it does not necessarily mean that the organization should in fact be rendered ineligible. The seriousness of actions by the organization or omissions of remedial measures or mitigating factors should be considered in making any ineligibility decision. The following factors should be considered in determining whether a supplier should benefit from discretion:

- Has the organization put in place effective standards of conduct and internal compliance controls, including review procedures as well as ethics and compliance training programs.
- Did the organization bring the alleged misconduct as a cause for ineligibility to the attention of the Government of Canada in a timely manner?
- Did the organization engage in a full investigation of the circumstances associated with the cause of the ineligibility?
- The degree of cooperation by the organization with the Government of Canada.
- Whether the organization has agreed to make restitution related to the offending activity.
- Whether the organization has taken action against the individuals responsible for the alleged misconduct.
- Whether the organization has put in place remedial measures, including those recommended by the Government of Canada.

- Whether the organization's senior management acknowledges the seriousness of the misconduct and put in place measures to prevent recurrence, eg, tone from the top, whistle blowing actions, etc.
- Mitigating factors that should be taken into account, as proposed by the organization.

Consideration should be given to a revision mechanism, whereby a debarred organization can ask for a revision after a certain time, if it believes that the above factors have evolved since the debarment was imposed upon the organization.

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

Other offences that call into question the integrity of the supplier should not necessarily be specifically included in the Government's Ineligibility and Suspension Policy. Indeed, such specificity may not be consistent with the Government's focus in this consultation on federal government procurement contracts and the integrity of the federal procurement system.

There is reason to be concerned with the possible extraterritorial reach of the Government of Canada in this regard. An integrity regime that takes into account civil or provincial offences, other federal offences related to corporate wrongdoing, allegations, or debarment decisions in other jurisdictions could be made without full regard for the systems of jurisprudence associated with the other jurisdictions, leniency provisions or other rules therein. The focus of the Government of Canada should remain within the realm of Canadian government(s) and specifically with respect to the procurement of goods and services.

For example, Germany and Sweden do not subject organizations to criminal prosecution. However, it is indeed possible if not likely that each country has equivalent if not more stringent and significant administrative provisions to deal with misconduct of organizations in those countries. In the case of Germany this seems to be the case. Such administrative provisions could be as adequate or more adequate to the task of preserving the integrity of procurement regimes in those countries. Thus, the risk associated with the Government of Canada's procurement regime is mitigated while the Government of Canada may not be as familiar with third country administrative rules and provisions.

Question 4: What factors should be considered in determining whether new offences should be included?

The Government of Canada should consider including in its policy the right to render ineligible or to suspend any supplier who has engaged in misconduct that indicates a lack of business integrity that seriously and directly impacts the responsibility of the Government of Canada as a contractor or subcontractor.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The Government of Canada should <u>not</u> consider actions regarding corporate wrongdoing on the basis of allegations, or when under investigation, to determine whether to suspend or render ineligible an organization. Assessment of future risks is not the primary principle upon which to render such serious actions. Rather, such actions could be contemplated when it has been concluded/determined that immediate action (in the present) is required to protect the public interest.

A key question before the Department of Public Services and Procurement is whether it has the administrative capacity to engage in such actions.

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

Integrity Regime determinations of ineligibility should only be applied to procurement related federal procurement. Such determinations should not be applied to non-procurement federal services. The criteria for the determination of ineligibility differ across various government agencies. Best practices should be shared between the PSP Canada and various Canadian government agencies who conduct due diligence and their own assessments of eligibility.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

Debarment decisions made in other jurisdictions by another organization should have no impact on a supplier's status under the Integrity Regime. Specific reference is made in the discussion paper to the practice of cross debarment by the five multilateral development banks (MDBs). This is an especially questionable practice that would sacrifice the jurisdictional independence of Canadian federal agencies. It also results in ad hoc decision making that may be subject to the policy priorities of new governments, such as recently with respect to international development contracting in the Canadian government context.

Cross debarment leads to confusion between jurisdictions who are parties to cross debarment agreements and those that are not party to such provisions in other fora. Further, the Government of Canada's criteria and process in determining eligibility will undoubtedly be different than that of MDBs. This could result in a debarment outcome in one jurisdiction, but not in another jurisdiction.

Rather than multiplying the deterrence factor, cross debarment undermines the capacity and capabilities of the organization to improve itself and to develop stronger practices regarding ethics and conformity, and to move forward as a good corporate citizen.

If an organization is debarred by a provincial jurisdiction or agency using similar criteria as the Government of Canada, then it makes sense to at least examine with greater scrutiny such actions viz. the organization's relationship with the Government of Canada. However, the reverse is also true. If a provincial agency, such as the Authorité des Marchés Financiers, makes a decision not to debar an organization, utilizing its own criteria, then the Government of Canada should take this provincial action into consideration as it relates to the supplier's status under the Integrity Regime.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

There are very limited measures that can or should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement. To repeat, the Government of Canada should generally not take actions to preclude, suspend or debar on the basis of allegations, or associations.

However, if there is enough evidence that the public interest could be negatively impacted by the award of such a federal contract or agreement, then the Government of Canada should consider giving itself the discretion to preclude such an award/agreement (if it does not already have such discretion).

Steps could be taken in the procurement process, as well in the descriptions of suppliers found in relevant government data bases, to be as up to date as possible with respect to known membership and associations with organized crime.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

and

Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

Amendments are required to the Integrity Regime, including some that are mentioned in this submission, before consideration to apply the IR on a broader basis, to include federal entities beyond departments and agencies, or to achieve other social, economic or environmental policy objectives. Some of the policy objectives indicated in the discussion document are indeed deserving of support, including for example the UK's Modern Slavery Act. But the IR needs to be brought into alignment with similar regimes in other countries. It needs some adjustment so that the Government of Canada can truly "use its purchasing to positively and uniformly influence corporate behavior."

As constructed, the existing regime does not promote self-disclosure. The punitive consequences of the Integrity Regime – 5-10 years disbarment from bidding or working on Federal contracts (with cascading effect on provincial governments, foreign governments and private sector contracts) - are sufficiently draconian to preclude most if not all companies from ever self-reporting acts of misconduct under the current Integrity Regime. The Integrity Regime does not allow a company to purge itself of an offence by, for example, coming forward to the government to say "these 2 employees engaged in misconduct, we have fired them as their acts are inconsistent with our policies, we have tightened processes to make their misconduct more difficult in future, etc..."

Effectively, companies should be allowed to properly disclaim individual acts of misconduct as not reflecting the "mens rea" or true intent of the company. In such cases there should be little or no consequence to the company if the latter has clearly demonstrated by its behaviour, promptly after the misconduct is discovered and investigated, that it completely disclaims such conduct and itself substantively punishes and/or dismisses without compensation or reward the individual perpetrators of the misconduct. The company can send no clearer signal to all its other employees that it means what its policies say and will not condone or reward misconduct. If there is to be any penalty in such circumstance, it should be proportionate to the negligence, if any, of the company in publishing its compliance program, training staff on the compliance program, and enforcing its compliance program. If the company has not been so negligent, (per a previous answer) then no punishment of the company is necessary as its own behaviour is self-correcting. When it comes to fostering a culture of good ethics in business, as the saying goes: "One good sacking is worth a thousand memos."

By not having a self-disclosure safe-harbour, the Integrity Regime actually makes it harder for companies to dismiss staff for misconduct – the consequences to the company of proving in court the employee misconduct, where the misbehaving employee disagrees he/she is being dismissed from their employment for cause, expose the company to potentially 5-10 years of debarment and the resultant impact to the company's eligibility to compete for Canadian government and other customer contracts. If the company quietly dismisses the employee and pays them compensation (as it must) because cause cannot reasonably be proven publicly in court due to the disbarment risk under the Integrity Regime, that can be made to look as though the company is rewarding a bad employee for their misconduct. Finally, that absence of a safe-harbour for self-disclosure may expose companies to blackmail by their current or former employees who are aware of misconduct – their own or that of another employee.

In sum, the Integrity Regime should have a safe-harbour provision for self-disclosure, and should not lead to punishment of companies that have legitimately disavowed their employee's misconduct in ways that make it clear the company itself had no criminal intent to commit the misconduct.

Business Council of Canada | Conseil canadien des affaires

The Honourable John P. Manley, P.C., O.C.
President and Chief Executive Officer

L'honorable John P. Manley, C.P., O.C.
Président et chef de la direction

November 16, 2017

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Justice Canada
Office of the Minister of Justice and Attorney General of Canada
Department of Justice Headquarters, 284 Wellington Street
OTTAWA, Ontario
K1A 0H8

The Honourable Carla Qualtrough, P.C., M.P.
Minister of Public Services and Procurement
Public Services and Procurement Canada
Place du Portage, Phase III, Room 18A1, 11 Laurier Street
GATINEAU, Quebec
K1A 0S5

Dear Ministers,

On behalf of Canada's business leaders, I am pleased to contribute to the federal government's current consultation on two related subjects: 1) proposed refinements to the federal *Integrity Regime* (IR); and 2) the question of whether Canada should introduce Deferred Prosecution Agreements (DPAs) as an additional tool to deal with cases of corporate wrongdoing.

The Business Council's member companies comprise some of the largest suppliers of goods and services to governments at all levels in Canada. As such, we support your efforts to ensure that the government gets good value from all of its purchasing decisions and that it only does business with ethical suppliers.

Our primary recommendation with respect to the IR is to reduce the mandatory 10-year exclusion from government contracts in favour of a more flexible approach that reflects the severity of the transgression in each case. A system that is too rigid could actually discourage the high standards of corporate compliance and

accountability that we all seek. In that same vein, the government should give serious consideration to a "safe harbour" provision that encourages a company to come forward as soon as it becomes aware of possible wrongdoing, without facing the prospect of immediate suspension from the eligible supplier list.

The discussion paper on the Integrity Regime anticipates several areas where its scope could be expanded. The IR and its related processes are still relatively new and it has taken time for even large, sophisticated companies to become fully apprised of all its requirements. Accordingly, the government should move cautiously before undertaking considerable expansion of its scope. As well, we would caution against attempting to use government procurement as a mechanism to try to align corporate behaviour with a broader array of societal norms.

For more than two years, the Business Council has argued that DPAs should be part of the federal government's arsenal in dealing with cases of white collar crime. The use of this mechanism would encourage companies to come forward and cooperate with authorities, in most instances revealing cases of wrongdoing that otherwise might go undetected by enforcement authorities. They can act as a powerful incentive for companies to focus attention and resources on instilling a strong compliance culture throughout the organization. And an effectively executed DPA can mean that the real perpetrators of the crime are dealt with appropriately, while innocent employees and shareholders do not suffer the economic fallout.

It is imperative that the government move ahead expeditiously with the implementation of a DPA regime. The fact that DPAs already are in use in several OECD countries puts our firms at a competitive disadvantage. It also could restrict acquisition opportunities for those companies with strategies to become global champions from their Canadian base. Some Canadian companies already have lost significant contracts abroad because foreign competitors have been able to impugn the integrity of the firm while corruption charges are pending.

Our more detailed responses to some of the issues raised in the two discussion papers can be found in the attached annexes.

In closing, let me reiterate the importance that Canada's business leaders place on maintaining our country's reputation for high standards of corporate ethics. A focused and practical IR, together with the appropriate use of DPAs, are important parts of that national strategy.

We would be happy to meet with you and your staff to discuss these issues in more detail.

Sincerely,

c.c. The Honourable Scott Brison, P.C., M.P.
President of the Treasury Board

The Honourable William Morneau, P.C., M.P.
Minister of Finance

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development

The Honourable Chrystia Freeland, P.C., M.P.
Minister of Foreign Affairs

The Honourable James G. Carr, P.C., M.P.
Minister of Natural Resources

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of International Trade

ANNEX 1

Possible Enhancements to the Integrity Regime

Time periods associated with ineligibility and suspension

The current ten-year debarment period is too rigid and inflexible. There is only limited discretion in the policy, e.g. to reduce the time period to five years for companies that have cooperated with authorities or taken steps to address the weaknesses in their compliance regime. Even five years may be unnecessarily harsh depending upon the nature of the transgression and the company's efforts to rectify it. While the government should deal severely with the most egregious cases, there is also a need to make the punishment fit the crime and to provide the ability to shorten the debarment period as appropriate to the circumstances. This is not only manifestly fairer. It also can serve to promote compliance and early remedial action by a potential offender. The consequences of a ten-year ineligibility period from government contracting might make a company reluctant to come forward as the economic consequences would be severe. This approach also would align with the practice in the United States and Europe.

A few key considerations should govern whether discretion is exercised to reduce the period of ineligibility. These include: 1) the seriousness of the offence, and the degree to which it reflects on the integrity of the company; 2) was it the result of actions by one or more rogue employees, or rather more indicative of a broader pattern of behaviour within the company; 3) whether the company made an early effort at cooperation with regulatory authorities and the degree of that cooperation; 4) whether the company has put in place corrective action, including an enhanced compliance program, employee training, etc.; and 5) the company's efforts to make restitution to any parties harmed.

This also points to the imperative of the government considering how to make available a "safe harbour" provision that would encourage companies to come forward as soon as a possible transgression within the company is discovered. Establishment of a deferred prosecution agreement is also necessary, but that would only become available once a company has been charged. The IR should encourage companies to come forward at an even earlier stage, with some confidence that they will not automatically be declared ineligible for government contracts. The absence of a safe harbour mechanism risks frustrating the ability of the IR to promote high standards of corporate ethics.

Criteria for ineligibility and suspension

Great caution should be exercised before the government contemplates a potential significant expansion of the IR's applicability to a broader category of federal offences, as well as provincial and civil offences. At the very least, the criteria should only be extended to criminal-like offences that manifestly involve a serious breach of corporate ethics, such that the public interest would not be served by the federal government

doing business with a company under these circumstances. There is obvious difficulty in coming up with a precise list of offences that clearly meet this test. More likely it would lead to many grey areas and violation of an important principle – that contractors potentially facing the loss of significant government business should clearly understand in advance the rules of the game.

Similarly, we would be reluctant to support an expansion of the IR to debar companies which have been prosecuted under civil provisions, rather than criminal, in another country. A few EU nations have civil regimes and a strong record of enforcement against corporate wrongdoing. In some other jurisdictions the company in question may not have the benefit of Canadian standards of legal protection. Nor would the federal government necessarily be able to access the relevant information from authorities in other countries nor have the capability to make that judgment.

As well, we have serious reservations about the proposal that a potential supplier could be deemed ineligible merely on the basis that it is facing allegations of possible wrongdoing. Given the potentially significant consequences to the company's economic wellbeing, normal principles of procedural fairness would require a higher standard. We are uncertain how Public Services and Procurement Canada would go about assessing the validity of those allegations, and what safeguards, if any, would be available to the company. Equally important, it is unclear what criteria the department would use to determine that the public interest requires the supplier's immediate suspension, rather than waiting for a proper legal determination about charges and/or a conviction.

A further concern is that deeming a supplier ineligible on the basis of mere allegations of corporate wrongdoing could work at cross purposes with what the government would hope to accomplish by the introduction of DPAs. It could also lead to strategic behaviour by unscrupulous companies seeking government procurement contracts if the whiff of corruption was enough to knock out one of their competitors.

Application to non-procurement Government of Canada services

The discussion paper notes the example of Global Affairs Canada's Trade Commissioner Service and the discretionary nature of its service to Canadian companies interested in markets outside Canada. Other government agencies may have their own rules on who is eligible to receive government services, and it is not clear that all would have need for something like an "Integrity Declaration" before deciding whether a company may avail itself of those services. Rather than attempting to apply the IR to a broad array of government services, we would prefer to see the relevant federal agencies cooperate and share best practices with respect to their due diligence procedures.

Other jurisdictions' debarment decisions

Debarment decisions in other jurisdictions can offer guidance to Canadian officials, and be one factor in making a determination of eligibility in Canada. This would necessitate the other jurisdiction having similar criteria and safeguards as our federal regime. But a debarment decision in another jurisdiction should not be determinative. Immediate cross-debarment could lead to confusion as to the standards that a Canadian supplier must meet, and could undermine efforts to improve the company's compliance practices.

Using the Integrity Regime to achieve other purposes

This is another area where we believe caution should be exercised, rather than an attempt to significantly extend the reach of the Integrity Regime. The primary rationale for the IR must continue to be to ensure that that the federal government only does business with ethical suppliers. It cannot and should not be extended to try to police corporate behaviour on a broad array of other societal norms. We can see some justification in moving with other leading jurisdictions to ensure that public bodies are doing business with companies that respect labour and human rights. Similarly, the policy could require contractors to attest that, to the best of their knowledge, their suppliers in other countries did not engage in forced labour or child labour in the production of the product or its component parts.

We would have greater concern with the idea, as raised in the discussion paper, that the IR be extended to include environmental violations. We believe this would be extremely difficult to administer procedurally and from a fairness perspective. Virtually all environmental legislation today, both federal and provincial, deals with offences on the basis of "strict liability". The reality is that most environmental offences today involve inattention, employee negligence or control system failures. In other words, companies will be found liable, not because there was deliberate and malicious disregard for the law, but because of a breakdown in operational procedures. This is very different from fraud, corruption and other ethical failings at which the Integrity Regime is targeted.

ANNEX 2

Adoption of Deferred Prosecution Agreements in Canada

Advantages and disadvantages of DPAs as a tool for addressing corporate criminal liability in Canada

The prime advantage of a DPA is that it provides a clear incentive for companies to come forward and report cases of wrongdoing. This enables greater discovery by enforcement authorities and a quicker route to getting companies to reform their ethics and compliance practices.

The reality is that without the company coming forward, cases of wrongful conduct would often go undetected, or insufficient evidence would be available upon which wrongdoers could be prosecuted. These cases are usually highly complex, the true facts are known to only a few individuals and they can be notoriously difficult to prove without some assistance from inside the company.

The other clear advantage of the use of DPAs is that it puts the focus on the true wrongdoers (often a single or small number of rogue employees) and better protects the innocent. Debarment from government procurement for up to 10 years can have a significant economic impact on a government contractor, and have immediate as well as lasting negative consequences for those who had nothing to do with the crime – employees, shareholders, suppliers, etc. One only has to look at the example of the accounting firm Arthur Andersen in light of the Enron scandal of the early 2000s. Arthur Andersen had been the auditors for Enron, and the end result was the demise of one of the largest accounting firms in the United States, impacting the livelihoods of thousands of employees.

Adopting a DPA regime in Canada would bring our practices in line with other leading countries and trade partners. The United States, the United Kingdom and France have DPA regimes, while Australia is close to adopting one. This would eliminate a potential competitive disadvantage for our companies. Foreign investors may be reluctant to expose themselves to an uncertain enforcement regime in this country that creates additional legal risks. It also could restrict acquisition opportunities for enterprises with a strategy to become global champions from their Canadian base. Some Canadian companies already have lost significant contracts abroad because foreign competitors are able to impugn the integrity of the firm while corruption charges are pending.

The most oft-repeated criticism of the use of DPAs is that they could come to be viewed by the corporate sector as merely a "cost of doing business". This argument has little merit in practice. DPAs can and should be restricted to those cases which most merit their use, and be subject to a number of stringent conditions.

A company entering into a DPA would have to pay a significant monetary penalty, plus the possibility of restitution to those harmed. It must demonstrate a wholesale change in the corporate practices that led to the offence, including the discipline or dismissal of those employees directly responsible. And through the DPA its transgression will be publicly acknowledged, thus leading to damage to its corporate brand and reputation that is every bit as real as if it had been prosecuted and found guilty.

Role of the courts

Prosecutorial discretion will always involve the balancing of a number of key factors. The critical question always is whether the decision to defer prosecution under the terms of the agreement is in the public interest. We can see merit in having court supervision in the development of a DPA as this degree of oversight and transparency will bolster public confidence in the administration of justice.

Nonetheless, companies have to be convinced that a DPA can work for them as well. A relatively efficient supervision process will be critical, as the advantages of a entering into a DPA could easily be lost in a court system already overburdened with complex cases. If the process becomes lengthy, and terms carefully negotiated between the company and the government can easily be overturned or adjusted, that could make DPAs much less attractive for a company.

Factors to be taken into account

There are a number of key factors in deciding whether a DPA would be appropriate:

- Should be available primarily for economic crimes (fraud, corruption, bribery, false accounting, etc.), rather than cases of serious injury or damage to health and safety, environment, etc.
- Does the company take responsibility for the action (even if done by employees in violation of company policy)?
- Has the company identified the responsible parties and taken appropriate disciplinary action?
- A high degree of cooperation with regulatory authorities, including the degree to which information was made available that otherwise would not have been known;
- Corrective actions taken by the company, including possible restitution;
- Reform of the company's practices to prevent such incidents in future;
- Whether a criminal conviction is likely to result in significant economic damage to the company and/or have serious impacts on innocent parties – employees, shareholders, suppliers or other stakeholders.

Terms to be included in a DPA

A number of key terms would be appropriate in the use of a DPA:

- The company should acknowledge the facts of the case and responsibility for the overall conduct.
- The company should cooperate fully with authorities, including making necessary information available and supporting the prosecution of responsible individuals. (In reality, companies can only provide information that is in their possession. Employees who participated in the offence may be withholding necessary information.)
- Payment of a penalty appropriate to the seriousness of the crime, including repayment of any profits resulting therefrom.
- Full implementation of a comprehensive compliance program, or improvements to an existing program, to meet high standards of business ethics.
- As appropriate, appointment of an outside monitor to ensure ongoing compliance.
- The ability to reinstate charges if any of the key terms of the DPA are breached.
- A finite term for the operation of the DPA, after which the prosecution is stayed. Typically perhaps two to three years, and potentially shorter in less serious cases.

While the use of a DPA is a matter first and foremost for prosecution authorities, there should be a mechanism whereby a company facing charges can proactively submit a proposal for a DPA, subject to the usual terms and conditions. The company should also be able to ask for an extension of the DPA beyond its stated term, if there are legitimate reasons why the company has not been able to meet all the conditions of the DPA.

Publication

There is a need to balance the virtues of transparency about DPAs in terms of public confidence with the reality that they will often involve complex negotiations about sensitive issues. Too early public disclosure could discourage companies from entering into a DPA and/or jeopardize the successful conclusion of negotiations. Generally, publication should take place only after conclusion of the terms of the agreement, or approval of the terms by the court if applicable. Some information may have to be excluded from publication, for example commercially sensitive material or the names of individuals. As well, there may be a need to postpone publication if such would jeopardize another ongoing proceeding.

Addressing non-compliance with a DPA

The most appropriate course would be for the prosecutor to apply to the court for a determination that the company is in violation of the DPA. In the case of a substantial and persistent non-performance, the likely outcome would be a termination of the DPA

and a resumption of the prosecution. This would be a matter for factual determination by the court.

Where the failure to comply with some of the terms of the DPA is not as significant, options could include the imposition of additional terms and/or the extension of the DPA to allow time to rectify. The latter would be particularly appropriate if both parties agree that the original terms have proved unusually burdensome for the company, or difficult for it to accomplish despite best efforts. An example of the latter could be where the DPA called for restitution to be paid to victims of the wrongdoing, but some victims have been difficult to identify.

Compliance Monitoring

Appointment of an independent compliance monitor can be appropriate in cases of sufficient complexity and severity where the DPA provides for a number of compliance terms that would best be served by independent verification. In most cases, this likely would involve the ongoing implementation of a comprehensive business ethics and compliance program, including ongoing supervision by senior management and employee engagement/training. Needless to say, it will be critical to ensure a pool of professionally trained and independent monitors, with the necessary expertise to effectively assess the robustness of company compliance programs and their ongoing implementation. How this works in practice is a matter for negotiation between the prosecuting authority, the company and the selected monitor.

For less serious offences and less complicated DPAs, it may not be necessary to appoint an actual person to carry out the monitoring role. A commitment by the company to report regularly, through written summaries and periodic evidence, may be sufficient, with the possibility of an audit by prosecuting authorities if necessary.

Victim Compensation

DPAs often will, and should, include a substantial monetary penalty. This serves both the deterrent effect but also as a form of general restitution. Compensation to particular individuals should only be included within a DPA where the group of victims is of manageable size, readily identifiable, and the quantum of just compensation for each can easily be assessed. As the discussion paper notes, even in criminal cases victim compensation is generally a matter of provincial jurisdiction. As well, in many cases of fraud and bribery, there may not be identifiable victims, but rather broad classes of impacted groups, such as shareholders, competitors or citizens of another country in the case of a foreign bribery.

November 16, 2017

Response from Canadian Manufacturers & Exporters (CME) on the Federal Government consultations on *Expanding Canada's toolkit to address corporate wrongdoing*, including Deferred Prosecution Agreements and the Integrity Regime.

Part 1: Deferred Prosecution Agreements

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Deferred Prosecution Agreements (DPAs) provide a useful complement to Canadian prosecutors of corporate criminal liability. We believe a DPA delivers the following advantages:

- Lowers the risk of a failed prosecution. Investigation of economic crimes (particularly those that involve international jurisdictions) can be difficult, expensive and lengthy. When the crown is unable to secure a guilty verdict, observers may question the credibility of the justice system.
- Focuses more on long-term prevention than prosecution. A guilty verdict will punish the offender and deter others from engaging in such criminal behaviour. But afterwards there is little follow-up. In contrast, DPAs include a monitoring period whereby the crown can actively observe and assess the behaviour of the organization and suggest changes to ensure compliance and improved outcomes.
- Encourages self-reporting from companies; part of the terms of an effective DPA is that the alleged offender fully comply with the prosecutor. Such self-reporting can affect positive changes in an organization's culture. Employees can now watch out for improper or illegal behaviour and feel safe in reporting it.
- Promotes Canada as a safe jurisdiction to invest and do business in. Many other countries (including other G7 nations such as the United Kingdom, France and the United States) have a DPA regime in place. The DPA system provides comfort and safety to international investors, and as such, they are more willing to invest in countries that have it. Canadians have already lost significant business because of the absence of a DPA, and our members are worried about falling further behind.
- Decreases collateral damage to those within and outside the organization that had no knowledge of the alleged criminal behaviour. Corporate criminal investigations cause immense reputational damage and affect all employees, investors, etc. The effects of a guilty verdict are even worse for the company and its employees. Often, it prevents them from winning important government and private sector contracts, and, thus, limits the ability of the company to continue to grow as a going concern. Companies do bear some responsibility for the actions of their employees. Accordingly, DPAs provide companies the opportunity to admit faults and pay the appropriate financial penalties—but without threatening the viability of the entire organization. Companies who legitimately want to reform have the opportunity to do so.

As for disadvantages, the main criticism is that DPAs allow organizations to "pay their way" out of trouble. To deflect such critiques, the crown must carefully decide when a DPA is appropriate. The United Kingdom model allows for the agreement to be reviewed and confirmed by a judge, reassuring the public that justice has been served.

Question 2: For which offences do you think DPAs should be available and why?
We believe that DPAs should be available in cases involving economic crimes perpetrated by organizations, including fraud, tax evasion and money laundering. DPAs are best suited for these types of crimes because they decrease collateral damage to the organization as well as improve enforcement outcomes (advancing corporate culture, promoting self-reporting, etc.). Currently, prosecutors of such crimes are limited in how they can pursue them. DPAs provide a much needed complement.

We believe that limiting the availability of DPAs to organizations involved in economic crimes (at least initially) will allow prosecutors to become more accustomed to them. After some time the government can then determine whether DPAs could be useful in other cases.

DPAs should not be provided to individuals. People involved in alleged criminal misconduct should be brought before the courts, and the companies involved in a DPA should be required to cooperate with the authorities so that the individual's alleged crimes can be prosecuted to the fullest extent possible.

Question 3: What role do you think the courts should play with respect to DPAs?
Courts should be involved in the DPA process, namely in an oversight role. We believe that organizations and a public prosecutor should present a draft DPA to the court, which can then determine whether the proposed terms and conditions are reasonable and fair.

Generally, the court will decide whether a DPA is appropriate, or if proceeding with a DPA will damage the reputation of the overall justice system. (For example, would an individual escape consequences—despite them engaging in serious misconduct—if a DPA goes forward?) The courts may provide suggestions to the public prosecutor on how they could improve and amend the terms of the DPA.

The courts should also be consulted once the organization and prosecution agree to the final terms of the DPA.

We believe that having a judge determine the appropriateness of a DPA will provide certainty to the process and reassure the involved parties and general public.

Question 4: What factors should to be taken into account in offering a DPA?
The public prosecutor should determine whether entering into a DPA with an organization is in the public interest. The prosecutor should consider the following factors when making that determination:

- Whether the organization is a repeat offender (have they engaged in similar behaviour before?).
- Whether the organization has been proactively cooperating with the authorities and if they have made sincere attempts at reforming their processes and procedures to prevent reoccurrence.
- Whether the organization's executives and/or board condoned the alleged economic crimes, or were they the actions of a rogue actor within the organization and unknown to others. If it was the former, we believe that a DPA would be inappropriate, but the latter scenario indicates a DPA could be useful.
- Whether the organization is suffering material damage by being under investigation. The investigation could be affecting the organization's ability to compete in the market place, and thus, limiting the ability of its employees, shareholders and investors to succeed—even when they had no direct knowledge of the criminal actions.

- Whether a successful prosecution of the economic crime will injure the organization to such an extent that it will be unable to proceed as a going concern. A criminal record may prevent the organization from winning important business from the private sector and governments. Consequently, it may have to wind up operations with all of the attendant negative consequences for employees, pensioners, investors and so on. DPAs should be considered in such a situation so as to mitigate some of the collateral damage.

Question 5: When would a DPA not be appropriate?

A DPA would be inappropriate under the following circumstances:

- The senior executives and/or board members of the organization knew about the alleged economic crimes, and either encouraged or condoned the behaviour.
- The organization is a "repeat offender" of the same or similar crimes.
- The organization lacks a credible compliance program, or has neglected to undertake any corrective actions that would prevent the crimes from reoccurring.
- The organization is impeding the prosecutor's investigation, and generally speaking, being uncooperative.
- The economic crime in question was significant and greatly affected many people, such that it called into question the legitimacy of fair markets and government regulations.

Question 6: What terms should be included in a DPA?

A DPA should include the following terms when appropriate (notwithstanding that every situation is different and some factors may be more relevant under certain circumstances):

- A statement of facts.
- Any financial penalties that the organization will pay.
- A set time period of the DPA (ie. how long it will be in force), including how long the government can monitor the actions of the organization to ensure its compliance with the terms of the DPA.
- Commitment to cooperate with the prosecutor (in the current investigation as well any future inquiry) and replace any implicated individuals.
- Consequences should the organization reoffend.
- Steps the organization will undertake in order to improve its compliance program.
- A joint public statement from the crown and the organization about the DPA.

Question 7: What factors should be taken into account in setting the duration of a DPA?

The length of the DPA should be based on the individual set of circumstances involved in each case. However, we believe every DPA should have an expiry date. Having a deadline will allow for better organizational planning on both sides (prosecutor and organization) and improve the likelihood of long-term compliance.

Question 8: Under what circumstances should publication be waived or delayed?

A key advantage of the DPA is that it encourages self-reporting from organization. However, this advantage could become null should publication happen prematurely; organizations would rather keep their findings to themselves rather than having them in the public domain. We believe that the publication of the DPA should only occur after all parties agree to a final, definitive text.

DPA negotiations should be confidential, as should any reasoning or opinion from a judge in a court of law (should the government choose to have court oversight of Canadian DPAs).

Question 9: How should non-compliance be addressed?
The public prosecutor should make it known to the organization that they are in non-compliance, and they should have an opportunity to respond to this finding.

Should non-compliance continue, the courts should provide oversight. There would be a fact-finding process that would measure the degree of non-compliance, and if non-compliance is indeed confirmed, there should be consequences, including financial penalties or additions to the terms and conditions.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?
Facts disclosed during DPA negotiations can be used against the organization if they are prosecuted again for the same or similar crimes. That is to say, admissions in a DPA should be admissible in future prosecutions against the company if they're alleged to have engaged in economic crimes.

Question 11: How should compliance monitors be selected and governed?
The prosecution and organization should agree to a set of criteria for selecting independent monitors. The selection process used in the Integrity Regime could be a helpful example in this regard.

The monitors would report to the prosecutor, but be engaged by the organization. This arrangement would be set out in the DPA's terms and conditions.

Question 12: What use should be made of compliance monitoring reports?
The prosecutor should use the compliance monitoring reports as an effective tool to determine whether the organization is making progress on its commitments under the DPA. The reports should provide recommendations as to how the organization can better meet its undertakings, and then continue to score its efforts for the entire lifespan of the DPA.

Question 13: Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?
Victim compensation should not be included as a DPA term. Matters involving victim compensation largely fall under provincial jurisdiction. It may not apply in federal offences, particularly those that happened in foreign countries.

Moreover, in economic crimes such as tax fraud and bribery it is often difficult to determine an individual victim. Restitution would be difficult to calculate. Generally speaking, victim compensation is a complicated proceeding, and it is best left out of DPA negotiations.

Part 2: Integrity Regime Consultation

While the discussion documents outlined a number of key questions and issues under consideration by the Government of Canada in a reform of the Integrity regime, our comments will focus around two core issues that have been the source of the majority of member feedback, and our input to the government over the past several years; the duration of ineligibility and the issue of a safe-harbour.

Duration of ineligibility and/or suspension

Since the original consultation on the Integrity Regime, CME has consistently raised concerns about the potential severe impact of the 10 year ineligibility timeframe. While we fully support the government's decision to bring in these measures, we have been firmly against what our members believed were potentially overly punitive actions, especially in comparison to Canada's international competitors. In this regard, there are a number of issues that we believe this review should examine and address:

- Decisions to make organizations ineligible, and the duration of those suspensions must be aligned with the seriousness of the action and the public impact. Specifically, there should be more flexibility built into the sanctions of the regime with more discretion in applying disbarment to ensure punishments fit the actual crime of the organization.
- Procurement ineligibility and suspension duration guidelines should be fully aligned to that of our major trading partners, especially the United States. As indicated in the discussion document, discretion allows for an organization in the United States to be excluded from bidding on procurement contracts for up to three years, with the possibility of extension. This also means that discretion allows for a zero debarment time period.

The Safe-harbour issue

As constructed, the existing regime does not promote self-disclosure nor does it allow a company to purge itself from an offense. The punitive consequences of the current Integrity Regime – 5-10 years disbarment from bidding or working on Federal contracts – are sufficiently punitive to preclude most if not all companies from ever self-reporting acts of misconduct under the current Integrity Regime.

We believe that companies should be allowed to properly disclaim individual acts of misconduct. In such cases there should be little or no consequence to the company if it has fully shown through its behaviour, promptly after the misconduct is discovered and investigated, that it completely disclaims such conduct and itself substantively punishes and/or dismisses without compensation or reward the individual perpetrators of the misconduct.

BMO Financial Group

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November 17, 2017

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Re: DPA Consultation and Integrity Regime Consultation

Ladies and Gentlemen,

Bank of Montreal (BMO) supports the Government of Canada's efforts to expand the tools available to address corporate wrongdoing. We welcome the opportunity to provide comments with regard to both the Deferred Prosecution Agreement (DPA) discussion paper and the Integrity Regime discussion paper, and we appreciate the opportunity to be involved in discussions regarding these important topics.

BMO has been in business for over 200 years. Our continued success and reputation are built on the trust we've earned from the people we work with and the customers we serve. Our commitment to corporate citizenship and long-term sustainability is part of who we are, and we are committed to always doing the right thing. We therefore agree with the principals of encouraging fulsome and consistent compliance with laws, deterring criminal conduct, and identifying criminal corporate activity wherever it exists. As such, and as described below, we support the implementation of a DPA regime and certain amendments to the existing Integrity Regime.

Deferred Prosecution Agreement Regime

BMO supports the addition of DPAs as an additional tool to help identify and prevent corporate wrongdoing. We believe that a prudently designed DPA regime can serve to both deter wrongdoing and appropriately sanction criminal conduct.

A DPA regime has the potential to increase self-disclosure of criminal conduct. Companies will be more likely to self-disclose misconduct (whether caused by a limited number of rogue employees or the result of broad corporate policies) if a negotiated DPA, as opposed to a full prosecution, is a potential outcome. Such increased disclosure of wrongdoing would benefit not only the government, but also the public as a whole, as misconduct that might otherwise go undetected is disclosed and remediated.

In addition to such increased disclosure, and perhaps most importantly, DPAs can reduce the negative impacts of criminal misconduct on innocent customers, employees, shareholders and investors. Public disclosure and remediation of misconduct, together with the imposition of appropriate and judicious sanctions, could be much less harmful to such third parties than either not disclosing such misconduct or having the company face formal prosecution. The use of DPAs in appropriate circumstances could permit prosecutors to focus on the individuals responsible for the misconduct, while permitting the company to focus on remediation and the continued provision of products and services to its customers.

We believe that adding DPAs as an additional tool to be used by prosecutors, and the appropriate and judicious use of DPAs, would not undermine public confidence in the criminal justice system. To the contrary, we believe the increased detection of wrongdoing (as a result of increased self-reporting) could potentially improve public confidence in such system. Because prosecutors will potentially be increasing the volume of sanctions issued, while maintaining their ability to initiate full prosecution proceedings when the circumstances warrant, the public will see a more efficient criminal justice system with more active enforcement.

Integrity Regime

BMO supports amending the debarment provisions of the Integrity Regime to provide the government with more flexibility.

We support the government's efforts to protect and safeguard the use and expenditure of public funds and its efforts to protect against fraud, collusion and corruption. In addition, we support the concept that the federal government should only do business with ethical counterparties and suppliers.

In that regard, we believe that providing the government with flexibility to tailor ineligibility and suspension periods, and the judicious exercise of such discretion, would be in the public's best interest. Specifically, we believe that a more flexible and discretionary debarment regime would have many of the same results as the establishment of a DPA regime, including (i) increased self-disclosure of misconduct and (ii) reduction of the negative impacts on innocent third parties.

Debarment periods should take into consideration the severity and nature of the misconduct, as well as other factors, such as the company's level of cooperation and remedial efforts. We believe that companies would be more likely to self-report discovered misconduct if they were likely to receive sanctions proportionate, and appropriately scaled, to the nature and level of the misconduct. In addition, we believe companies would be incentivized to undertake strong remediation efforts, including implementing transparent and fulsome compliance programs, if such actions could potentially reduce the resulting sanctions. An automatic debarment period could be unduly harsh in some circumstances, and could result in unduly harsh consequences for innocent customers, employees, shareholders and investors. Of course, even if a more flexible regime was adopted, the government would retain the ability to impose lengthy debarment periods for criminal conduct that warrants such a sanction.

Conclusion

Thank you for the opportunity to provide input on these important topics. We welcome the Government of Canada's efforts to improve the tools available to address corporate wrongdoing. As discussed above, we believe the adoption of a DPA regime and the enhancement of the Integrity Regime through prudent amendments would be beneficial to the government, to innocent third parties, and to the public as a whole.

Please do not hesitate to contact me if you have any questions or would like to discuss the above matters.

Sincerely,

SCMA™

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November 17, 2017

The Honourable Carla Qualtrough, P.C., M.P.
Minister of Public Services and Procurement Canada
11 Laurier Street, Building – Portage III
Tower A, Room 18A1
Gatineau, Quebec
Canada K1A 9S5

Deferred Prosecution Agreement and Integrity Regime Consultation:
Expanding Canada's Toolkit to Address Corporate Wrongdoing

Dear Minister,

On behalf of the Supply Chain Management Association (SCMA), I thank you for the opportunity to provide consultation to address corporate wrongdoing within the Deferred Prosecution Agreement (DPA) and the Integrity Regime Streams.

Founded in 1919, the SCMA represents the voice of more than 7,000 supply chain professionals across end-to-end supply chain management in Canada, including demand planning, sourcing, procurement, inventory, logistics and transportation. Our members cut across all industries and consist of small and medium enterprises (SMEs) and large multinationals, with deeply integrated links to the global marketplace. SCMA sets the standards for excellence and ethics, and is the principal source of professional development and accreditation in supply chain management in Canada.

Supply chain management (SCM) is a key strategic and competitive advantage that can position organizations to new levels of success. Over 800,000 people work in the supply chain sector in Canada with an estimated value of $162.1 billion. Members of SCMA adhere to, and are bound by, our code of ethics for the profession.

To address the questions posed by the government, the SCMA created a Task Force led by our Research and Policy Analyst, Simona Zarbalieva, to provide thoughtful response and debate prior to arranging our submission. The Task Force, made up of supply chain practitioners from various industries and sectors, brought significant experience and input into these consultations. A complete participant list of the SCMA Task Force can be found in Appendix 1. The Task Force convened a series of conference calls beginning October 19, 2017. Responses were debated, documented and validated, leading to the following responses, provided in a Q&A format. The information presented herewith was provided to the Task Force to ensure each member had an opportunity to confirm all considerations were appropriate and responses were accurate.

It is the opinion of this group that the Canadian DPA should be designed within the broader enforcement regime where prosecution is the norm. The DPA process should be armed with transparency, accountability and monitoring in mind in order to serve as an additional tool against corporate economic crime. Further, it should be a means of supporting strong ethical standards at every organizational level and protecting third parties that include victims and

employees. A DPA should be awarded in the situation where a company has self-reported, admitted guilt and cooperated fully with authorities, and where the wrongdoing has not inflicted serious harm. The standard in Canada needs to be at a high enough level where there is public confidence in the process, where fines would not be the sole penalty and therefore merely a cost of doing business, and yet fair in that the process encourages companies to come forward and comply. The role of our court system is critical in raising the status of the Canadian DPA beyond that of a policy instrument to a trusted tool benefitting organizations, the public and government.

In order to enhance the Integrity Regime, The Government of Canada should align itself with international best practices and modify the duration of ineligibility and suspension so that it is commensurate with the seriousness of the misconduct while serving the public interest. Greater levels of discretion should be built into the regime with respect to the periods of ineligibility, on a case by case basis, where the punishment fits the crime. The Government of Canada should adopt a graduating scale illustrating increasing severity of corporate crime with proportional years of ineligibility to ensure appropriateness while continuing to mitigate risk. As the Q&A further illustrates, the Integrity Regime can be used as a tool to achieve broader social, economic or environmental policy objectives.

Please find enclosed our Task Force responses to questions proposed through this consultation exercise.

Sincerely,

Christian Buhagiar,
President and CEO

c.c. The Honourable Scott Brison, P.C., M.P., B. Comm.
President of the Treasury Board
Treasury Board of Canada

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development
Innovation, Science and Economic Development Canada

The Honourable William Morneau, P.C., M.P.
Minister of Finance
Finance Canada

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Justice Canada

The Honourable Chrystia Freeland, P.C., M.P.
Minister of Foreign Affairs
Global Affairs Canada

The Honourable James G. Carr, P.C., M.P.
Minister of Natural Resources
Natural Resources Canada

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of International Trade
Global Affairs Canada

Consultation: Expanding Canada's toolkit to address corporate wrongdoing
Deferred Prosecution Agreement (DPA) Submission

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Advantages of DPAs

- Encourage companies to acknowledge, self-report, and take measures to correct wrongdoing.
- Save government funds and resources by avoiding lengthy legal proceedings that have an uncertain outcome, especially when government's enforcement resources are limited.
- Protect employees, investors and other third-parties who were not involved in the crime.
- Facilitate compensation for victims of corporate crimes.
- Avoidance of reputational harm and debarment from public contracting for organizations.
- Provide broader beneficial impact on the corporate community if DPAs are published and made known because they encourage compliance programmes.
- Provide an alternative legal approach in the arsenal of dealing with white collar crime.

Disadvantages of DPAs

- Often seen as second to prosecution in terms of being a deterrent for individuals and companies to avoid criminal conduct. As such, DPAs could weaken the deterrent effect of prosecution.
- Seen as unregulated and lacking oversight and therefore may not provide sufficient incentive to guarantee self-reporting.
- Perception that DPAs allows companies to "buy their way out of trouble".
- Seen as having become a substitute for individual accountability.

Despite the arguments against DPAs, they are already being used or are being developed in several countries, including Canada's key trading partners the US and the UK. The Canadian DPA should be designed within the broader enforcement regime where prosecution is the norm. The DPA process should be armed with transparency, accountability and monitoring in mind in order to serve as an additional tool against corporate economic crime.

A DPA should not be construed as a "way out" for companies who have perpetrated corporate crime or encourage leniency, but rather a means of supporting strong ethical standards at every organizational level and protect third parties that include victims and employees. A DPA should be awarded in the situation where a company has self-reported, admitted guilt and cooperated fully with authorities, and where the wrongdoing has not inflicted serious harm. The standard in Canada needs to be at a high enough level where there is public confidence in the process, where fines would not be the sole penalty and therefore merely a cost of doing business, and yet fair in that the process encourages companies to come forward and comply.

Question 2: For which offences do you think DPAs should be available and why?

DPAs should be available in alleged cases of economic crime by organizations, with a minimum value threshold in order to avoid nuisance cases. Economic crime would include offences such as fraud (including accounting fraud), bribery, corruption, collusion, and money laundering. It is important for the Government of Canada to focus its early efforts on a specific area before widening its scope to include other corporate offenses, such as environmental, regulatory and health and safety.

Although DPAs should be made exclusively to organizations at this time, companies should engage fully within the DPA process in order to bring rogue employees within their organization to justice. Ideally, agreements should not be made unless they can be accompanied by individual prosecutions for the wrongdoing in question.

Question 3: What role do you think the courts should play with respect to DPAs?

DPAs should not be strictly a policy instrument – courts should be involved in the DPA process from beginning to end in order to ensure transparency and public confidence in the process. As stated, a DPA should fit into a regime where prosecution and the judicial process is the norm. Before a DPA is approved, the prosecutor should apply to the court for a preliminary hearing to obtain a declaration that entering into the DPA is in the public interest and that the terms are fair, reasonable and proportionate.

Judicial oversight should be transparent and conducted in a public hearing whereby the public is confident in the DPA process. Once negotiations are complete, the prosecutor must apply for a final hearing to obtain a declaration that the DPA meets these conditions. A DPA must provide an equivalent level of detail about the wrongdoing to the public as a court hearing would. This would include:

- Names and rank of officials involved in the wrongdoing;
- Amounts paid;
- How the offense was committed;
- Full analysis of the public interest factors considered.

Question 4: What factors should to be taken into account in offering a DPA?

The following factors should be taken into account in offering a DPA:

- History of similar conduct – if an organization has previously committed wrongdoing and received a DPA, it should not be eligible to receive a subsequent DPA.
- Nature of wrongdoing – on a graduating scale, how serious or egregious is the crime?
- The extent of the economic damage to competitors and communities.
- Whether the organization has a corporate compliance programme in place, has engaged in structural or organizational reforms, and has taken steps to change corporate culture.

- Degree of self-reporting and cooperation with the Crown.

Question 5: When would a DPA not be appropriate?

A DPA would not be appropriate if it is not in the public interest for the prosecutor to engage in such an action. Other factors that may contribute to a DPA not being appropriate include:

- A history of similar conduct
- The seriousness of the crime and the significant harm that was done to the public, government, and/or market.
- A lack of (or effective) organizational compliance mechanisms and no effort to establish such a program since alleged misconduct.
- A lack of cooperation with authorities.

Question 6: What terms should be included in a DPA?

A DPA should include the following elements:

- A statement of facts relating to the offence.
- Obligation to cooperate with any investigation and prosecution of company staff.
- A compliance monitoring schedule.
- A time period for the duration of the DPA and an expiry date that indicates a final assessment by the court.
- An obligation to cooperate with any current or future investigation of the alleged past offence.
- The consequences for the defendant if it engages in further misconduct.
- Implementing or improving a company compliance and ethics program.

In addition, a bond could be requested of the company under a DPA to be held for the duration of the compliance monitoring schedule, plus 2-years' probation period, which would be invoked if the company fails to meet the terms of the DPA. If there are no further compliance issues, the bond is cancelled.

Question 7: What factors should be taken into account in setting the duration of a DPA?

The duration of a DPA should be administered on a case by case basis and be proportional to the severity of the crime.

A graduating scale may be created to show median duration time of a DPA depending on the severity of the alleged misconduct. Other factors (see Question 4) would be a part of this scale.

Each DPA should have an expiry date where the DPA is no longer in effect. Prior to the expiry date, the organization should be assessed by the court to ensure it has met all the terms and conditions of the DPA.

Question 8: Under what circumstances should publication be waived or delayed?

During the negotiation stage of a DPA, there should be no publication so as to encourage organizations to comply and disclose all relevant information to the court. Once the court has approved the DPA, it may be published so as to confirm that the DPA is in the public interest and the terms are reasonable. Publication of the DPA ensures transparency and public confidence in the DPA as a useful tool in addressing corporate crime.

Question 9: How should non-compliance be addressed?

For a DPA to be a serious deterrent of corporate wrongdoing, non-compliance needs to be addressed through the possibility of prosecution.

If an organization fails to comply with the terms of the DPA, it should stand before the court to explain its inability to meet the terms of the DPA and propose a variation of the terms. The organization would need to present a case on how it will remediate its actions moving forward and a comprehensive plan to stay on track until the expiry date of the DPA.

If the organization fails to provide an adequate case, the court should be able to terminate the agreement and the organization would face prosecution. Other consequences for non-compliance of a DPA may include a financial penalty, additional terms and conditions, and a modification of the expiry date of the DPA.

An organization would have a single opportunity to revise the terms of a DPA in the event of non-compliance. Any subsequent acts of misconduct would result in the organization facing prosecution.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

Facts disclosed during DPA negotiations should be admissible in a prosecution if they are related to and may influence the decision of another crime. The Government of Canada should align itself with the UK model in this regard and allow for facts disclosed to be used as evidence in related proceedings.

Question 11: How should compliance monitors be selected and governed?

Independent compliance monitors should be selected in order to ensure transparency and accountability at every level of the DPA process. The Government of Canada should consider making this

a licensed professional whose standards are consistently applied through the country in order to ensure these compliance monitors have a common approach.

The Government of Canada should consider, as part of the DPA agreement, having organizations fund the employment (and/or training) of a compliance monitor(s). For example, a certain percentage of the financial penalty as a term of the DPA would be set aside in order to hire individual(s) to be compliance monitors. The organization that enters into a DPA would have to invest in a compliance monitor and should they meet all the terms of conditions of the DPA and are found to be exercising due diligence in their expiry date assessment, they would get their investment back.

Question 12: What use should be made of compliance monitoring reports?

Compliance monitoring reports should be conducted several times throughout the lifespan of the DPA and be made publicly available. They should provide a thorough review of the organization's progress in remediating the corporate wrongdoing. The reports should include a review of the implementation and effectiveness of the ethics and compliance programme of the organization, measured against the integrity principles as set out in the DPA agreement. The monitor's reports should include short and long-term recommendations for improvements and assess how previous recommendations have been implemented.

In response to each report, the organization needs to create an action plan on how it plans to implement and operationalize the recommendations. As with the Integrity database, a similar database may be created which makes the compliance monitoring reports and the organization's action plans publicly accessible. This ensures public confidence in the process and encourages organizations to maintain compliance throughout the monitoring process and the lifetime of the DPA.

Question 13: Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

Victim compensation should be included as a DPA term when the victims can be clearly identified and the costs of harm quantified. Devising and implementing compensation arrangements should not be made solely by the organization but rather subject to judicial supervision. This ensures transparency and legitimizes the use of a DPA as a tool in fighting corporate misconduct.

Consultation: Expanding Canada's toolkit to address corporate wrongdoing
Integrity Regime Submission

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

Currently, the fixed ten-year period of ineligibility may be disproportionate to the nature and context of the offense, does not serve the public interest, and is not aligned with international best practices. Therefore, the duration of ineligibility and/or suspension should be made commensurate with the seriousness of the misconduct while serving the public interest. Greater levels of discretion should be built in to the regime with respect to the periods of ineligibility, on a case by case basis, where the punishment fits the crime. The Government of Canada should adopt a graduating scale illustrating increasing severity of corporate crime with proportional years of ineligibility to ensure appropriateness while continuing to mitigate risk.

In addition, there should be a clear process by which a supplier's period of ineligibility may be revised if they can demonstrate that they have taken concrete actions, including cooperating with law enforcement or having taken steps to address the causes of the conduct that led to their ineligibility. The inverse should also apply, whereby if a supplier fails to cooperate with authorities and put in place effective internal standards of conduct and compliance controls their period of ineligibility may be extended to the maximum number of years. In addition, if the vendor or any of its sub-contractors or partners is suspended, the loss of a license will apply for the term of the offence.

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

By applying a case by case approach to the Integrity Regime and following a graduating scale when determining ineligibility, greater discretion can be built in. The following factors should be considered in determining whether a supplier should benefit from discretion:

- Did the organization bring the alleged misconduct as a cause for ineligibility to the attention of the Government of Canada in a timely manner?
- The degree of cooperation by the organization with the Government of Canada.
- Did the organization engage in a full investigation of the circumstances associated with the cause of the ineligibility?
- Whether the organization has agreed to make restitution related to the offending activity.
- Whether the organization has taken action against the individual(s) responsible for the alleged misconduct.
- Whether the organization's senior management acknowledges the severity of the misconduct and puts in place measures to prevent recurrent misconduct.

- Has the organization put in place effective standards of conduct and internal compliance controls?
- Whether the organization has put in place remedial measures, including those recommended by the Government of Canada.

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

Other offences that call into question the integrity of a supplier should not necessarily be added to the *Ineligibility and Suspension Policy*. Adding further offences at this time may not be consistent with Government's focus on the federal government procurement process. The Government of Canada, without making any changes to the policy, may consider an organization's ethical conduct in Canadian provinces and territories in supporting a decision on the period of ineligibility on a graduating scale as well as in making recommendations for remedial measures to be taken by the organization.

Beyond the borders of Canada, there may be a risk in relying on international systems of jurisprudence and their associated leniency provisions or rules. Decisions made in these jurisdictions have varying levels of stringency in dealing with corporate crime and vary greatly in their provisions of preserving the integrity of their respective procurement regimes. In addition, it is in the public interest that the *Ineligibility and Suspension Policy* not include allegations or investigations in order to allow for a due process and uphold the principle of "innocent until proven guilty."

Question 4: What factors should be considered in determining whether new offences should be included?

In determining whether new offences should be included, the Government of Canada should consider the impact on its responsibility as a contractor or subcontractor and in upholding the public trust. In addition, if an offence related to corporate wrongdoing becomes increasingly common and a trend is noticed, then it may be useful to include this crime. Utilizing a graduating scale in assessing risk and ineligibility would also help to orient where a new offence may fit in the existing Integrity Regime.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The Government of Canada should take a measured approach in making a determination of suspension or ineligibility through a three-step process. If an organization is found to be under investigation, no action should be taken. Following this, if an organization is charged (but not convicted) it should be suspended from moving forward pending the outcome of due process. Should the organization be convicted, it would be deemed ineligible and the duration set based on a graduating scale and the severity of the crime.

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

Integrity Regime determinations of ineligibility should be applied solely to procurement federal services. Determinations of ineligibility should have no impact on an organization's ability to retain access of non-procurement federal services. As enhancements are made to the Integrity Regime, PSP Canada and other non-procurement federal services should share best practices in their due diligence efforts.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

As indicated in Question 3, the Government of Canada should consider debarment decisions made in Canadian provinces and territories in order to support a decision on duration of ineligibility and make recommendations for remedial measures to be undertaken by the organization. The government should look at the specific criteria used by the provincial jurisdiction or agency to reach a decision and use that information as a factor in determining ineligibility and what corporate initiatives the organization should implement to change culture and/or behaviour. Debarment decisions made outside of Canada should have no impact on the status of a supplier under the Integrity Regime because this may undermine the jurisdictional independence of Canadian agencies and may lead to confusion due to contrasting criteria and process.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

At this point in time, no measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property management. As previously stated, the Government of Canada should not take action on the basis of allegations unless there is sufficient evidence that the public interest could be negatively impacted by the award of such a federal contract or agreement. As stated in Question 5, no action should be taken if an organization is under investigation, if it is charged it should be suspended from moving forward, and if convicted, it would be deemed ineligible for a proportional duration of time.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

The application of the Integrity Regime should be broadened to include federal entities beyond departments and agencies. Other federal entities, such as Crown Corporations, should participate more broadly in order to accomplish the government's mission of "using its purchasing to positively and uniformly influence corporate behavior" and ensuring business is solely conducted with ethical suppliers. This could be achieved through greater access to the Integrity Database Services across all federal entities.

Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

The Government of Canada should use the Integrity Regime to achieve broader social, economic or environmental policy objectives. For example, as it relates to upstream sourcing practices, sometimes corporations are left with no choice but to source from questionable sources. Where practices of sourcing cannot always be ethical, the corporate entity should show a genuine and concerted effort (such as by implementing programs and initiatives) to improve the circumstances at issue. Canada can look to international best practices in achieving specific social objectives. As in the US, for example, Canada should require federal contractors who supply items which may have been made by forced or indentured child labour to certify that they have made a good faith effort to determine whether forced or indentured labour was used to produce the items.

Likewise, imposing prohibitions on suppliers and subcontractors who engage in activities which constitute or may lead to some form of trafficking should be a part of this discussion. In addition, The Government of Canada can learn from the UK's Modern Slavery Act in order to encourage highly profitable companies to take actions to eliminate modern slavery in their own supply chains.

Lastly, the federal government may consider referencing the International Labour Organization (ILO) conventions, which form the basis for supplier codes of conduct and the ISO 14000 (Environmental) and ISO 26000 (social responsibility) standards when contracting.

Appendix 1 – SCMA Task Force

- Larry Berglund, SCMP, MBA, FSCMA
- LouAnn Birkett, CSCMP, FSCMA; National Board of Directors, SCMA
- Rick Cleveland, CTDP; Vice President, Policy and Professional Development, SCMA
- Rita Godin, CSCMP
- Glynn Hancott, CSCMP; Manager, Procurement, Planning & Corporate Services

RECOMMANDATIONS DE L'ASSOCIATION DE LA CONSTRUCTION DU QUÉBEC

Élargir la trousse d'outils du Canada pour répondre aux actes répréhensibles des entreprises

17 novembre 2017

ASSOCIATION
DE LA CONSTRUCTION
DU QUÉBEC

RECOMMANDATIONS DE L'ASSOCIATION DE LA CONSTRUCTION DU QUÉBEC

Élargir la trousse d'outils du Canada pour répondre aux actes répréhensibles des entreprises

Association de la construction du Québec
9200, boulevard Métropolitain Est
Montréal (Québec) H1K 4L2

17 novembre 2017

TABLE DES MATIÈRES

PRÉAMBULE

L'Association de la construction du Québec (ACQ) salue l'initiative du gouvernement fédéral d'effectuer des consultations publiques pour la mise en place d'un régime d'accords de poursuite suspendue (APS) ainsi que pour l'amélioration de son régime d'intégrité.

Principal groupe de promotion et de défense des intérêts des entrepreneurs de l'industrie québécoise de la construction, l'Association de la construction du Québec (ACQ) s'est imposée au fil des ans comme le plus important regroupement multisectoriel à adhésion volontaire de cette industrie.

Unique agent patronal de négociation pour tous les employeurs des secteurs institutionnel-commercial et industriel, l'Association de la construction du Québec représente à ce titre quelque 17 000 entreprises qui génèrent plus de 60 % des heures totales travaillées et déclarées dans l'industrie.

Non seulement l'Association de la construction du Québec joue un rôle actif et crédible dans les prises de décisions concernant l'industrie dans son ensemble, mais elle offre à ses membres une multitude d'outils et de services grâce à un important réseau de 10 associations régionales implantées dans 16 villes du Québec.

Aucune industrie ne souhaite se voir imposer des mécanismes d'accréditation et de vérification à l'égard de règles qui, si elles ne sont pas respectées, peuvent mener à d'importantes sanctions. Surtout lorsque ces règles, appliquées à tous, ne visent généralement qu'un plus petit nombre.

Déjà largement réglementée, notre industrie s'est vue imposer, depuis les dernières années, plusieurs mesures qui alourdissent de façon significative l'administration des projets de construction.

Les entrepreneurs québécois rendent actuellement des comptes à la Commission de la construction du Québec, à la Régie du bâtiment du Québec, à la Commission des normes, de l'équité, de la santé et de la sécurité du travail, à Revenu Québec et à l'Agence du revenu du Canada qui disposent tous de pouvoirs élargis d'enquête. Sans compter les processus de sécurité obligatoires pour travailler sur certains projets provinciaux ou fédéraux.

Ceci étant dit, les entrepreneurs québécois partagent l'objectif du gouvernement fédéral qui vise à rétablir la confiance du public dans le processus d'octroi des contrats publics. L'enjeu est à la fois éthique et économique.

En renforçant la notion d'équité et d'intégrité, le gouvernement fédéral fait un pas en avant afin de combattre la corruption et la collusion, entraves significatives à la libre concurrence et au développement des entreprises.

C'est dans ce contexte que l'Association de la construction du Québec vous livre ses commentaires.

INTRODUCTION

De façon générale, l'ACQ souscrit à la mise en place des accords de poursuite suspendue. L'ACQ s'inspire d'un programme québécois, mis en place par le projet de loi 26, soit la « Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics » (ci-après « le P.L. 26 ») et, à cet effet, propose la mise en place d'un organisme administratif chapeauté par un Commissaire-Administrateur.

L'entreprise qui en ferait la demande, si elle remplit les critères d'accès aux APS, verrait son dossier transféré à cet organisme pour traiter de questions allant de l'autorisation à participer à un APS à la révocation de l'APS en passant par l'évaluation du respect de ses conditions d'APS. La mise en place d'un tel organisme assurerait transparence et équité dans le traitement des dossiers ainsi que le développement d'une expertise en ce qui a trait à la réhabilitation d'une entreprise aux prises avec des pratiques pouvant être qualifiées d'illégales.

De plus, il est important de souligner que la consultation du gouvernement à l'égard du Régime d'intégrité, pour laquelle l'ACQ présente aussi des observations, est, après analyse, intimement liée à la consultation concernant les APS. Premièrement, les deux documents visent, de façons différentes, certains objectifs communs tels que :

- La confiance du public en attestant de l'intégrité des entreprises avec qui le gouvernement peut être appelé à faire affaire;
- La transparence des processus mis en place par les appareils gouvernementaux;
- Le traitement intègre et équitable de tous;
- La mise en œuvre de systèmes d'assurance;
- L'imputabilité des acteurs avec qui le gouvernement peut être appelé à faire affaire;
- Etc.

Deuxièmement, puisqu'une entreprise se conformant parfaitement aux conditions de son APS pourrait ne pas être déclarée coupable au niveau pénal ou criminel, elle pourrait être en mesure de participer pleinement aux appels d'offres publics au niveau fédéral, mais pourrait se voir interdire l'accès aux appels d'offres au niveau provincial. Cette réflexion prend tout son sens, lorsque, dans la consultation concernant le Régime d'intégrité, il est question de la mise en place d'un système de radiation mutuelle.

Concernant le Régime d'intégrité, l'ACQ propose un système similaire à celui du Québec qui est le registre des entreprises autorisées (REA). Ce dernier est régi par la *Loi sur les contrats des organismes publics*, L.R.Q. c. C-65.1 (Ci-après « LCOP »).

Le Régime d'intégrité du gouvernement fédéral est basé sur un système d'inadmissibilité créant une liste de toutes les entreprises inadmissibles à contracter avec le gouvernement fédéral. Afin d'envoyer un signal aux individus et aux entreprises malhonnêtes, ou qui pourraient l'être, l'ACQ croit qu'il est préférable d'avoir un régime positif et ainsi avoir une liste d'entreprises autorisées à contracter avec le gouvernement fédéral comme

c'est le cas au Québec. Un tel régime d'autorisation envoie le message que « l'obtention d'un contrat public n'est pas un droit, c'est un privilège réservé aux seuls contractants qui font preuve d'intégrité »[1].

Ce régime positif que nous proposons est fondé sur l'obtention d'une autorisation afin de contracter avec le gouvernement. Il viserait non seulement à renforcer les conditions d'intégrité des entreprises, mais aussi celles de leurs actionnaires, administrateurs, associés, dirigeants qui devront satisfaire aux exigences élevées d'intégrité auxquelles le public est en droit de s'attendre d'une partie à un contrat public. Ce renforcement de l'intégrité des concurrents permettrait de maintenir davantage la confiance du public dans les marchés publics, d'assainir la concurrence, ainsi que de réduire les risques de collusion et de corruption.

L'ACQ est consciente que la mise en place d'un tel régime aura son lot de défis notamment en ce qui concerne la coexistence du système des APS et de la radiation mutuelle des régimes d'intégrités fédéraux et provinciaux. Une entreprise accusée d'une des infractions visées pourrait bénéficier d'un APS au niveau fédéral, mais pourrait se voir refuser de façon discrétionnaire l'autorisation de contracter au niveau provincial. Toutefois, l'ACQ est convaincue que les régimes d'APS et d'intégrité doivent coexister afin de combattre la collusion et la corruption.

C'est donc en gardant à l'esprit les liens existants entre les deux consultations, ainsi que la nécessité de mettre en place un organisme administratif spécialisé dans le traitement des APS et de créer un service de certification et/ou d'autorisation par TPSGC relativement au Régime d'intégrité que l'ACQ présente ses observations dans le cadre de la consultation concernant les actes répréhensibles.

I – VOLET ACCORDS DE POURSUITE SUSPENDUE

QUESTION 1

À votre avis, quels sont les principaux avantages et désavantages des APS en tant qu'outil pour reconnaître la responsabilité criminelle des entreprises au Canada?

PRINCIPAUX AVANTAGES

La trousse de consultation (ci-après la « Trousse ») indique d'emblée certains avantages perçus des APS. En effet, la trousse cite à titre d'avantages l'amélioration de la conformité et l'amélioration de la culture organisationnelle des entreprises ou la possibilité, pour une entreprise fautive, de continuer à participer à des appels d'offres émanant du gouvernement.

En plus des avantages mentionnés ci-dessus, l'implantation d'un système d'APS au Canada pourrait, entre autres, améliorer la souplesse et la rapidité dans le traitement des dossiers éligibles, puisqu'il s'agit d'accords négociés. La mise en place de ces accords négociés pourrait aussi améliorer la collaboration des entreprises

[1] *Rapport sur la mise en œuvre de la Loi sur l'intégrité en matière de contrats publics*, Secrétariat du Conseil du trésor, Gouvernement du Québec, Février 2014, p.10.

fautives avec les autorités chargées des APS. En plus d'une meilleure collaboration, l'implication de l'entreprise fautive dans la négociation de sa sanction peut permettre une meilleure prise de conscience de l'entreprise quant à ses pratiques d'affaires et donc une meilleure réhabilitation. Finalement, tel qu'il le sera expliqué à la question 3, puisque les tribunaux n'interviendraient qu'à la toute fin du processus, l'implantation d'un système d'APS évitera d'engorger les tribunaux.

PRINCIPAUX DÉSAVANTAGES

Sans être un désavantage en soit, l'implantation d'un système d'APS va requérir la mise en place d'une administration rigoureuse, ainsi que la nécessité de nommer et de former des agents qui surveilleront la conformité ainsi que des agents attitrés au traitement des dossiers et de vérification des APS. De plus, la mise en place d'un système d'APS ne peut se faire sans une harmonisation des régimes d'octroi de contrats publics fédéraux et provinciaux. Afin d'éviter de possibles problématiques, l'harmonisation devrait être faite de façon concomitante avec la mise en place de l'organisme administratif indépendant, ce qui pourrait contribuer à créer une pression importante sur les appareils législatifs et administratifs.

QUESTION 2

À votre avis, pour quelles infractions le recours aux APS devrait-il être permis et pourquoi?

Il est primordial de circonscrire clairement les infractions permettant à une entreprise d'avoir recours aux APS. La liste des infractions proposée ci-dessous se veut un point de départ puisqu'il s'agit d'infractions déjà visées en matière de restriction d'attribution de contrats et étant utilisées autant au niveau fédéral que provincial. De plus, il s'agit des infractions les plus susceptibles d'être commises par une entreprise.

Ainsi, les APS pourraient être utilisés pour toutes infractions criminelles et statutaires prévues à la Politique sur l'inadmissibilité et la suspension (ci-après la Politique). De plus, l'ACQ propose l'ajout de certaines infractions aux lois fédérales prévues à l'Annexe 1 de la LCOP. Dans l'optique où les infractions criminelles contenues dans la Politique et la LCOP sont les mêmes, à quelques exceptions près, il est intéressant de spécifier que cette question met en lumière l'importance d'harmoniser les régimes provinciaux et fédéraux en matière d'octroi de contrats. En effet, puisque les APS suspendent la poursuite, il serait problématique pour les entreprises œuvrant autant au niveau fédéral que provincial d'être, pour la même infraction et grâce à la mise en place d'un APS, autorisées à œuvrer sur des projets fédéraux, mais visées par une interdiction au niveau provincial.

Il est entendu que toutes infractions causant des lésions corporelles ou la mort ou des infractions qui mettent en danger la sécurité publique ou la sécurité nationale ne seront pas considérées admissibles à la mise en place d'un APS.

Le tableau ci-dessous répertorie l'ensemble des infractions qui pourraient mener à la conclusion d'un APS. De plus, la mise en place d'un système d'APS pourrait prévoir un mécanisme permettant de modifier la liste d'infractions établie au besoin.

	Infractions menant à un APS	
Lois	Articles	Définitions
Code criminel	750(3)	N'est pas autorisé à contracter
	80(1)(d)	Fausse inscription, faux certificat ou faux rapport
	119	Corruption de fonctionnaires judiciaires
	120	Corruption de fonctionnaires
	121	Fraudes envers le gouvernement et Entrepreneur qui souscrit à une caisse électorale
	122	Abus de confiance par un fonctionnaire public
	123	Acte de corruption dans les affaires municipales
	124	Achat ou vente d'une charge
	125	Influencer ou négocier une nomination ou en faire commerce
	132	Parjure relatif à des affaires commerciales, professionnelles, industrielles ou financières
	136	Témoignage contradictoire relatif à des affaires commerciales, professionnelles, industrielles ou financières
	334	Vol dans le cadre d'affaires commerciales, professionnelles, industrielles ou financières
	336	Abus de confiance criminel
	337	Employé public qui refuse de remettre des biens
	346	Extorsion
	347	Perception d'intérêts à un taux criminel
	362	Escroquerie: faux semblant ou fausse déclaration
	366	Faux et infractions similaires
	367	Faux et infractions similaires
	368	Faux et infractions similaires
	375	Obtenir quelque chose au moyen d'un instrument fondé sur un document contrefait

	380	Fraude
	382	Manipulations frauduleuses d'opérations boursières
	382.1	Délit d'initié
	388	Reçu ou récépissé destiné à tromper
	397	Falsification de livres et de documents
	398	Falsifier un registre d'emploi
	418	Vente d'approvisionnement défectueux à Sa Majesté
	422	Violation criminelle de contrat
	426	Commissions secrètes
	462.31	Recyclage des produits de la criminalité
	463	Tentative et complicité à l'égard d'une infraction prévue à la présente annexe
	464	Conseiller une infraction prévue à la présente annexe qui n'est pas commise
	465	Complot à l'égard d'une infraction prévue à la présente annexe
	467.11 à 467.13	Participation aux activités d'une organisation criminelle
Loi sur la concurrence	45	Complot, accord, ou arrangement entre concurrents
	46	Directives étrangères
	47	Truquage des offres
	49	Accords bancaires fixant les intérêts
	52	Indications fausses ou trompeuses
	53	Documentation trompeuse
Loi sur la gestion des finances publiques	154.01	Fraude commise au détriment de Sa Majesté
Loi de l'impôt sur le revenu	239	Déclarations fausses ou trompeuses
Loi sur la taxe d'accise	327	Déclarations fausses ou trompeuses
Loi sur la corruption d'un agent public étranger	3	Corruption d'un agent public étranger

Loi réglementant certaines drogues et autres substances	5	Trafic de substances
	6	Importation et exportation
	7	Production
Loi sur le lobbying	14(1)	Omission de fournir la déclaration en vertu des paragraphes 5 et 7

QUESTION 3

À votre avis, quel est le rôle que les tribunaux devraient jouer à l'égard des APS?

Afin d'éviter l'engorgement des tribunaux et de permettre une meilleure souplesse et une rapidité dans le traitement des dossiers d'infractions éligibles à la conclusion d'un APS, l'ACQ propose une approche mitoyenne à celle déjà mise en place par les États-Unis et le Royaume-Uni. En effet, l'ACQ propose la mise en place d'un organisme administratif indépendant, chapeauté par un Commissaire-Administrateur. Le rôle de cet organisme administratif indépendant serait d'évaluer la pertinence de conclure un APS avec une entreprise fautive, la réussite de celui-ci et la nécessité ou non de terminer l'APS pour non-respect des conditions imposées dans l'accord et le renvoi du dossier au poursuivant pour le dépôt d'accusations.

Le rôle et les fonctions du Commissaire-Administrateur s'inspirent de ceux du commissaire prévus par l'article 6 du P.L. 26. En effet, à cet article il est prévu que :

> « Le gouvernement désigne une personne pour agir à titre d'administrateur du programme. Elle doit exercer ses fonctions de façon impartiale.
>
> L'administrateur a notamment pour fonction de tenter d'amener le ministre et une entreprise ou une personne physique mentionnée à l'article 10 à s'entendre.
>
> Dans ce cadre, il doit les informer de la portée des dispositions des articles 7 et 8 et formuler les recommandations au ministre quant aux propositions de remboursement dont il est saisi. »

Ainsi, le Commissaire-Administrateur superviserait l'ensemble des activités de l'organisme. Son rôle serait celui d'un agent facilitateur, ainsi qu'un expert en éthique et en intégrité corporative.

Finalement, les tribunaux interviendraient en toute fin de parcours et n'auraient qu'un pouvoir d'approbation ou de confirmation de l'APS une fois sa mise en place et le respect de l'ensemble des conditions de l'entreprise fautive (ci-après la « **Réussite de l'APS** ») constatée par l'organisme indépendant, en vue de lui conférer une force exécutoire équivalente à celle d'un jugement. Une fois la Réussite de l'APS approuvée par les tribunaux, le dépôt d'accusation subséquent à la Réussite de l'APS serait impossible.

QUESTION 4

Quels sont les facteurs qui devraient être pris en considération pour offrir le recours à un APS?

En premier lieu, le recours à un APS devrait toujours être évalué en fonction du type d'infraction commise et en fonction de l'intérêt public. De plus, les répercussions de l'infraction sur l'intégrité et la confiance des marchés devraient aussi être prises en compte.

En plus de ces grands principes, d'autres facteurs pourraient être pris en compte afin d'établir s'il est pertinent, ou non, de négocier un APS avec une entreprise fautive, dont notamment :

- L'entreprise fautive est une personne morale dûment inscrite au registraire des entreprises de sa province. En effet, l'APS vise les entreprises fautives et non les travailleurs fautifs;
- L'entreprise fautive est capable d'établir sa solvabilité après le remboursement des profits provenant d'activité illégale et/ou le paiement d'une pénalité pécuniaire;
- L'entreprise fautive n'est pas un prête-nom d'une autre personne morale qui ne serait pas éligible à la conclusion d'un APS;
- L'entreprise fautive n'a pas été déclarée coupable au cours des cinq dernières années d'une infraction ne permettant pas d'avoir recours à un APS;
- L'entreprise fautive souhaite négocier un APS et mettre en place des mesures afin d'éliminer les sources de comportements illégaux;
- Les dirigeants, actionnaires ou administrateurs de l'APS n'étaient pas, au cours des trois dernières années, les dirigeants, actionnaires ou administrateurs d'une entreprise ayant conclu un APS et l'ayant échoué.

QUESTION 5

Quand un recours à un APS ne serait-il pas approprié?

Tel que mentionné précédemment, le recours aux APS devrait toujours, en premier lieu être évalué en fonction du type d'infraction commise par l'entreprise fautive. Si une entreprise commet une infraction ne se trouvant pas à liste des infractions permettant la conclusion d'un APS, tel que présenté à la question 3, elle ne devrait pas être autorisée à en conclure un.

Il pourrait être pertinent d'évaluer certains des éléments mentionnés à l'article 21.28 de la LCOP afin d'établir si le recours à un APS est approprié. Soulignons notamment :

- Le fait qu'une entreprise ait été déclarée coupable, au cours des cinq années précédentes d'une infraction ne permettant pas d'avoir recours à un APS;
- Le fait que l'entreprise ait été déclarée coupable par un tribunal étranger, au cours des cinq années précédentes, d'une infraction qui, si elle avait été commise au Canada, ne lui aurait pas permis d'avoir recours à un APS;
- L'entreprise est multirécidiviste OU l'entreprise a déjà fait l'objet d'un APS pour le même type d'infraction;

- L'entreprise a, de façon répétitive éludé ou tenter d'éluder l'observation des lois dans le cours de ses affaires;
- L'entreprise entretient des liens avec une organisation criminelle au sens du paragraphe 1 de l'article 467.1 du Code criminel, ou avec toute autre personne ou entité qui s'adonne au recyclage des produits de la criminalité;
- Les dirigeants de l'entreprise étaient dirigeants d'une autre entreprise, au cours des cinq années précédentes laquelle a commis une infraction ne permettant pas d'avoir recours à un APS;
- L'entreprise est un prête-nom pour une entreprise ayant été déclarée coupable, au cours des cinq années précédentes d'une infraction ne permettant pas d'avoir recours à un APS;
- L'entreprise a déjà fait l'objet d'un APS qu'elle a échoué;
- Prescription au niveau de la connaissance de l'infraction.

QUESTION 6

Quelles sont les conditions qui devraient être incluses dans un APS?

D'entrée de jeu, la Trousse mentionne certaines conditions d'ordre général qu'il serait nécessaire de retrouver au sein de tous les APS. Les conditions générales mentionnées par la Trousse prévoient une « garantie que les parties ont conclu l'accord de bonne foi; une garantie liée à l'exactitude des renseignements fournis dans le cadre des négociations et une déclaration indiquant que les conditions prévues sont dans l'intérêt public ».

À ces conditions d'ordre général, il est proposé d'ajouter entre autres, l'ensemble des conditions listées ci-dessous :

- La date d'échéance de l'APS;
- Une garantie quant à la confidentialité du processus d'analyse et de négociation mené par l'entreprise fautive et le poursuivant;
- La possibilité de rétablir les accusations en cas de non-conformité aux conditions prévues à l'APS;
- La liste des actes qu'il est interdit à l'entreprise de réaliser;
- La liste des actes que l'entreprise doit faire sous la supervision de l'organisme indépendant ou de toute autre personne désignée à cet effet;
- Les documents à fournir par l'entreprise à l'organisme indépendant chargé de la surveillance de la vérification des APS;
- Les conditions concernant la mise en place de changements au sein de l'entreprise ou la mise en place d'un programme de conformité et la diffusion auprès des employés de l'entreprise d'un tel programme;
- Des sommaires d'étape à compléter par l'entreprise sur les mesures qu'elle met en place afin de rétablir la situation;
- La possibilité de réviser ou modifier les conditions prévues à l'APS;
- Le paiement de pénalités reliées aux profits réalisés de façon illégale, ou si possible, le remboursement des profits réalisés de façon illégale;
- Les garanties offertes pour assurer le paiement des sommes convenues ainsi que les modalités de paiement, le cas échéant;

- Une renonciation à invoquer les questions de délais procédurales advenant le dépôt d'accusation à la suite de l'échec d'un APS.

QUESTION 7

Quels sont les facteurs qui devraient être pris en considération pour établir la durée d'un APS?

La liste non exhaustive des facteurs listés ci-dessous pourrait être à prendre en considération afin d'établir la durée d'un APS :

- **La nature de l'infraction.** La nature de l'infraction doit être prise en compte afin de s'assurer qu'un APS n'est pas autorisé lorsque l'entreprise a commis des infractions causant des lésions corporelles ou la mort ou des infractions qui mettent en danger la sécurité publique ou la sécurité nationale.
- **Le niveau de sophistication de l'infraction.** Il serait important que ce critère soit examiné pour établir la durée d'un APS. Il faut se demander si l'infraction est le résultat d'un stratagème complexe mis en place par l'entreprise fautive ou s'il s'agit d'une mauvaise décision sans préméditation ? Un stratagème complexe militerait bien évidemment en faveur d'un APS prolongé.
- **Le nombre de personnes de l'entreprise impliquées dans la perpétration de l'infraction.** Le nombre de personnes impliquées dans la perpétration de l'infraction aura un impact sur la durée de l'APS. En effet, est-ce que le fonctionnement ou certaines pratiques illégales étaient tolérées et régulièrement appliquées ou est-ce seulement un petit groupe de personnes qui fonctionnaient ainsi ?
- **Les postes des employés impliqués dans l'infraction** (re : haut dirigeant ou employé de plancher). Plus le niveau de responsabilité des employés fautifs est important au sein de l'entreprise, plus cela devrait militer pour une durée prolongée de l'APS. Il pourrait aussi être pertinent de prendre en considération leurs antécédents professionnels.
- **Y a-t-il eu contamination ?** Cette question vise les situations où le dirigeant d'une entreprise ayant commis une infraction serait aussi dirigeant, actionnaire ou administrateur d'une autre entreprise. Ainsi, l'organisme indépendant chargé de la mise en place, de l'administration et de la gestion des APS devrait se questionner quant à la nécessité d'imposer un APS pour l'ensemble des entreprises liées ou seulement pour l'entreprise fautive. L'imposition d'APS à un groupement d'entreprises aura certainement une influence sur la durée de l'APS.
- **S'agit-il d'une récidive ?** L'organisme indépendant devra vérifier si l'entreprise a déjà bénéficié d'autres APS par le passé. Si oui, était-ce pour la même infraction ou des infractions différentes ?
- **Le type de mesures correctives proposé.** La nature des mesures correctives proposées aura un impact sur la durée plus ou moins longue d'un APS.
- **La taille de l'entreprise.** La taille de l'entreprise aura un impact sur la durée possible d'un APS. En effet, il peut être parfois plus aisé d'établir des changements radicaux dans une petite ou moyenne entreprise que dans une entreprise de très grande taille possédant plusieurs filiales.
- **La prescription de l'infraction.** Puisque certaines lois prévoient un délai de prescription en lien avec l'infraction commise, il serait important que l'APS permette la suspension du délai de prescription.

QUESTION 8

Dans quelles circonstances la publication devrait-elle être annulée ou retardée?

Afin de préserver le fragile équilibre entre la transparence du processus pour maintenir la confiance du public dans les APS à titre de mécanisme pénal efficace et le droit à la confidentialité des négociations entre l'entreprise fautive et le poursuivant, deux moments semblent pertinents en ce qui trait à la publication d'un APS.

Tel que mentionné dans une question précédente, les tribunaux interviendraient, après la réussite d'un APS, afin de valider cette réussite et de confirmer le retrait des accusations de la part du poursuivant. Ainsi, le premier moment où il serait possible de publier un APS serait au moment de la publication du jugement confirmant la réussite.

Le deuxième moment permettant la publication d'un APS interviendrait dans la situation où une entreprise échoue à l'APS. Tout échec à un APS devrait entraîner la publication des conditions associées à celui-ci. Il est important de préciser que l'échec à un APS ne signifie pas le non-respect, par l'entreprise fautive, de l'ensemble des conditions de l'APS. Il serait possible qu'un non-respect de certaines conditions seulement entraîne l'échec de l'APS et le dépôt de poursuites.

La publication d'un APS pourrait être retardée lorsque des entreprises tierces ou simplement des tiers, liés, conformément aux lois en vigueur au Canada, à l'entreprise fautive, ont des dossiers en cours d'évaluation ou devant les tribunaux. En d'autres mots, et tel que mentionné dans la Trousse, la publication de la réussite ou de l'échec d'un APS pourrait être retardée dans les cas où elle risque de porter atteinte à l'administration de la justice.

Finalement, l'ACQ ne voit pas dans quel cadre la publication d'un APS pourrait tout simplement être annulée.

QUESTION 9

De quelle façon faudrait-il remédier à la non-conformité?

Il serait préférable que ce soit un organisme administratif indépendant, via ses agents surveillants de conformité (voir la question 11) qui se charge d'évaluer ou de constater les non-conformités aux APS. Une fois une non-conformité constatée par un agent surveillant de conformité, deux options seraient alors possibles pour l'entreprise; soit la modification des conditions de l'APS et la continuation de celui-ci avec les nouvelles conditions ou alors, la terminaison de l'APS et le dépôt d'accusation par le poursuivant. Il est pertinent de souligner que dans le cas de très grandes entreprises possédant plusieurs bureaux régionaux et/ou plusieurs filiales, la non-conformité causée par l'un de ses bureaux régionaux ou ses filiales n'entraînerait pas nécessairement la non-conformité de l'ensemble de l'entreprise.

Les mesures de rechange ou la modification d'un APS en cours de route pour non-conformité devraient être des mesures exceptionnelles et non des mesures applicables à tout coup. Afin de pouvoir s'en prévaloir, l'APS devrait prévoir spécifiquement un droit de modification et de révision de l'APS; de plus, le droit de modification ou de révision de l'APS devrait ne pouvoir être exercé qu'une seule fois.

Finalement, il a été mentionné à la question 6 que l'une des conditions d'un APS pourrait être la rédaction, par l'entreprise visée par l'APS, d'un sommaire d'étape indiquant les efforts mis en place afin de se conformer aux conditions de l'APS. Ces sommaires d'étapes pourraient être un excellent outil permettant à une entreprise de s'autoévaluer afin d'éviter une non-conformité.

QUESTION 10

Quand les faits divulgués dans le cadre de la négociation d'un APS devraient-ils être admissible dans une poursuite instituée contre une entreprise?

La Trousse présente certaines conditions qu'il est pertinent de commenter. Tout d'abord, il est prioritaire que l'admission des faits qui constituent l'infraction et le fait de fournir des observations complètes et exactes tout au long du processus d'APS soient assorties d'une garantie de confidentialité et d'une impossibilité, pour le poursuivant, d'utiliser l'APS et les informations qui y sont associées dans une poursuite concernant la même infraction ayant donné lieu à la conclusion d'un APS.

De plus, le fait de verser une sanction pécuniaire dans le cadre de la réalisation d'un APS pourrait être problématique advenant le dépôt d'accusation à la suite de l'échec d'un APS. Il pourrait y avoir un risque de double peine. C'est pourquoi les sommes payées dans le cadre d'un APS devraient être reportées dans la poursuite. Finalement, l'utilisation d'un APS à titre de facteur aggravant dans le cadre de la détermination de la peine doit être nuancée. En effet, l'échec à un APS pourrait être pris en considération. Cependant, s'il s'agit d'une deuxième infraction et qu'un APS avait déjà été réussi, alors l'APS réussi ne devrait pas être pris en considération.

Tel qu'abordé sommairement à la question 6, les faits divulgués dans le cadre d'un APS ne devraient en aucun temps être utilisés dans le cadre d'une poursuite et devraient rester confidentiels. À titre d'exemple, au Québec, l'article 7 du P.L. 26 prévoit que « tout ce qui est dit ou écrit dans le cadre de l'application du programme est confidentiel et ne peut être reçu en preuve ». De plus, l'article 8 de cette même loi stipule que :

> « L'administrateur du programme, le ministre, l'entreprise ou la personne physique mentionné à l'article 10 ne peut être contraint de dévoiler ce qui lui a été dit ou ce dont il a eu connaissance dans le cadre de l'application du programme. Il ne peut non plus être tenu de produire un document préparé ou obtenu dans ce cadre devant un tribunal judiciaire, devant une personne ou un organisme de l'ordre administratif lorsqu'il exerce des fonctions juridictionnelles ou devant toute autre personne ou organisme ayant le pouvoir d'assigner des témoins, de recueillir de la preuve et d'exiger la production de documents.
>
> Malgré l'article 9 de la Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, nul n'a droit d'accès à un tel document. »

Ainsi, tel que mentionné en début de réponse et précédemment à la question 6, une garantie de confidentialité concernant les faits divulgués dans le cadre de la négociation renforce la position selon laquelle l'ensemble des négociations et des faits divulgués par l'entreprise fautive ne peuvent être soumis en preuve advenant le dépôt subséquent d'accusations pour cette même infraction.

QUESTION 11

Comment les surveillants de conformité devraient-ils être sélectionnés et régis?

L'organisme indépendant des APS serait chargé, entre autres, d'établir les qualifications minimales à détenir afin d'être un surveillant de conformité ainsi que de développer et superviser des programmes de formation et de développement pour les surveillants de conformité. Ce serait donc cet organisme qui serait en charge de la nomination des surveillants de conformité. Les surveillants de conformité devraient, en tout temps, exercer leur fonction de façon impartiale. À ce sujet, un code d'éthique pourrait être développé afin de bien définir les rôles et responsabilités des surveillants de conformité. Finalement, il serait important que les surveillants de conformité ne puissent être poursuivis en justice en raison d'un acte accompli de bonne foi dans l'exercice de leurs fonctions.

QUESTION 12

Quelle devrait être l'utilisation des rapports de surveillance de la conformité?

Les rapports de surveillance de la conformité devraient rester confidentiels en tout temps pour les mêmes raisons qui ont été mentionnées à la question 6. L'utilisation de ces rapports sera pertinente pour les surveillants de conformité pour assurer un suivi des changements implantés au sein d'une entreprise fautive afin qu'elle se conforme aux conditions établies dans l'APS.

Finalement, tel que mentionné à la question 3, une fois la Réussite d'un APS confirmé par le Tribunal, celle-ci sera rendue publique, au même titre qu'un jugement.

L'organisme administratif indépendant chargé des APS pourrait, à la suite de la réussite, tenir un registre des APS réussis. À titre d'exemple, l'article 19 du P.L. 26 prévoit la rédaction, par le ministre en charge du programme, d'un rapport sur sa mise en œuvre. Il est indiqué, à l'article 19, que le rapport doit comprendre le nom des entreprises ou des personnes physiques qui s'en sont prévalus, le nom des organismes publics ayant été remboursés, ainsi que le montant du remboursement.

QUESTION 13

Dans quelles circonstances l'indemnisation des victimes (dédommagement anticipé) devrait-elle faire partie des conditions d'un APS?

L'indemnisation des victimes est une mesure à adopter s'il est possible de quantifier les pertes et si les victimes sont identifiables. Cependant, dans certaines situations, il sera possible de quantifier la valeur des dommages, mais non de lier ceux-ci à des victimes identifiables; c'est pourquoi, dans cette optique, il pourrait être intéressant que les sommes soient versées dans un fonds d'indemnisation commun. À titre d'exemple, l'article 14 de l'Annexe 17 de la *Crime and Courts Act 2013* prévoit un système de fonds d'indemnisation consolidé : « *Any money received by a prosecutor under the term of a DPA that provides for P to pay a financial penalty to the prosecutor to disgorge profits made from the alleged offence is to be paid into the Consolidated Fund* ». De plus, il est intéressant de constater qu'au Québec, les articles 25 à 28 du P.L. 26 dans le cadre de contrats

publics prévoient la création d'un tel fonds, ainsi que les sommes qui peuvent y être versées et leurs utilisations possibles.

Finalement, tel que déjà soulevé dans la Trousse, l'indemnisation de victimes provenant d'autres pays pourrait créer de nombreux enjeux dans le versement, la gestion et l'attribution des sommes.

II – VOLET RÉGIME D'INTÉGRITÉ

QUESTION 1

Dans quelle mesure, le cas échéant, la durée de l'inadmissibilité ou de la suspension devrait-elle être modifiée pour être jugée appropriée tout en continuant à atténuer les risques?

L'ACQ propose d'appliquer le régime d'inadmissibilité ou de suspension à une durée de 5 ans dans un contexte de mise en place d'un régime positif d'autorisation de contracter émise par TPSGC. Un délai plus long pourrait être considéré en lien avec la ou les infractions commises, mais considérant le contexte économique actuel où les gouvernements constituent les donneurs d'ouvrage les plus importants en termes de marchés pour 80 % des entreprises de construction (essentiellement des PME), il pourrait signifier la fermeture de l'entreprise.

QUESTION 2

A) Comment un plus grand pouvoir discrétionnaire pourrait-il être intégré au Régime d'intégrité pour traiter les questions associées aux périodes d'inadmissibilité?

L'ACQ propose que dans le cadre de ce régime, les entreprises désirant obtenir un contrat public de biens, de services, de travaux de construction ou de sous-traitance d'une valeur égale ou supérieure d'un montant à être déterminé par le gouvernement et dont la mise en place peut se faire par étape[2], devront adresser une demande à TPSGC afin d'obtenir l'autorisation de contracter et ce, préalablement à l'obtention du contrat.

TPSGC pourra accorder ou refuser une telle autorisation. Le refus pourra être automatique lorsque l'entreprise, l'un de ses actionnaires, administrateurs, associés, ou dirigeants auront commis l'une des infractions énumérées dans la liste présentée à la question 3.

Par ailleurs, TPSGC pourra aussi conclure à un refus dit « discrétionnaire ». En d'autres mots, tout comme au Québec, lors de l'analyse du dossier de l'entreprise, TPSGC pourra faire preuve de discrétion à l'égard de certains éléments afin d'accorder ou non l'autorisation de contracter. Ces éléments devront être considérés dans leur ensemble. Ainsi un seul élément ne devrait pas être déterminant en soi.

Afin d'alléger le fardeau administratif et d'harmoniser les régimes provinciaux et fédéraux, l'ACQ propose qu'une entreprise qui est autorisée auprès de sa province soit automatiquement autorisée à contracter avec les organismes publics du gouvernement fédéral tel que mentionné à la question 7.

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[2] À titre d'exemple, l'autorisation de contracter au niveau provincial est exigée pour tout contrat de travaux de construction de 5 millions $ et plus. L'objectif est d'atteindre un seuil de 100 000 $. Toutefois, le seuil de 100 000 $ est déjà exigé au niveau de la Ville de Montréal. Le seuil pour les services professionnels est de 1 million $.

B) Quels facteurs devraient être pris en compte pour déterminer si un fournisseur devrait profiter du pouvoir discrétionnaire?

Certains éléments mentionnés à l'article 21.28 de la LCOP pourraient être considérés afin d'évaluer l'intégrité de l'entreprise :

1° les liens qu'entretient l'entreprise, l'un de ses actionnaires, administrateurs, associés, ou dirigeants avec une organisation criminelle au sens du paragraphe 1 de l'article 467.1 du Code criminel (L.R.C. 1985, c. C-46) ou avec toute autre personne ou entité qui s'adonne au recyclage des produits de la criminalité ou au trafic d'une substance inscrite aux annexes I à IV de la Loi réglementant certaines drogues et autres substances (L.C. 1996, c. 19);

2° le fait que l'entreprise, l'un de ses actionnaires, administrateurs, associés, ou dirigeants ait été poursuivie, au cours des cinq années précédentes, à l'égard d'une des infractions visées la liste d'infraction;

3° le fait que l'entreprise l'un de ses actionnaires, administrateurs, associés, ou dirigeants ait, dans le cours de ses affaires, été déclarée coupable ou poursuivie, au cours des cinq années précédentes, à l'égard de toute autre infraction de nature criminelle ou pénale;

4° le fait que l'un de ses actionnaires, administrateurs, associés, ou dirigeants de l'entreprise étaient actionnaires, administrateurs, associés, ou dirigeants d'une autre entreprise, au cours des cinq années précédentes laquelle a commis une infraction énumérée dans la liste;

5° le fait que l'entreprise l'un de ses actionnaires, administrateurs, associés, ou dirigeants, a, de façon répétitive, éludé ou tenté d'éluder l'observation de la loi dans le cours de ses affaires;

6° le fait qu'une personne raisonnable viendrait à la conclusion que l'entreprise est la continuité d'une autre entreprise qui n'est pas autorisée à contracter avec le gouvernement;

7° le fait qu'une personne raisonnable viendrait à la conclusion que l'entreprise est le prête-nom d'une autre entreprise qui n'obtiendrait pas une autorisation;

8° le fait qu'il n'y a pas d'adéquation entre les sources légales de financement de l'entreprise et ses activités;

9° le fait que la structure de l'entreprise lui permet d'échapper à l'application de ses nouvelles dispositions.

Au niveau provincial, l'organisme responsable d'octroyer les autorisations de contracter peut aussi prendre en considération dans son analyse le fait qu'une personne en autorité agissant pour l'entreprise a été poursuivie ou déclarée coupable, au cours des cinq années précédentes, d'une infraction visée. Il serait inapproprié ici de considérer un tel élément en raison du régime des APS. Tel que mentionné à la question 2 du volet des APS, puisque celles-ci suspendent la poursuite, il serait problématique pour les entreprises œuvrant tant au niveau fédéral que provincial d'être, pour la même infraction et grâce à la mise en place d'un APS, autorisées à œuvrer sur des projets fédéraux, mais visées par une interdiction au niveau provincial. L'harmonisation des régimes provinciaux et fédéraux en matière d'octroi de contrats sera d'une importance capitale.

QUESTION 3

Devrait-on envisager d'inclure à la Politique d'inadmissibilité et de suspension d'autres infractions qui remettent en question l'intégrité du fournisseur? Le cas échéant, lesquelles?

Il est primordial d'indiquer clairement les infractions qui devraient être incluses au régime d'intégrité. Les infractions criminelles et statutaires déjà prévues à la Politique sur l'inadmissibilité et la suspension (ci-après la Politique) doivent être conservées. De plus, l'ACQ propose l'ajout de certaines infractions aux lois fédérales prévues à l'Annexe 1 de la LCOP. Le tableau ci-dessous répertorie l'ensemble des infractions qui pourraient mener à refus de la part de TPSGC. Il pourrait être judicieux de réviser cette liste de façon périodique afin de s'assurer qu'elle répond aux besoins d'intégrité auxquels le public est en droit de s'attendre.

	Infractions du régime d'intégrité	
Lois	**Articles**	**Définitions**
Code criminel	750(3)	N'est pas autorisé à contracter
	80(1)(d)	Fausse inscription, faux certificat ou faux rapport
	119	Corruption de fonctionnaires judiciaires
	120	Corruption de fonctionnaires
	121	Fraudes envers le gouvernement et Entrepreneur qui souscrit à une caisse électorale
	122	Abus de confiance par un fonctionnaire public
	123	Acte de corruption dans les affaires municipales
	124	Achat ou vente d'une charge
	125	Influencer ou négocier une nomination ou en faire commerce
	132	Parjure relatif à des affaires commerciales, professionnelles, industrielles ou financières
	136	Témoignage contradictoire relatif à des affaires commerciales, professionnelles, industrielles ou financières
	334	Vol dans le cadre d'affaires commerciales, professionnelles, industrielles ou financières
	336	Abus de confiance criminel
	337	Employé public qui refuse de remettre des biens

	346	Extorsion
	347	Perception d'intérêts à un taux criminel
	362	Escroquerie: faux semblant ou fausse déclaration
	366	Faux et infractions similaires
		Faux et infractions similaires
	368	Faux et infractions similaires
	375	Obtenir quelque chose au moyen d'un instrument fondé sur un document contrefait
	380	Fraude
	382	Manipulations frauduleuses d'opérations boursières
	382.1	Délit d'initié
	388	Reçu ou récépissé destiné à tromper
	397	Falsification de livres et de documents
	398	Falsifier un registre d'emploi
	418	Vente d'approvisionnement défectueux à Sa Majesté
	422	Violation criminelle de contrat
	426	Commissions secrètes
	462.31	Recyclage des produits de la criminalité
	463	Tentative et complicité à l'égard d'une infraction prévue à la présente annexe
	464	Conseiller une infraction prévue à la présente annexe qui n'est pas commise
	465	Complot à l'égard d'une infraction prévue à la présente annexe
	467.11 à 467.13	Participation aux activités d'une organisation criminelle
Loi sur la concurrence	45	Complot, accord, ou arrangement entre concurrents
	46	Directives étrangères
	47	Truquage des offres
	49	Accords bancaires fixant les intérêts
	52	Indications fausses ou trompeuses
	53	Documentation trompeuse

Loi sur la gestion des finances publiques	154.01	Fraude commise au détriment de Sa Majesté
Loi de l'impôt sur le revenu	239	Déclarations fausses ou trompeuses
Loi sur la taxe d'accise	327	Déclarations fausses ou trompeuses
Loi sur la corruption d'un agent public étranger	3	Corruption d'un agent public étranger
Loi réglementant certaines drogues et autres substances	5	Trafic de substances
	6	Importation et exportation
	7	Production
Loi sur le lobbying	14(1)	Omission de fournir la déclaration en vertu des paragraphes 5 et 7

QUESTION 4

Quels facteurs devrait-on prendre en compte pour déterminer si d'autres infractions devraient être incluses?

Comme nous l'avons mentionné précédemment, la liste des infractions devrait être révisée de façon régulière afin de s'assurer qu'elle répond aux besoins d'intégrité auxquels le public est en droit de s'attendre.

QUESTION 5

À quel moment le gouvernement du Canada devrait-il envisager de prendre des mesures à l'égard des actes répréhensibles des entreprises lorsqu'il fait une détermination d'inadmissibilité ou de suspension? Quel acte répréhensible ou mesure justifierait une réponse du gouvernement fédéral?

L'ACQ est d'avis qu'une entreprise doit être déclarée inadmissible seulement lorsqu'elle est reconnue coupable par un tribunal compétent ou qu'elle reconnaît sa culpabilité.

La Politique d'inadmissibilité et de suspension prévoit actuellement qu'il est possible d'infliger une suspension à une entreprise si elle est accusée de l'une des infractions visées ou si elle a reconnu sa culpabilité à l'une de ces infractions. L'ACQ propose de n'avoir qu'une seule liste soit celle des entreprises autorisées à contracter avec le gouvernement fédéral.

Afin que l'entreprise se retrouve sur la liste des entreprises autorisées, elle devra en faire la demande à TPSGC. C'est à l'instar de l'analyse de cette demande que le gouvernement du Canada devra envisager de prendre des mesures à l'égard des actes répréhensibles soit en accordant l'autorisation de contracter de l'entreprise soit en la refusant.

QUESTION 6

Comment les déterminations d'inadmissibilité effectuées dans le cadre du Régime d'intégrité devraient-elles s'appliquer à des services fédéraux autres que l'approvisionnement?

L'ACQ n'est pas en mesure de se positionner sur cette question compte tenu de son champ d'expertise. Nous ne pouvons pas déterminer si les différents niveaux de sécurité accordés aux entreprises tiennent compte de l'ensemble des infractions mentionnées plus haut ni dans quel contexte ils sont exigés, mais un fait demeure, le besoin d'intégrité auxquels le public est en droit de s'attendre en termes d'octroi de contrat devrait se refléter dans l'ensemble des activités gouvernementales, incluant celles du gouvernement lui-même.

QUESTION 7

Quelle incidence une décision de radiation prise par une autre administration ou organisation devrait-elle avoir sur le statut d'un fournisseur en vertu du Régime d'intégrité?

Le gouvernement fédéral et les provinces devraient adopter un système de radiation mutuelle. À titre d'exemple, l'annexe 1 de la LCOP prévoit l'inscription d'une entreprise sur le registre des entreprises non admissibles (ci-après le « **RENA** ») pour des infractions au Code criminel, à la Loi sur la concurrence, à la Loi sur la corruption d'agents publics étrangers, à la Loi réglementant certaines drogues et autres substances, à la Loi sur la taxe d'accise ainsi qu'à la Loi de l'impôt sur le revenu. Ces infractions se retrouvent aussi dans la Politique d'inadmissibilité et de suspension. La seule déclaration de culpabilité à l'une de ces infractions devrait être reconnue en même temps par les deux instances afin d'éviter des décalages administratifs liés à l'étude du dossier, ainsi que la possibilité, pour une entreprise fautive, d'être dans l'incapacité d'obtenir des contrats ou sous-contrats publics au niveau provincial, mais qu'elle puisse continuer à en obtenir au niveau fédéral.

En contrepartie, le système de radiation mutuelle ne requiert pas uniquement une uniformisation des sanctions, mais aussi une uniformisation des régimes d'applications. En d'autres termes, il serait important d'harmoniser la durée de la sanction, mais surtout le type de contrats ou de sous-contrats auxquels cette radiation mutuelle s'applique.

QUESTION 8

Quelles mesures devraient être prises pour empêcher les fournisseurs qui sont reconnus comme étant membres de groupes du crime organisé ou ayant des liens avec ceux-ci de conclure des contrats ou des accords immobiliers avec le gouvernement fédéral?

Dans le cadre d'une demande d'autorisation de contracter, ces entreprises feront l'objet d'une analyse au cours de laquelle TPSGC pourra conclure que l'entreprise ne satisfait pas aux exigences d'intégrité auxquelles le public est en droit de s'attendre et refusera de façon discrétionnaire d'accorder l'autorisation en question.

De plus, dans l'éventualité où l'entreprise est déjà autorisée et que de nouvelles informations sont portées à l'attention de TPSGC, cette dernière pourra se prévaloir d'un pouvoir de révocation à l'égard de l'autorisation de contracter.

QUESTION 9

La portée du Régime d'intégrité devrait-elle être élargie afin d'inclure les entités fédérales autres que les ministères et organismes? Quels facteurs devraient être pris en compte pour déterminer à quelles autres organisations le Régime d'intégrité devrait s'appliquer?

Le public canadien est en droit de s'attendre à des exigences élevées d'intégrité des entreprises obtenant des contrats ou des sous-contrats publics. Le Régime d'intégrité devrait donc être élargi à toute entité administrée avec des deniers publics.

Les facteurs, non exhaustifs, pouvant être pris en compte pour identifier les autres organisations devant adopter le Régime d'intégrité, sont indiqués ci-dessous :

- L'organisme est-il listé dans l'une des Annexes I, I.1, II, III de la Loi sur la gestion des finances publiques ?
- L'organisme est-il une société d'État administrée sous le régime de la Partie X de la Loi sur la gestion des finances publiques ?
- La loi habilitante de l'organisation indique-t-elle qu'elle relève de la compétence du gouvernement fédéral ?
- De quelle façon l'organisme est-il financé ? Est-ce que cette organisation est financée avec des deniers publics ou non ?
- Quel est le mandat de cet organisme ? Vise-t-il l'ensemble des Canadiens ? Vise-t-il la protection du public ?
- Est-ce que les employés de l'organisme sont nommés en vertu de la Loi sur l'emploi dans la fonction publique ?

La présence de plusieurs de ces facteurs dans l'analyse du dossier de l'entreprise devrait inciter TPSGC à adopter le Régime d'intégrité dans le cadre de l'octroi de ses contrats.

QUESTION 10

Comment le gouvernement du Canada devrait-il utiliser le Régime d'intégrité pour atteindre d'autres objectifs stratégiques sociaux, économiques ou environnementaux?

Le Régime d'intégrité devrait selon nous servir d'abord au développement de la culture d'intégrité en entreprise. La consultation elle-même témoigne de l'importance de cet enjeu. Les entreprises qui souhaitent se distinguer par les soins qu'ils apportent au développement et au maintien d'une telle culture sont présentes dans tous les secteurs économiques. Toutefois, peu de support est disponible pour ces entreprises (surtout les PME) et les moyens pour les organisations qui souhaitent leur venir en aide sont inexistants.

L'ACQ travaille activement à l'implantation d'un programme d'intégrité en entreprise depuis plusieurs années déjà et a collaboré à la mise sur pied du Bureau de certification Intégrité (Intégrité Québec), OBNL indépendant ayant pour objet de :

a) Développer des critères permettant d'évaluer et de reconnaître, par une certification, l'implantation de processus et de moyens favorisant le développement de l'éthique en entreprise;

b) Reconnaître, par une certification, l'implantation effective d'un ensemble de processus et de moyens favorisant de façon continue le développement de l'éthique en entreprise;

c) Favoriser par la formation, la diffusion d'information et l'organisation d'événements, l'implantation effective des meilleures pratiques éthiques en entreprise;

d) Encourager et inciter les membres et toute autre personne morale à implanter de manière effective de meilleures pratiques éthiques en entreprise;

e) Fournir des services de toute nature en relation avec les buts de l'organisation;

f) Sensibiliser le public de l'importance d'implanter des meilleures pratiques éthiques en entreprise;

g) Imprimer, publier, éditer et distribuer des revues, journaux et périodiques et, plus généralement, diffuser toute information se rapportant à l'éthique en entreprise.

Le financement de ces initiatives devrait être au cœur des préoccupations du gouvernement et le régime des APS permettrait, par voie d'une contribution obligatoire de la part d'une entreprise qui souhaite s'en prévaloir à un fonds dédié à ces initiatives ou directement à l'un ou l'autre des organismes qui développent de tels programmes d'implantation ou de certification à travers le pays.

CONCLUSION

En conclusion, l'ACQ remercie le gouvernement fédéral de lui avoir permis de soumettre ses commentaires à l'égard de la consultation publique portant sur le régime des APS ainsi que sur le Régime d'intégrité.

L'ACQ est favorable à la mise en place d'un régime d'APS ainsi qu'à l'amélioration du Régime d'intégrité existant. L'ACQ est confiante que ces deux régimes contribueront à assainir la concurrence et à diminuer les risques de collusion et de corruption dans les marchés publics.

En effet, l'élaboration de ces deux régimes étant guidée par la confiance du public dans les marchés publics, la transparence des processus ainsi que le traitement intègre et équitable, favoriseront assurément un resserrement du cadre normatif des marchés publics ainsi qu'une plus grande rigueur à l'égard des entreprises autorisées à contracter avec le gouvernement.

Ces régimes permettront aussi une plus grande uniformité dans l'application des règles puisqu'il est primordial que les deux régimes soient conciliables avec ceux des provinces. L'ACQ insiste toutefois sur l'importance capitale d'harmoniser le système des APS et le Régime d'intégrité amélioré avec les régimes provinciaux existants.

CPQ
S'ALLIER POUR LA **PROSPÉRITÉ**

Commentaires du Conseil du patronat du Québec dans le cadre de la consultation du gouvernement du Canada :

« ÉLARGIR LA TROUSSE D'OUTILS DU CANADA POUR RÉPONDRE AUX ACTES RÉPRÉHENSIBLES DES ENTREPRISES »

- Novembre 2017 –

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CPQ

S'ALLIER POUR LA **PROSPÉRITÉ**

Le CPQ a pour mission de s'assurer que les entreprises disposent au Québec des meilleures conditions possibles – notamment en matière de capital humain – afin de prospérer de façon durable dans un contexte de concurrence mondiale. Point de convergence de la solidarité patronale, il constitue, par son leadership, une référence incontournable dans ses domaines d'intervention et exerce, de manière constructive, une influence considérable visant une société plus prospère au sein de laquelle l'entrepreneuriat, la productivité, la création de richesse et le développement durable sont les conditions nécessaires à l'accroissement du niveau de vie de l'ensemble de la population.

Conseil du patronat du Québec –
Novembre 2017

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Commentaires du Conseil du patronat du Québec dans le cadre de la consultation du gouvernement du Canada – Élargir la trousse d'outils du Canada pour répondre aux actes répréhensibles des entreprises

Novembre 2017

Introduction

Le Conseil du patronat du Québec salue l'initiative du gouvernement du Canada de tenir des consultations publiques afin d'évaluer les améliorations possibles au Régime d'intégrité fédéral et d'examiner la possibilité d'instaurer un régime canadien d'accords de poursuite suspendue (APS) comme outil supplémentaire destiné aux procureurs de la Couronne lorsque des actes répréhensibles sont commis par des entreprises.

Le CPQ est une confédération d'employeurs représentant directement et indirectement plus de 70 000 employeurs au Québec, issus autant du secteur privé que du secteur public. Il a pour mission de veiller à ce que les employeurs bénéficient des meilleures conditions possibles pour prospérer, notamment en veillant à ce qu'ils évoluent dans un contexte économique et social favorisant leur essor.

La protection de l'intégrité des marchés publics canadiens est essentielle à une saine concurrence et, par le fait même, à la prospérité de toutes les entreprises qui font affaire ou désirent faire affaire par voie contractuelle avec les organismes publics. De plus, une saine attribution des contrats publics va de pair avec la bonne gestion des finances publiques, ce qui est une des principales préoccupations du CPQ.

D'emblée, le CPQ reconnaît que les crimes économiques commis par des entreprises doivent être sévèrement punis, et il souhaite que le système tienne compte des lourds impacts que peuvent avoir les agissements isolés d'individus sur l'ensemble d'une entreprise et sur des dizaines, voire des centaines d'employés. Par conséquent, la législation et les politiques en place doivent privilégier le moyen optimal de condamner les actes répréhensibles commis par des entreprises et empêcher la récidive, tout en protégeant la viabilité des activités des entreprises et les emplois en jeu, lorsque la situation le justifie.

Dans ce contexte, le CPQ formulera ses commentaires au regard des volets traitant de la possibilité d'instaurer le mécanisme des accords de poursuite suspendue au Canada (I), et des améliorations possibles au Régime d'intégrité (II).

I- Les accords de poursuite suspendue (APS)

Le CPQ est favorable à la mise en œuvre d'un régime d'APS au Canada. Comme nous en ferons état ici en réponse aux questions du document de travail, la mise en œuvre d'un tel régime aurait plusieurs avantages et nous permettrait d'équilibrer notre capacité concurrentielle à l'échelle internationale par rapport à certains de nos importants partenaires économiques, tels les États-Unis, la France, l'Australie et le Royaume-Uni, qui disposent déjà d'un tel mécanisme.

Commentaires spécifiques en rapport avec les questions formulées dans le document de consultation

1. **Quels sont les principaux avantages et désavantages des APS en tant qu'outil pour reconnaître la responsabilité criminelle des entreprises au Canada?**

À ce chapitre, le document de travail énonce correctement les avantages reliés aux APS. Le CPQ estime que les APS pourraient effectivement être plus efficaces que les poursuites pénales pour améliorer la conformité et la culture organisationnelle d'une entreprise puisqu'ils exigent généralement 1) la mise en place de mesures de conformité appropriées, et 2) peuvent exiger une surveillance indépendante de l'entreprise.

De plus, un régime d'APS favoriserait la divulgation volontaire des actes répréhensibles d'une entreprise. Il semble en effet qu'une dénonciation volontaire faite le plus rapidement possible favoriserait la négociation de conditions moins contraignantes pour l'entreprise. À l'inverse, une entreprise ayant connaissance d'actes répréhensibles commis mais ne les dénonçant pas rapidement pourrait s'exposer à des conditions plus contraignantes, voire se rendre inadmissible au mécanisme d'APS. Actuellement, les entreprises ne sont pas encouragées à faire une divulgation volontaire, en raison, principalement, des conséquences graves que cela pourrait entraîner pour des intervenants sans reproche – employés, actionnaires, clients, investisseurs et fournisseurs. Au surplus, les entreprises qui divulguent volontairement des actes d'inconduite ne bénéficient pas réellement de mesures d'atténuation.

En revanche, le CPQ doute que les inconvénients associés aux APS dans le document de travail soient bien réels dans un système où les accords bénéficient d'un encadrement législatif juste et équilibré, mais il reconnaît néanmoins que les enjeux de l'instauration des APS peuvent être sensibles.

L'un des inconvénients soulevés prétend que les APS pourraient atténuer l'effet dissuasif de la poursuite, qu'ils peuvent être perçus comme moyen pour les entreprises de «payer pour se sortir d'embarras » et, enfin, qu'il n'est pas certain qu'ils soient suffisamment avantageux pour encourager la divulgation volontaire d'une infraction par les entreprises.

Dans un contexte où l'encadrement des APS définit clairement le rôle des tribunaux, le type d'infractions visées, les facteurs pris en considération pour autoriser le recours à un APS, le type de conditions incluses dans un APS et l'ensemble des autres éléments compris aux questions qui suivent (2 - 13), les craintes soulevées relativement à l'instauration du mécanisme d'APS nous apparaissent peu fondées.

2. **Pour quelles infractions le recours aux APS devrait-il être permis et pourquoi?**

Les APS devraient s'appliquer aux crimes économiques commis par des entreprises, notamment les crimes relatifs à la fraude, à la falsification comptable, à la corruption et au blanchiment d'argent. Les APS pourraient aussi s'appliquer aux infractions prévues dans certaines autres lois fédérales.

Alors que le recours devrait être ouvert aux infractions d'ordre criminel dès l'implantation des APS au Canada, les infractions pénales susceptibles de faire l'objet d'un APS pourraient être énoncées dans un règlement distinct. Cette procédure permettrait de faciliter la modification des infractions admissibles au recours à un APS.

3. Quel rôle devraient jouer les tribunaux?

Un rôle trop important accordé aux tribunaux pourrait décourager les entreprises d'effectuer une divulgation volontaire mais en revanche, un rôle trop restreint risquerait de miner la transparence du processus d'APS et la confiance du public envers ce mécanisme. Aussi les compétences accordées aux tribunaux dans le cadre des procédures d'APS doivent-elles être très clairement définies.

Sans aucun doute, les tribunaux doivent pouvoir participer aux APS afin que soient assurées l'indépendance, l'impartialité et la transparence du processus. Le tribunal devrait aussi pouvoir s'exprimer à la fin du processus sur la portée et l'étendue des conditions négociées, sans toutefois avoir le pouvoir de les modifier. Les juges pourraient possiblement, et exceptionnellement, renvoyer les parties à renégocier certaines conditions, bien que le rôle des tribunaux ne serait pas ici de déterminer la peine à infliger ou de statuer sur les faits allégués dans l'accusation, ni d'exercer leur pouvoir dans le but de modifier l'APS.

4. Quels sont les facteurs qui devraient être pris en considération pour offrir le recours à un APS?

L'intérêt public est un des facteurs à mettre de l'avant dans l'évaluation du service de poursuites pénales au Canada. Du point de vue de l'intérêt public, la décision d'entamer des négociations relatives à un APS devrait dépendre, entre autres, des facteurs énoncés ci-dessous.

- Le degré de collaboration proactive avec la Couronne.
- L'ampleur de la divulgation volontaire.
- Les antécédents de conduite similaire avant l'acte répréhensible (inconduite réglementaire, financière, etc.)
- L'existence d'un programme de conformité à l'échelle de l'entreprise, ou preuve concrète que celle-ci a pris des mesures pour mettre en place un tel programme depuis l'inconduite alléguée.
- Le fait que la conduite délictuelle résulte d'actes individuels d'employés (par opposition à des actions autorisées par les pratiques et politiques d'entreprise et approuvées par le conseil d'administration) et prise en compte du fait que les individus en cause dans l'inconduite sont encore présents dans l'entreprise.
- Le fait que l'entreprise ait entrepris des réformes structurelles pour améliorer ses processus de reddition de compte et mettre en place les mesures nécessaires pour éviter toute future inconduite alléguée.
- La preuve que des mesures crédibles et efficaces ont été instaurées pour changer la culture de l'entreprise.
- Les conséquences négatives disproportionnées que pourrait avoir une condamnation criminelle sur des personnes innocentes, c'est-à-dire les actionnaires, titulaires de régimes de retraite, employés, fournisseurs et autres parties concernées. Comme nous l'avons mentionné dans nos propos introductifs, les conséquences seront lourdes pour une entreprise qui ne peut pas conclure de contrat avec les gouvernements, provinciaux ou fédéral, ou encore à l'étranger, à cause de condamnations criminelles. Par exemple, la baisse du cours des actions ainsi que plusieurs licenciements peuvent suivre la condamnation criminelle d'une entreprise, et sont alors prises en otage des personnes pourtant innocentes.

5. Quand le recours à un APS ne serait-il pas approprié?

Le recours à un APS ne serait pas justifié s'il va à l'encontre de l'intérêt public.

La gravité de l'inconduite alléguée est le facteur le plus important de la décision de poursuivre ou non et d'entamer une négociation dans le cadre d'un APS. Le degré de préjudice subi par le public ou les victimes

en raison de l'inconduite alléguée, l'ampleur des répercussions négatives sur l'intégrité et la confiance des marchés ou des gouvernements doivent aussi être considérés.

Par ailleurs, si l'inconduite s'accompagne de plusieurs circonstances aggravantes importantes, par exemple si elle touche plusieurs juridictions, si elle a exigé une planification minutieuse (préméditation), a nécessité l'intervention de plusieurs cadres supérieurs de l'entreprise et l'approbation de membres du conseil d'administration, cela pourrait aussi s'avérer aller à l'encontre de l'intérêt public.

D'autres facteurs doivent également servir à déterminer ce qui va à l'encontre de l'intérêt public : les antécédents de conduite similaire, l'absence de poursuite pour des violations de la loi semblables ou plus graves, le fait que l'entreprise n'ait pas de programme de conformité efficace ou n'a pas déployé suffisamment d'efforts pour en instaurer un depuis qu'a été dénoncée l'inconduite alléguée et, enfin, l'absence totale de collaboration avec les autorités.

Par ailleurs, si l'entreprise a été avertie ou sanctionnée précédemment, ou encore si des accusations criminelles ont été portées contre elle et qu'aucune mesure pertinente n'a été prise pour empêcher une telle conduite future, cela jouera également en sa défaveur.

6. Quelles sont les conditions qui devraient être inclues dans un APS ?

Le document de consultation indique que les conditions de l'APS seraient adaptées à chaque situation individuelle, mais elles pourraient exiger ce qui suit de l'accusé.

- Admettre les faits qui constitueraient l'infraction et fournir des observations complètes et exactes tout au long du processus.
- Consentir à faire l'objet de l'accord et faire enregistrer auprès d'un tribunal les admissions à l'appui.
- Accepter de mettre en œuvre des mesures visant à garantir la conformité future et à prévenir toute inconduite future, ce qui peut inclure l'amélioration des contrôles internes et la formation des employés.
- Accepter d'aider les autorités responsables à faire enquête et à instituer des poursuites relatives aux individus associés à l'infraction.
- Verser une sanction pécuniaire.
- Fixer une date d'échéance pour l'APS.
- Recouvrer les profits tirés de l'inconduite, indemniser les victimes sous forme de dédommagement anticipé, saisir-arrêter les traitements et les primes des cadres supérieurs.

Le CPQ adhère à ces propositions, jugeant que le Canada tirera les avantages de la procédure d'APS s'il met en œuvre un modèle qui englobe ces conditions. Précisons qu'une admission d'inconduite et des faits qui s'y rattachent ne constituerait pas une admission formelle de culpabilité. Le document de consultation fait aussi état de conditions générales qui pourraient être incluses dans les APS, auxquelles nous adhérons aussi pleinement. Ces conditions sont les suivantes :

- Une garantie que les parties ont conclu l'accord de bonne foi.
- Une garantie liée à l'exactitude des renseignements fournis dans le cadre des négociations.
- Une déclaration portant que les conditions prévues sont dans l'intérêt public.

7. Quels sont les facteurs qui devraient être pris en considération pour établir la durée d'un APS?

De l'avis du CPQ, la question de la durée de l'APS devra être traitée au cas par cas, en tenant compte du contexte global et de l'ensemble de conditions négociées dans l'accord. Tout comme une peine au pénal

ou au criminel, la durée des sanctions (ici des conditions) pourra dépendre de la gravité de l'inconduite et des faits fournis durant la négociation.

Quoi qu'il en soit, chaque APS devra être entériné d'une date d'expiration claire, qui établira sans ambiguïté les obligations des dirigeants d'entreprises.

8. Dans quelles circonstances la publication devrait-elle être annulée ou retardée?

Le document de consultation note que :

« La transparence du processus et du résultat est essentielle au maintien de la confiance du public dans les APS en tant que mécanisme valide d'application du droit pénal. Dans le cadre de l'examen d'une exigence de publication, il est également important de garantir à l'entreprise que la confidentialité sera respectée dans le cadre des négociations; sinon, le processus pourrait être compromis du fait que l'entreprise pourrait être réticente à divulguer des actes répréhensibles ».

À notre avis, cette citation énonce parfaitement un des enjeux majeurs à examiner dans le cadre de l'instauration d'un mécanisme APS.

Ainsi, l'absence d'obligation de publication, comme aux États-Unis, pourrait possiblement apparaître à plusieurs comme insuffisante. Par ailleurs, l'obligation de publier l'APS une fois l'accord approuvé nous semble une voie acceptable. Selon le CPQ, dans l'éventualité où les tribunaux devraient intervenir durant le processus de négociation, il serait primordial que le maximum d'informations demeure confidentiel, pour ne pas diffuser l'essentiel de l'APS avant sa conclusion.

De plus, si la publication de l'APS risque de porter atteinte à l'administration de la justice, elle devrait être retardée. En ce sens, le Service des poursuites pénales du Canada (ci-après le « SPPC ») ou l'entreprise pourrait en faire la demande à un juge.

9. De quelle façon faudrait-il remédier à la non-conformité?

Il y a de nombreux moyens de remédier à la non-conformité d'une entreprise. Dans un premier temps, des critères tels que la gravité de l'infraction et le nombre de récidives devront être pris en compte afin de déterminer la façon la plus appropriée de sanctionner ou de corriger la non-conformité. L'APS pourrait lui-même contenir des clauses qui prévoient des sanctions précises à des actes spécifiques non conformes, clauses auxquelles il faudrait se référer.

L'entreprise devrait avoir la possibilité de remédier à la non-conformité. Dans le cas de plusieurs occurrences répétées de non-conformité, hors du contrôle de l'entreprise, celle-ci devrait avoir la possibilité d'agir pour remédier à la non-conformité et de renégocier les conditions de l'APS avec le SPPC.

Par exemple, les sanctions pourraient comprendre des amendes (dont le montant serait fonction de nombreux facteurs) et la modification de certaines conditions (telle la date d'échéance). La détermination d'une non-conformité devrait revenir au tribunal, en tenant compte de l'avis du SPPC. Une preuve factuelle serait nécessaire pour définir l'ampleur de la non-conformité.

10. Quand les faits divulgués dans le cadre de la négociation d'un APS devraient-ils être admissibles dans une poursuite instituée contre une entreprise?

En règle générale, les faits divulgués pendant les négociations d'un APS devraient être recevables dans le cadre d'éventuelles poursuites contre l'entreprise. Par contre, il devrait y exister une série d'exceptions; par exemple, les faits pourraient ne pas être divulgués s'ils risquent de nuire à la crédibilité ou au bon déroulement d'autres procédures en cour.

11. Comment les surveillants de conformité devraient-ils être sélectionnés et régis?

Étant donné qu'ils sont en partie responsables de la surveillance de la conformité des entreprises et de la mise en application de leurs bonnes pratiques, les surveillants en conformité devront être impartiaux. Pour s'en assurer, le processus menant à leur nomination pourrait, par exemple, être dirigé par Services publics et Approvisionnement Canada. Toutefois, d'autres pistes peuvent être envisagées.

12. Quelle devrait être l'utilisation des rapports de surveillance de la conformité?

Les rapports de surveillance pourraient être déposés auprès de la personne désignée au sein de l'entreprise. Si des manquements graves sont notés, l'incident devra être rapporté aux instances appropriées, le cas échéant, soit au SPPC ou à Services publics et Approvisionnement Canada, après que la personne ressource au sein de l'entreprise ait eu la chance de soumettre ses commentaires.

13. Dans quelles circonstances l'indemnisation des victimes devrait-elle faire partie des conditions d'un APS?

L'ensemble de conditions d'un APS devrait être négocié, dans tous les cas, d'une manière globale. Ainsi, il n'est pas possible de citer des cas où les victimes devront être indemnisées selon les conditions de l'APS.

Toutefois, certaines situations pourraient porter davantage à l'indemnisation des victimes. Par exemple, lorsque la victime est clairement identifiable, la question de l'indemnisation pourrait avoir une pondération plus importante dans la négociation de l'ensemble des conditions. Toutefois, dans les cas de crimes économiques, l'identification d'une personne n'est pas toujours réalisable, et le montant de l'indemnité sera alors difficile à déterminer.

De plus, il ne fait aucun doute que les autres procédures ou condamnations de l'entreprise concernée devraient être prises en considération afin d'éviter les situations de sur-indemnisation.

Enfin, le CPQ souhaite que les APS puissent s'appliquer aux accusations en cours. Dans un contexte où les tribunaux subissent une grande pression depuis l'arrêt Jordan, il serait tout indiqué de se doter le plus tôt possible d'un régime d'APS pour combattre la criminalité économique.

II- Le Régime d'intégrité

Au cours des dernières années, la gestion et l'octroi des contrats publics ont fait couler beaucoup d'encre au Québec, comme dans l'ensemble du Canada.

Comme nous l'avons mentionné dans nos propos introductifs, le CPQ accueille, globalement, favorablement les mesures visant l'intégrité des marchés publics lorsque celles-ci respectent les principes d'une règlementation intelligente, axée le plus possible sur les objectifs plutôt que sur les moyens.

Puisque le gouvernement fédéral, tout comme le gouvernement du Québec, dépense chaque année des dizaines de milliards de dollars en contrats publics, nous appuyons évidemment l'édiction de règles qui visent à encadrer l'accès et la bonne gestion de ces contrats.

À l'instar de celui du Québec, le Régime d'intégrité fédéral adopté en 2015 vise certains objectifs louables : encourager les pratiques commerciales éthiques, contrer la corruption et maintenir la confiance du public envers l'administration publique. Toutefois, le régime fédéral d'intégrité peut être amélioré. Les commentaires qui suivent exposeront certaines des améliorations possibles.

Commentaires spécifiques en rapport avec les questions formulées dans le document de consultation

1. Dans quelle mesure, le cas échéant, la durée de l'inadmissibilité ou de la suspension devrait-elle être modifiée pour être jugée appropriée tout en continuant à atténuer les risques?

Durée de suspension

Selon la Politique d'inadmissibilité et de suspension actuelle, un fournisseur peut d'abord être suspendu pour une période pouvant atteindre 18 mois s'il est simplement accusé d'avoir commis une infraction figurant sur la liste. Selon le CPQ, cette disposition peut créer de l'manque d'équité et elle est incompatible avec la présomption d'innocence. De plus, pour ceux qui seront ultimement reconnus coupables, la période d'inadmissibilité totale peut s'étendre au-delà de dix ans puisque la période de suspension n'a pas pour effet de réduire la période d'inadmissibilité.

Durée d'inadmissibilité

Quant au fournisseur reconnu coupable au Canada d'une infraction inscrite à la liste, il peut être inadmissible pendant une période de dix ans à l'attribution d'un contrat et d'une entente de transaction immobilière du gouvernement.

De l'avis du CPQ, la décision de rendre inadmissible une entreprise aux contrats publics et la durée de la sanction applicable devraient être fonction de l'intérêt public et de la gravité de l'inconduite. Actuellement, les règles canadiennes (notamment la possibilité d'être automatiquement exclu pendant cinq ou dix ans), peuvent sembler disproportionnées comparativement aux règles d'autres juridictions provinciales et étrangères.

Au Québec, un fournisseur reconnu coupable d'une infraction donnée au titre d'une loi provinciale ou fédérale sera radié pour une période maximale de cinq ans. Cette période d'inadmissibilité nous semble mieux adaptée, et elle permet d'atteindre les objectifs poursuivis par la législation : d'une part elle permet à l'entreprise de mettre sur pied des mesures afin de se conformer dans l'avenir et, d'autre part, elle est suffisamment dissuasive et punitive pour que l'entreprise ne récidive pas, en plus de lancer un message aux entreprises ne faisant pas preuve de suffisamment de diligence.

Les périodes de radiation appliquées aux États-Unis nous paraissent également intéressantes. Par exemple, une entreprise peut être radiée pour une période de trois ans, avec possibilité de prolongation. Ce modèle permettrait aussi, selon le CPQ, d'atteindre les objectifs visé par le Régime d'intégrité.

2. **Comment un plus grand pouvoir discrétionnaire pourrait-il être intégré au Régime d'intégrité pour traiter les questions associées aux périodes d'inadmissibilité? Quels facteurs devraient être pris en compte pour déterminer si un fournisseur devrait profiter du pouvoir discrétionnaire?**

Comme nous l'avons mentionné précédemment, le fait pour une entreprise d'être suspendue, ou inadmissible aux contrats publics peut avoir des conséquences graves pour un ensemble d'acteurs, notamment les employés et les fournisseurs. Ainsi, par souci d'équité dans la détermination des sanctions, un plus grand pouvoir discrétionnaire semblerait indiqué pour traiter les questions reliées au Régime d'intégrité. Il serait pertinent de dresser une liste des facteurs qui détermineront si une entreprise peut bénéficier d'un grand pouvoir discrétionnaire et, partant, d'une plus grande flexibilité.

Selon nous, une entreprise devrait bénéficier d'un pouvoir discrétionnaire fondé sur son niveau de coopération avec le gouvernement et les mesures préventives qui ont été mises en place. L'on devrait aussi tenir compte du fait que l'entreprise a adopté les mesures nécessaires à l'endroit des individus responsables de l'inconduite et a corrigé les conséquences de son inconduite, selon les circonstances.

Toutefois, rappelons qu'en accordant un plus grand pouvoir discrétionnaire à l'instance responsable du Régime d'intégrité, on doit s'assurer qu'une expertise interne sera en place au sein de cette instance. Enfin, nous croyons qu'un mécanisme de révision devrait être mis sur pied dans le cadre du Régime d'intégrité. Ainsi, une entreprise pourrait, après un certain temps, demander la révision de son dossier suite à une amélioration notable de sa situation.

3. **Devrait-on envisager d'inclure à la Politique d'inadmissibilité et de suspension d'autres infractions qui remettent en question l'intégrité du fournisseur? Le cas échéant, lesquelles?**

Le Régime d'intégrité fédéral ne tient actuellement pas compte des infractions provinciales ou de nature civile, de certaines infractions fédérales associées à des actes répréhensibles[1], des allégations ou des enquêtes et des décisions de radiation prises par d'autres administrations. Nous considérons que la liste indiquée dans le document de consultation énumère les infractions les plus pertinentes et que le régime doit se concentrer principalement sur celles-ci. Toutefois, il demeure pertinent d'envisager d'ajouter des infractions à la liste de la Politique d'inadmissibilité et de suspension, ce qui soulève certains enjeux.

D'abord, le CPQ souligne que la prise en compte des infractions et des sanctions imposées à l'étranger peut soulever plusieurs difficultés pratiques. Par exemple, la radiation mutuelle comporte certains risques; le Canada n'étant pas nécessairement familier avec les régimes d'États étrangers et de certaines entités, il y a risque qu'une entreprise devienne inadmissible sur la base de règles étrangères que notre administration de connaît pas réellement. Certes, nous souhaitons que le régime prenne en compte l'équité entre les entreprises étrangères et canadiennes, mais nous doutons du mécanisme de radiation mutuelle. Il faudrait ici s'abstenir d'adopter des mesures strictes qui pourraient mener à certaines confusions dans l'application de la législation.

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[1] Autres que le Code criminel, la Loi sur la concurrence, la Loi règlementant certaines drogues et autres substances, la Loi sur la corruption d'agents étrangers, la Loi sur la taxe d'accise, la Loi sur la gestion des finances publiques, la Loi sur l'impôt sur le revenu et la Loi sur le lobbying.

4. **Quels facteurs devrait-on prendre en compte pour déterminer si d'autres infractions devraient être incluses?**

Le gouvernement du Canada devrait pouvoir inclure dans sa politique l'inadmissibilité ou la suspension de ses fournisseurs dont les conduites sont reprochables, notamment en raison du manque d'intégrité dans les pratiques d'affaires qui auront un impact direct sur le gouvernement.

5. **À quel moment le gouvernement du Canada devrait-il envisager de prendre des mesures à l'égard des actes répréhensibles des entreprises lorsqu'il fait une détermination d'inadmissibilité ou de suspension? Quel acte répréhensible ou mesure justifierait une réponse du gouvernement fédéral?**

En règle générale, le CPQ soutient que de simples accusations et allégations contre une entreprise ne doivent pas permettre sa suspension ou son inadmissibilité. Seul le dénouement d'un procès peut véritablement faire état de la culpabilité d'une entreprise au niveau criminel. Toutefois, nous reconnaissons que dans des circonstances exceptionnelles, les allégations pourraient être considérées (par exemple dans les cas où il serait contraire à l'intérêt public que l'entreprise soit liée par contrat avec le gouvernement).

6. **Comment les déterminations d'inadmissibilité effectuées dans le cadre du Régime d'intégrité devraient-elles s'appliquer à des services fédéraux autres que l'approvisionnement?**

Le cadre du Régime d'intégrité que l'on retrouve notamment dans la Politique d'inadmissibilité et de suspension devrait se limiter aux fins d'approvisionnement du gouvernement du Canada. À notre avis, bien que les services fédéraux puissent s'échanger les bonnes pratiques et certaines procédures, on ne doit pas pour autant uniformiser le cadre d'intégrité à l'ensemble des services. En procédant ainsi, nous laissons la chance aux différents services fédéraux de développer leur propre modèle qui tient compte des spécificités de leur service.

7. **Quelle incidence une décision de radiation prise par une autre administration ou organisation devrait-elle avoir sur le statut d'un fournisseur en vertu du Régime d'intégrité?**

Comme nous l'avons exposé en partie à la question 3, la radiation mutuelle n'est pas à privilégier dans un contexte où une entreprise inadmissible dans une autre administration ne l'est pas nécessairement sur la base des mêmes critères ni ne s'expose aux mêmes sanctions. La radiation mutuelle mènerait aussi à une perte d'indépendance des agences fédérales.

Par contre, nous reconnaissons que dans le cas d'une entreprise radiée dans une province ou utilisant des critères semblables à ceux du gouvernement fédéral, il ferait alors plus de sens de se pencher sur les actions qui ont menées à la radiation et considérer dans une certaine mesure ce fait et les condamnations sous-jacentes.

Toutefois, si le gouvernement fédéral en venait à considérer davantage les régimes provinciaux, il devrait faire attention de ne pas faire de lien avec des inadmissibilités qui ne sont pas pertinentes pour le Régime d'intégrité. Par exemple, une entreprise au Québec peut être inadmissible à des contrats d'une valeur de plus de 5 millions sans avoir commis d'infraction au niveau pénal, simplement parce que l'entreprise n'a pas demandé d'autorisation en ce sens à l'AMF et se contente de faire des contrats de moindre valeur. De

plus, au Québec une entreprise peut être inadmissible pour une durée de 2 ans après que son rendement ait été jugé insatisfaisant par un donneur d'ouvrage public.

8. **Quelles mesures devraient être prises pour empêcher les fournisseurs qui sont reconnus comme étant membres de groupes du crime organisé ou ayant des liens avec ceux-ci de conclure des contrats ou des accords immobiliers avec le gouvernement fédéral?**

Le document de consultation indique que certains intervenants trouvent insuffisant que le gouvernement ne fasse pas affaire avec des fournisseurs affiliés au crime organisé sur l'unique base d'accusations et de condamnations en lien avec certains articles spécifiques du Code criminel et de la Loi réglementant certaines drogues et substances. Ils affirment que cette approche est trop restrictive.

Évidemment, nous ne souhaitons pas que le gouvernement conclue des contrats avec les entreprises impliquées dans le crime organisé. Toutefois, il faut demeurer prudent et ne pas condamner trop vite une entreprise avant même qu'un tribunal ne le fasse. Par ailleurs, nous reconnaissons qu'une entreprise pourrait se voir exclue de la possibilité de conclure des contrats avec le gouvernement en l'absence de condamnation, mais dans de rares cas seulement. À titre d'exemple, une preuve soutenue que des dirigeants d'entreprises sont impliqués dans le crime organisé, et que l'entreprise elle-même est impliquée dans ces activités pourrait être prise en compte, notamment pour des questions d'intérêt public.

9. **La portée du Régime d'intégrité devrait-elle être élargie afin d'inclure les entités fédérales autres que les ministères et organismes? Quels facteurs devraient être pris en compte pour déterminer à quelles autres organisations le Régime d'intégrité devrait s'appliquer?**

Les annexes I.1 et II de la *Loi sur la gestion des finances publiques* énumèrent les dizaines d'organismes et ministères fédéraux assujettis au Régime d'Intégrité. Les sociétés d'État sont quant à elles encouragées à adopter le Régime.

Selon nous, la proposition d'élargir la portée du régime, en le rendant obligatoirement applicable à davantage d'organismes fédéraux vient au second plan. Certes, il pourrait être pertinent que le Régime couvre davantage d'organismes, mais il faudra pour ce faire un contexte où les principaux irritants du régime auront été éradiqués.

Nous croyons que la présente consultation permettra de relever les principaux irritants. Dans un contexte où les modifications du Régime en tiendront compte, nous ne nous opposerions pas à ce que le Régime s'applique à plus d'entités fédérales.

10. **Comment le gouvernement du Canada devrait-il utiliser le régime d'intégrité pour atteindre d'autres objectifs stratégiques sociaux, économiques ou environnementaux?**

Lee gouvernent du Canada pourrait-il envisager d'ajouter au Régime d'intégrité des infractions liées aux problèmes sociaux comme le travail forcé et la violation des droits des travailleurs, la traite de personnes et les infractions environnementales?

Le CPQ encourage certainement les entreprises à adopter des pratiques exemplaires de leur secteur d'activité qui vont au-delà de l'approvisionnement, car les mesures sociales, environnementales et économiques sont tout aussi importantes.

Nous croyons toutefois qu'il serait prématuré d'utiliser l'approvisionnement pour inclure des clauses reliées aux mesures sociales et environnementales. Comme nous le mentionnons à la question 9, le régime d'intégrité actuel doit d'abord être amélioré. Le régime actuel n'encourage pas la divulgation volontaire, ce qui constitue un problème majeur.

CONCLUSION

En conclusion, le CPQ souhaite remercier une fois de plus le gouvernement de mener de telles consultations et insiste sur les points suivants :

APS

- L'instauration d'un mécanisme d'APS aurait plusieurs avantages, principalement :
  - ✓ Il encouragerait la divulgation volontaire d'actes répréhensibles.
  - ✓ Il permettrait la mise en place de mesures de conformité plus appropriées et plus efficaces pour les entreprises.
  - ✓ Il réduirait vraisemblablement l'impact sur les employés, fournisseurs, administrateurs et actionnaires innocents.

- Les recours aux APS devraient s'appliquer prioritairement aux cas de crimes économiques commis par les entreprises

- L'admission d'inconduite par une entreprise ne constituerait pas une admission formelle de culpabilité

- Le mécanisme d'APS devrait être adopté et entrer en vigueur le plus rapidement possible et s'appliquer aux accusations déjà déposées, dans un contexte où les tribunaux subissent beaucoup de pression.

Régime d'intégrité

- Le Régime d'intégrité doit être plus flexible; le fait de priver systématiquement une entreprise de la possibilité de conclure des contrats avec le gouvernement fédéral pour une période de cinq ou dix ans peut mener à sa perte.

  Il faut demeurer prudent et éviter de suspendre une entreprise avant même qu'elle ait été condamnée; une entreprise qui fait l'objet de simples accusations doit bénéficier de la présomption d'innocence et elle ne devrait pouvoir être suspendue qu'exceptionnellement s'il est contraire à l'intérêt public que le gouvernement fasse affaire avec elle.

- Le cadre du Régime d'intégrité que l'on retrouve notamment dans la Politique d'inadmissibilité et de suspension devrait se limiter aux fins d'approvisionnement du gouvernement du Canada.

- Le Régime d'intégrité doit favoriser la divulgation volontaire

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November 17, 2017

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Dear Sirs,

RE: DPA Consultation

Probe International hereby submits this letter to the federal government's consultation with Canadians on potential enhancements to the Integrity Regime and on considerations regarding the possible adoption of a deferred prosecution agreement (DPA) regime in Canada.

It is our view that Canada should not adopt DPAs and that the Integrity Regime should be modified. The federal government should prosecute the individuals within the firms that have committed the crimes, disgorge the companies of ill-gotten gains, fine the companies to give shareholders an incentive to get rid of corrupt and incompetent management and directors, and ramp up enforcement capabilities to investigate, charge and prosecute guilty individuals and corporations.

We have not answered the questions found in "Expanding Canada's Toolkit to Address Corporate Wrongdoing" because they presume DPAs are a legitimate tool in the kit and are therefore not applicable to our position.

In summary, we reject DPAs for the following reasons:

- They decriminalize corporate crimes and make the consequences a mere cost of doing business. As a result, they do not deter corporate crime;
- They involve corporate monitors who take over executive functions without the concomitant industry expertise, profit incentive, or duties to shareholders;
- They create a moral hazard that encourages prosecutors to accuse companies of wrongdoing for self-interested reasons (large corporate fines that fund government agencies and major headlines) absent a provable crime, and divorced from the public interest;
- They promote regulation by prosecutors rather than legislators;
- They turn the prosecution into prosecutor, judge and jury, thereby giving them boundless discretion, and compromising justice, the rule of law, and public confidence in the judicial system.

.../2

With respect to the Integrity Regime Consultation: Expanding Canada's Toolkit to Address Corporate Wrongdoing, we believe the automatic nature of the ineligibility (debarment), and the 10-year duration of that ineligibility period for companies charged or convicted of an offence, while warranted to satisfy a public impulse for justice and to protect and safeguard the use and expenditure of public funds, would almost certainly put some convicted companies out of business. It is this existential threat that has created a corporate lobby for DPAs, which allow a company to survive. This blunt debarment tool, which may harm many innocent parties and ultimately allow the guilty individuals to walk free, warps and undermines our system of justice. For this reason, the Integrity Regime should be modified to allow for greater discretion, dependent upon the robustness with which the guilty individuals and corporation have been prosecuted, convicted, and sentenced. Strong sentences against individuals would provide true deterrence value and give the federal government greater confidence that the crimes will be less likely to be repeated.

Lastly, in response to Question 9, the Integrity Regime should also be applied to Export Development Canada.

I include two of my articles which make the expanded case found in this letter. They are:

Corporate shakedowns: Companies under threat of prosecution are filling government coffers

Deferred prosecution agreements won't stop corporate corruption

Sincerely,

Patricia Adams
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THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Addressing Corporate Wrongdoing in Canada

CANADIAN BAR ASSOCIATION
BUSINESS LAW, COMMODITY TAX, CUSTOMS AND TRADE, COMPETITION LAW, CRIMINAL JUSTICE, INTERNATIONAL LAW SECTIONS AND ANTI-CORRUPTION TEAM

December 2017

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Business Law, Commodity Tax, Customs and Trade, Competition Law, Criminal Justice and International Law Sections and the Anti-Corruption Team (collectively, the CBA Sections), with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform committee and approved as a public statement of the CBA Sections.

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Addressing Corporate Wrongdoing in Canada

Addressing Corporate Wrongdoing in Canada

I. INTRODUCTION

The CBA Business Law, Commodity Tax, Customs and Trade, Competition Law, Criminal Justice, International Law Sections and Anti-Corruption Team, (collectively, the CBA Sections) welcome the opportunity to comment on a possible Deferred Prosecution Agreement (DPA) regime and enhancements to the Integrity Regime as part of the government's consultation on expanding Canada's toolkit to address corporate wrongdoing.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day.

II. DPA REGIME

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Key advantages

DPAs encourage voluntary disclosure, foster a compliance culture and can provide a more effective way of holding organizations accountable without the cost, time and uncertainty associated with criminal trials. They offer more flexibility to prosecutors.

Corporate wrongdoing cases are often complex, taking time and resources to work their way through the court system. This new tool would alleviate some of the pressure Canada's courts are facing, brought to light in the Supreme Court of Canada judgment in *R. v. Jordan.*[1]

DPAs can reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors. They may also enhance the prospects for prosecuting the actual individuals who were responsible for the wrongdoing.

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1 R. v. Jordan [2016] 1 S.C.R 631

They can also encourage cooperation from a corporation to gather evidence for investigations. These investigations are particularly difficult in foreign anti-corruption cases and criminal activity involving non-Canadian parties.

DPAs negotiated in the United States and recently in the United Kingdom have highlighted the importance of transparency and meaningful cooperation. Without DPAs, far fewer cases of wrongdoing would be brought to the public's attention.

For competition matters, DPAs would complement the Competition Bureau's existing Immunity Program[2] and Leniency Program.[3] Depending on how the DPA regime is structured, the availability of a DPA could offer an alternative for cooperating with the Crown, particularly since participation in the Leniency Program requires an applicant to plead guilty to an offence (and debarment under the current Integrity Regime).

Key disadvantages

Common concerns are that DPAs can weaken the deterrent effect of a prosecution. There may also be a perception that DPAs allow companies to "buy their way out of trouble" and are just the cost of doing business. This perception can lead to lack of respect for the administration of justice and erode public confidence.

These concerns should be put in context. The same concerns are present in many other situations, not just economic crime, and have not deterred other Canadian law enforcement agencies from offering remedial tools short of prosecution. Where a corporation displays this attitude, it can be addressed by prosecutorial discretion in deciding whether to offer or accept a DPA.

Question 2: For which offences do you think DPAs should be available and why?

DPAs should be available in cases of economic crime. This includes offences such as fraud, false accounting, corruption, foreign bribery and money laundering (or dealing with the proceeds of crime), exportation and/or importation of prohibited or restricted goods and related offences.

DPAs should be available for all offences which can result in debarment under the Integrity Regime. A key motivation for an organization to seek a DPA would be to avoid debarment.

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2 Competition Bureau, Bulletin – Immunity Program under the Competition Act (June 7, 2010). (http://ow.ly/1byV30gEF2B)

3 Competition Bureau, Bulletin – Leniency Program (September 29, 2010). (http://ow.ly/MiQd30gEEWe)

Debarment can lead to the kinds of harm to blameless persons that DPAs are intended to avoid. Excluding some debarment offences from DPA eligibility would leave litigation as the only option (unless the Integrity Regime allows for discretion for the debarment period).

DPAs should be available for offences under the *Competition Act,* including offences of coordinated conduct. While cooperation programs exist at the Competition Bureau, DPAs would complement those programs – particularly if an organization doesn't qualify for a Bureau program or is otherwise reluctant to come forward given the onerous requirements of these programs. The US Antitrust Division operates a Leniency Program[4] similar to the Competition Bureau's Immunity and Leniency Programs, but the US Antitrust Division is nonetheless willing to enter into DPAs in appropriate cases.

As Canada becomes more comfortable and experienced with this new tool, the government could expand the scope of DPAs to include more offences.[5]

Death or serious injury: A DPA should not be available in situations of permanent serious bodily injury or death. A DPA would not be appropriate and, in some cases, could bring disrepute to the criminal justice system.

Individuals and corporations: The DPA Discussion Paper suggests that DPAs would be available to corporations. For greater certainty, we suggest that all entities doing business with the government (e.g. companies, firms, partnerships, etc.) be eligible for DPAs. DPAs should be available to an "organization" as defined in section 2 of the *Criminal Code*. Generally, DPAs should not be available to individuals. Entities seeking DPAs should be required to cooperate fully with authorities to bring the individuals who engaged in misconduct to justice.

Question 3: What role do you think the courts should play with respect to DPAs?

One option is that the court could approve the DPA (similar to the UK regime). Another option is that a court could provide independent "judicial scrutiny" of the proposed DPA but it would ultimately be approved by the prosecutor and the organization. For example, a court could offer its views on whether the proposed DPA is fair and proportionate to the parties.

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4 See US Department of Justice, Antitrust Division, Leniency Program (www.justice.gov/atr/leniency-program).

5 The DPA Discussion Paper points out that in some jurisdictions where DPAs are available only for certain specified offences, the use of DPAs seems to be more limited. For example, DPAs are not as broadly available in the UK as they are in the US and, to date, the UK DPA regime has been used only three times. However, the limited use of UK DPAs may also relate to some of its other characteristics, such as the role of the courts, publication of the terms of the DPA, etc.

The fundamental determination for the court would be whether the proposed DPA brought the administration of justice into disrepute. For example, some US courts have rejected DPAs where the organization was to pay a fine but there were no consequences for the employees who conducted the wrongdoing. The court found that letting these individuals escape justice was unacceptable.

However, some lawyers suggest that DPAs should not be conditional on court approval as they represent an exercise of prosecutorial discretion. A court approval process could involve multiple court appearances, create significant uncertainty and undermine the attractiveness of the DPA process.[6] Moreover, court approval may create additional risks and exposure for the organization, when it is otherwise willing to reach a resolution with the Crown in Canada.

If court filings were required, one model to consider is, where a DPA is filed with the court, it is open for public comment for the prosecutor's consideration for a set period (e.g. 30 days). After the consultation period, the DPA becomes binding. This approach is used with some antitrust settlements in the US.

Another option would be to enter into Non Prosecution Agreements (NPA). In short, an NPA is similar to a DPA but does not result in laying any charges or any agreement. Again, the US Department of Justice (Antitrust Division) has used NPAs in certain cases to achieve the goals of effective law enforcement.

Question 4: What factors should be taken into account in offering a DPA?

First, to maintain and uphold independence, the offer to enter into DPA discussions should be at the discretion of the prosecutor.

However, an organization should also be able to proactively submit a DPA proposal without prejudice to any future proceeding or to the independence of the prosecutor. DPAs should be available to an organization that wants to cooperate with the authorities and approaches the Crown with a hypothetical set of circumstances[7].

The following factors should be considered:

- Has the organization accepted responsibility for the conduct?

6 In the US, it appears that DPAs are registered with courts only in cases where prosecution is resumed. The courts generally do not play a role in approving or in overseeing DPAs.

7 This process is part of the US DPA regime.

- Has the organization demonstrated that it genuinely seeks to reform its practices and corporate culture?
- Has the organization mitigated the damage caused by the conduct?
- Does the offending conduct represent the actions of individuals or is it sanctioned by company policies and practice and are those individuals still with the organization?
- Is a criminal conviction likely to have disproportionate negative impacts on innocent people (e.g. shareholders, pension plan holders, employees, suppliers)?
- Is the organization a repeat offender?

Reasonable prospect of conviction: DPAs should not be the default option for a questionable or borderline case. A DPA should be considered only if it otherwise meets the prosecution[8] threshold of a reasonable prospect of conviction. The Crown must know its case and have evidence on the material elements of the offence.

We offer the following comments on some of the factors listed in the DPA Discussion Paper:

Seriousness of the offence and collateral impact on third parties: It is not clear how the seriousness of the offence and impact on third parties may factor in the decision to offer a DPA. All offences warranting consideration for prosecution, potential debarment under the Integrity Regime and a DPA would presumably be serious. In addition, the impact on victims and third parties is a matter that could be addressed through restitution obligations in the DPA. An implication that the government may deem some offences or the impact on third parties as too serious for a DPA could undermine the predictability or certainty required for organizations to come forward and propose a DPA.

Level of involvement by senior management: Involvement by senior management should not necessarily disqualify an organization for DPA consideration. The level of involvement by senior management would drive the degree of remedial measures required by the organization to demonstrate that it genuinely seeks to reform its business practices and corporate culture. Deliberate and harmful actions from the organization's directing minds would be aggravating factors that may lead the Crown to not offer a DPA.

8 The Public Prosecution Service of Canada (PPSC) and provincial Crown Attorneys would work with DPAs.

Reporting: The factor of reporting wrongdoing without undue delay should be qualified to give an organization reasonable time to conduct an internal investigation after the matter comes to its attention.

Identification of implicated individuals: The government should recognize that, in some cases, despite an organization's willingness to cooperate, it may be difficult to identify implicated individuals.

Question 5: When would a DPA not be appropriate?

It would not be appropriate to offer a DPA when:

a) the conduct raises national security or foreign affairs issues, or where the DPA would not be in the public interest generally;

b) the corporate wrongdoing led to death or permanent serious bodily injury;

c) the organization is not a bona fide business, exists only for the purposes of illegal conduct or is part of, or associated with, a criminal enterprise;

d) the organization has been previously warned or sanctioned, or criminal charges have been laid with no substantial changes to prevent such conduct in the future.

Question 6: What terms should be included in a DPA?

The DPA Discussion Paper notes that DPA terms would be customized to fit each case. That said, most DPAs should include the following:

- statement of facts relating to the offence;
- acknowledgement of responsibility for the conduct;
- implementation of applicable compliance programs (e.g. addressing anti-corruption, respect for human rights, or environmental requirements);
- where appropriate, a period of supervision by a monitor and funding of independent monitor by the organization;
- payment of fines, disgorgement of profits made from the misconduct;
- where applicable, restitution and compensation of victims;
- expiry date.

DPAs should not be a cost of doing business and they need to reflect true contrition from the organization. However, insisting on an express admission of guilt – which could be quickly used by class action plaintiffs – would likely have a chilling effect on DPAs and undermine

their very purpose. We suggest a regime similar to the UK where no express admission of guilt is required, though agreement on fundamental facts, compensation of victims and a commitment to remediation is required.

Again, the flexibility to tailor the terms of a DPA would allow the Crown to negotiate an agreement that achieves the goals of law enforcement while recognizing an organization's potential exposure to civil litigation.

Accuracy of information: The suggested warranty in the DPA Discussion Paper on the accuracy of the information provided during negotiations should be qualified as to the "best of the organization's knowledge after due inquiry."

Guidance material: In the interests of transparency and promoting certainty, the government should issue and regularly update a policy statement on DPAs similar to the Competition Bureau's Leniency Program Bulletin. Similarly, once the government has experience with DPAs, it should issue a template DPA to give potential applicants a sense of what to expect.

Question 7: What factors should be taken into account in setting the duration of a DPA?

The duration of a DPA will turn on the circumstances of each case. We recommend that each DPA should have an expiry date and the following factors should be taken into account in setting its duration:

- duration of the underlying wrongful conduct;
- if the organization made a good faith attempt to reform its business practices (as evidenced by corrective actions);
- if the organization is a repeat offender.

The presumption of innocence is suspended during the negotiation of a DPA. A DPA involves an acknowledgement of responsibility (or an agreement not to contest the Crown's allegations) and a formal commitment to rectify the action that caused the wrong in the first place. As such, the "suspension" of a prosecution while the DPA takes effect cannot be for a prolonged period and a party wishing to use a DPA must do so expeditiously. Therefore, we recommend that a time period for the negotiation of a DPA be established up front.

Question 8: Under what circumstances should publication be waived or delayed?

A careful balance needs to be maintained between ensuring public confidence in DPAs as a tool to combat economic crime and giving organizations certainty and confidentiality to negotiate the DPA. Organizations are less likely to come forward if their position might be compromised with early publication of facts, etc. Therefore, there should be no publication in the initial stages of the DPA negotiation. Moreover, the process should respect settlement privilege that applies in negotiating pleas or alternative resolutions with the Crown.

It would generally be appropriate for the government to announce when it has entered into a DPA and indicate the relevant conduct and key terms, but not necessarily file the entire DPA (as some terms may be commercially confidential)[9].

This would provide a degree of transparency, enable victims to seek redress and allow customers, suppliers and potential business partners to make their own decisions on whether to deal with the organization.

Ultimately, the prosecution should have the flexibility to waive or delay publication and publish selected parts of the DPA.

Question 9: How should non-compliance be addressed?

Generally, there should be flexibility to address the specific circumstances of non-compliance. Serious instances of non-compliance demonstrating lack of corporate resolution to comply with the DPA may warrant criminal charges, or extension or termination of the DPA. On the other hand, isolated or technical violations may warrant less onerous measures, such as warnings or renegotiated terms of the DPA.

The prosecutor should give the organization an opportunity to address allegations of non-compliance. If repeated incidents are beyond the organization's control, it may be useful to renegotiate some terms of the DPA.

Given that the Crown best knows its case and the chief issues, we recommend that a determination of non-compliance be made by a prosecutor in consultation with any compliance monitors. The Crown is in a good position to know if a proposed compliance plan is in earnest and if it will address the issue that caused the wrongdoing in the first place.

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9 This could be similar to the model in France under La loi sur la transparence, la lutte contre la corruption et la modernisation de la vie économique, commonly referred to as Sapin 2.

When it appears that a DPA will not be successfully negotiated, we recommend that new Crown counsel be appointed to alleviate concerns of bias and that the prosecution move swiftly to trial.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

Prosecution against the cooperating organization

An accused person has a right to silence pursuant to section 11(c) of the *Charter of Rights and Freedoms* and the right to a fair trial pursuant to section 7. Relevant cases[10] confirm that a person or a corporation[11] cannot be compelled to incriminate themselves and that settlement privilege applies in negotiations with the Crown relating to a potential resolution.[12] As such, any information gleaned in the course of a DPA negotiation should never be used in subsequent proceedings against the organization.

The government should provide assurances to this effect, similar to those in the Competition Bureau's Leniency Program Bulletin.[13]

Should a DPA negotiation fail, we also recommend that new Crown counsel be appointed to ensure that any information communicated during the course of the negotiations remain outside the scope of the prosecution. However, if charges are laid against individuals responsible for the wrongdoing, then this material may be relevant and admissible.

Prosecution against another organization

Facts disclosed during DPA negotiations could be admissible in a prosecution against another company or rogue employees for other crimes, subject to the law on settlement privilege and any necessary measures to protect the credibility and proceedings against the "confessing" corporation.

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10 R. v. White [1999] 2 S.C.R 417; R. v. Nedelcu [2012] 3 S.C.R.311

11 Section 2 of the *Criminal Code* defines a "person" to include an "organization". The definition of "person" is included under the definition of "everyone". The definition of "organization" includes a company, firm or corporate body.

12 *R. v. Delchev*, 2012 ONSC 2094, at para. 19.

13 Where a leniency applicant withdraws from the Leniency Program at any time before concluding a plea agreement, the applicant is assured that the information provided under the Leniency Program will not be used directly against it and will be treated as either confidential or settlement privileged. See Competition Bureau Bulletin – The Leniency Program (September 29, 2010) para. 34.

Question 11: How should compliance monitors be selected and governed?

Where compliance monitoring is required, the selection of independent monitors should be based on agreed criteria. Independent compliance monitors should report directly to the prosecutor but be engaged and compensated by the organization. The selection process used in the Integrity Regime by Public Services and Procurement Canada (PSPC) could serve as a model. Independent compliance monitors could be of great assistance to the DPA process and would relieve the already large burden put on Crown counsel.

However, active compliance monitors may not always be required and periodic certified reports subject to audit may be sufficient. Again, there should be flexibility to fit the particular circumstances.

Question 12: What use should be made of compliance monitoring reports?

Compliance monitoring reports provide an effective review of implementation programs. However, they should not form part of the DPA.

If court oversight is part of Canada's DPA regime, these reports could be used in the same way a probation report is used in sentencing – to inform the court of the organization's compliance and appropriateness of remedial measures. These reports should not inhibit the efforts of an organization trying to right a wrong.

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

As a general principle, it is appropriate to include victim compensation where applicable.

It may be appropriate to limit victim compensation under a DPA to persons who suffered direct harm (e.g., the customer whose contract was subject to a bribe), but not to shareholders of the organization entering into the DPA.

Any anticipatory restitution should take into account other actions and proceedings before the courts (to the extent possible where multiple jurisdictions are involved). For example, if the government imposes a material fine, such as a penalty fully reflecting the profit earned from the misconduct, in some cases, it may not be appropriate to impose further restitution.

The DPA regime should be flexible enough to allow for charitable donations but not establish an expectation or bias towards them. The selection of the charity and use of the funds by the recipients are often problematic.

III. INTEGRITY REGIME

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

In general, we recommend building more flexibility into the regime. The duration of ineligibility and suspension should be commensurate with the public interest, the seriousness of the misconduct and the organization's willingness to redress the misconduct. To this end, the factors considered when deciding to offer a DPA to an organization would also be relevant to its debarment (see question 4 of the DPA regime above).

An automatic five to ten year debarment carries significant consequences and may effectively dissolve a firm that is highly dependent on government contracts. Discretion to modify the term of ineligibility (and even waive debarment) could avoid overly punitive outcomes negatively impacting blameless persons.

Imposing a fixed temporal ban also departs from the approach taken by most other countries and organizations, including the World Bank, which uses discretionary and criteria-guided policies in assessing debarment periods. Since the existing Integrity Regime does not consider mitigating factors or remedial measures when assessing a debarment period, the regime does not encourage companies to cooperate. This is contrary to approaches taken by many regulators (including the Ontario Securities Commission and the U.S. Department of Justice) in formalizing credit for cooperation policies.[14]

For example, an automatic ten year suspension currently applies if a supplier provides a false or misleading certification or declaration. A more practical approach could be to limit the automatic suspension to failures to disclose charges or convictions for *specified offences* by the supplier or its *controlled* subsidiaries. Suspension for failures to disclose charges or convictions for a *broader category of offences* or a *broader category of affiliates* would be a discretionary decision. In those cases, PSPC could evaluate all the circumstances and have the option to not disqualify the supplier or to reduce the period of ineligibility.

This flexibility would be even more important if the government does not proceed with DPAs, which presumably are intended, in part, to offer an opportunity to negotiate a resolution that addresses criminal conduct but avoids application of the Integrity Regime.

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14 See CBA Letter to Minister Diane Finlay of PWGSC dated April 9, 2015. (http://ow.ly/beqn30gEJXp)

We suggest that the government align its procurement ineligibility and suspension guidelines to that of its major trading partners and specifically to the US.

In addition, we recommend that the government incorporate an exemption to align the Integrity Regime with pre-existing cooperation programs, particularly in the competition area. From October 2010 to November 2012, an express exemption under the Integrity Regime provided that participants in a "leniency program" were not subject to debarment. This exemption served an important public policy goal as it preserved the strong incentive for organizations to cooperate with the Competition Bureau.[15] However, in November 2012, the government, without significant consultation, removed this exemption from the regime.

This 2012 policy change discouraged many companies from cooperating with the Competition Bureau, since it could result in debarment from federal contracting for a long time. Competition counsel now regularly advise clients about the risks and benefits of applying for immunity or leniency, including the fact that cooperation with the Bureau and participation in the Leniency Program may subject them to a lengthy debarment. An organization may decide not to cooperate with the Bureau and assume the risk of defending criminal charges merely to avoid the potentially devastating consequences of debarment.

The Immunity and Leniency Programs are some of the Competition Bureau's most important and effective tools for discovering, investigating and prosecuting criminal anti-competitive conduct. We encourage the government to reinstate the exemption that existed prior to 2012 to exempt participants in the Competition Bureau's Immunity and Leniency Programs from debarment.

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15 These concerns arises largely in connection with a voluntarily plea by a participant the Leniency Program, since a participant in the Immunity Program is not required to plead to an offence under the *Competition Act*. In a 2013 Memorandum of Understanding, PWSGC agreed it would not disqualify a party under the Integrity Regime that had been granted immunity under the Bureau's Immunity Program. See MOU between Competition Bureau and PWSGC regarding the Prevention, Detection, Reporting and Investigation of possible Cartel Activity (May 30, 2013), s. 4.

However, with subsequent amendments to the Integrity Regime, PWSGC may now temporarily suspend any party that "admits guilt" to a listed offence for 18 months, and a participant under the Immunity Program is generally required to admit the underlying elements of the offence to participate in the program. As a result, it is unclear whether the earlier 2013 MOU would preclude a suspension based on an immunity applicant's admission of guilt in accordance with existing and future requirements of the Immunity Program, particularly since the Immunity Program is currently under review by the Bureau. We encourage the government to confirm that the policy embodied in the MOU 2013 continues to apply under the current regime, as well as to incorporate this understanding expressly in any revised policy.

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

Rendering an organization ineligible is a serious action and debarment should not be imposed unless it is clearly in the public interest. The following factors should be considered in determining whether a supplier should benefit from discretion to avoid debarment that the Integrity Regime would otherwise impose:

- Has the organization put in place appropriate standards of conduct and internal compliance controls, including review procedures as well as ethics and compliance training programs?
- Did the organization bring the misconduct to the attention of the government in a timely manner?
- Did the organization engage in a full investigation of the ineligibility?
- Has the organization agreed to an appropriate penalty and agreed to make restitution related to the offending activity?
- Has the organization taken appropriate action against the individuals responsible for the misconduct?
- Does the organization's senior management acknowledge the seriousness of the misconduct and have fully supported measures to prevent recurrence?
- Is the organization a repeat offender

In addition, the debarment regime should incorporate additional elements of due process. A debarment can have devastating consequences for a business, innocent employees and other stakeholders. PSPC should incorporate the following enhanced procedural protections:

- An opportunity to make submissions as to whether debarment is justified in the circumstances;
- A procedure to appeal the debarment;
- A procedure to revise or modify the debarment terms;
- Under certain circumstances, a procedure to seek to have the debarment lifted following a set period where the entity has demonstrated rehabilitation and a strong record of compliance;
- The publication of additional enforcement guidelines that govern PWGSC's discretion, such as the factors considered in imposing a debarment based on the existence of charges alone, and the factors considered in negotiating an "administrative agreement".

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

The government should be careful when adding offences to the Integrity Regime. An Integrity Regime that takes into account civil or provincial offences, other federal offences related to corporate wrongdoing, mere allegations or debarment decisions in other jurisdictions should not be made without full regard for the jurisprudence, leniency provisions and rules of other jurisdictions.

Question 4: What factors should be considered in determining whether new offences should be included?

The government should consider offences where the misconduct indicates a lack of integrity that directly impacts the responsibility of the government as a contractor.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The government should not suspend or render ineligible an organization based only on allegations of corporate wrongdoing.

A determination of debarment (suspension or ineligibility) before charges or conviction may violate due process rights. However, if a disqualification is on the basis of a contractual violation (e.g., failure to perform) the government could take that into account.[16]

As noted above, the Integrity Regime should reinstate the exemption for competition leniency programs in existence from October 2010 to November 2012. The Integrity Policy should also expressly state that a corporation may not be debarred by virtue of entering into a DPA or applying for (or receiving) immunity or leniency under competition or antitrust laws. One reason for entering into a DPA , in particular, is to avoid debarment, but the Integrity Regime Discussion Paper suggests that the government might debar an organization even in the absence of a charge or conviction.

16 While some jurisdictions, such as the US, permit debarment before charges or convictions in specific circumstances, the regime requires adherence to a specific process (e.g., adequate evidence to support suspension).

Section 7(d) of the Integrity Regime raises a similar issue with its potential to suspend a supplier for admitting guilt. As noted above, it is not clear how this provision operates in light of PWGSC's 2013 Memorandum of Understanding with the Competition Bureau.

In addition, it should be expressly provided that a supplier is not required to advise PSPC that it admitted guilt to a *Competition Act* offence when applying for immunity or leniency under one of the Competition Bureau's programs. These admissions are made on a confidential basis and disclosure would undermine the Competition Bureau's cooperation policies.

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

In our view, Integrity Regime determinations of ineligibility should not be applied to non-procurement federal services. A debarment determination is based on a myriad of factors and may be a nuanced decision. It would be inequitable to allow one unfavourable decision on public procurement to deny a Canadian company access to other government services.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

Debarment decisions in other jurisdictions or by another organization should not have an automatic impact on a supplier's status under the Integrity Regime. It is crucial that PSPC retain discretion to make its own determination.

The Discussion Paper refers to the practice of cross debarment by the five multilateral development banks (MDBs). This is an especially questionable practice that would sacrifice the jurisdictional independence of Canadian federal agencies. It also results in *ad hoc* decision making that may be subject to the policy priorities of other governments.

Cross debarment can lead to confusion between jurisdictions who are parties to cross debarment agreements and those who are not party to the provisions in other jurisdictions. Further, the Government of Canada's criteria and process to determine eligibility will likely differ from those of MDBs.

If an organization is debarred by a provincial agency using similar criteria to the Government of Canada, it may make sense for the federal government to consider that decision. The reverse is also true. If a provincial agency, such as the Quebec's *Authorité des Marchés Financiers* does

not debar an organization, using its own criteria, the Government of Canada could consider this provincial decision as it relates to the supplier's status under the Integrity Regime.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

We reiterate that the government should generally not take actions to preclude, suspend or debar on the basis of mere allegations.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

Provided the Integrity Regime itself has an appropriate balance, we have no objection to expanding the scope of government contracts subject to the Integrity Regime to other federal entities.

The Integrity Regime Discussion Paper points to Crown corporations. As the Integrity Regime may impose significant burdens on some Crown corporations, we recommend that it be left to individual Crown corporations to decide whether to opt in to the Integrity Regime.

Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

To the extent that the scope of debarment offences moves away from offences directly relevant to government contracting, the rationale for debarment may become less clear.

While the goal is laudable, using debarment to achieve other social, economic and environmental policy objectives could create uncertainty and inadvertently limit the number of companies prepared to bid on government contracts. Broader debarment adversely affects not only the debarred company, its employees and shareholders, but also taxpayers who are left with a less competitive process and may pay more or receive lower quality services.

If the government wants to take a wider scope of offences into account, it should consider issuing guidance on the weight it will give to such offences, rather than rendering an organization completely ineligible regardless of the type of offence.

When making procurement decisions, the government could encourage the participation of corporations that adopt corporate social responsibility norms such as:

- well-funded enforceable programs that promote robust health and safety requirements, living wages and diversity in their warehouses, factories and offices around the world.
- taking an active role in tracking their own greenhouse gas emissions and looking for ways to reduce those emissions, and transition to renewable energy;
- corporate social responsibility certifications.

IV. OTHER COMMENTS

Importance of promoting cooperation

The existing Integrity Regime does not promote cooperation with authorities. Its punitive consequences – five to ten years debarment from bidding or working on federal contracts (with a potential cascading effect on provincial governments, foreign governments and private sector contracts) – preclude many companies from reporting misconduct.

By discouraging cooperation, the Integrity Regime makes it harder for companies to dismiss employees for misconduct: establishing employee misconduct publicly in court (where the employee opposes the "for cause" termination) exposes the company to potential debarment.

On the other hand, if the company quietly dismisses the employee and pays compensation rather than prove "cause" publicly in court – to minimize the debarment risk under the Integrity Regime, the company may appear to be rewarding an employee for the wrongdoing. Also, the absence of a safe-harbour for coming forward may expose companies to blackmail by current or former employees who are aware of misconduct – their own or that of other employees.

The Integrity Regime should have a safe-harbour provision for self-disclosure and should not punish companies that have disavowed their employee's misconduct in ways that make it clear that no others in the company had any criminal intent to commit the misconduct.

Certificates of compliance

Given the significant consequences of debarment, the government should ensure that the Integrity Regime is clear and well defined. For example, it is difficult for corporations to provide the requisite certificates of compliance in the bidding and contracting process given

the open ended and unclear definitions of "affiliate" and foreign offences that are "similar" to the listed Canadian offences.[17]

Obligation to inform Registrar

The continuing obligation to inform the Registrar within ten working days of "any charge, conviction, or other circumstance relevant to the Policy with respect to itself, its affiliates and its first-tier subcontractors" is onerous, particularly for large multi-national companies. There seems to be a large scope for error, even by a company making diligent efforts to comply. Consideration should be given to revising this obligation to require notice within ten working days of the relevant entity *becoming aware of the conduct.*

V. CONCLUSION

We thank the government for consulting on its plans to expand Canada's toolkit to address corporate wrongdoing, namely enhancements to the Integrity Regime and a possible Deferred Prosecution Agreement regime. These new tools are especially welcomed given the pressures that Canada's courts are facing, brought to light in the Supreme Court of Canada judgment in *R. v. Jordan*.

17 The definition of "affiliate" includes controlled persons, and the concept of "control" includes "deemed control". "Deemed control" has a non-inclusive and circular definition – section (b) of the definition essentially says that deemed control includes a situation where a person is deemed to be controlled by an entity. PSPC should amend this definition to make it meaningful, if only to say something like "deemed control" means a situation in which PSPC determines that an entity is controlled in fact by another entity. (A number of legislative schemes, such as the CRTC, have control in fact concepts that could be incorporated by reference.) In any event, section (c) of the definition of "affiliate" makes clear that affiliates might include entities with which a company shares facilities or employees, implying a potentially the very broad concept of "control" and "affiliate".

Confidential

December 6, 2017

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Justice Canada
Office of the Minister of Justice and Attorney General of Canada
Department of Justice Headquarters
284 Wellington Street
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The Honourable Carla Qualtrough, P.C., M.P.
Minister of Public Services and Procurement
Public Services and Procurement Canada
Portage III, Tower A, 10A1
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GATINEAU, Quebec
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Dear Ministers Raybould & Qaultrough,

Re: Expanding Canada's toolkit to address corporate wrongdoing:
Deferred Prosecution Agreements and Integrity Regime

This letter is submitted on behalf of BCE Inc. in response to your government's invitation to participate in the consultation on expanding Canada's toolkit to address corporate wrongdoing through enhancements to the Integrity Regime, and the introduction of deferred prosecution agreements (DPAs).

Canada's largest communications company, BCE provides a comprehensive and innovative suite of broadband wireless, TV, Internet and business communication services from Bell Canada, Bell Aliant and Bell MTS. Bell Media is Canada's premier multimedia company with leading assets in television, radio, out of home and digital media. Setting the industry pace in investments in advanced networks and media content – $3.77 billion in 2016 alone - Bell offers services under the Bell, Bell Aliant and Bell MTS brands. These include fibre-based IPTV and the country's fastest high-speed Internet services, 4G LTE wireless that delivers unmatched speed, robust home phone services as well as business network and communications services, including data hosting and cloud computing through the country's largest network of data

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centres. The Bell Let's Talk mental health initiative promotes Canadian mental health with national awareness and anti-stigma campaigns like Bell Let's Talk Day and significant Bell funding of community care and access, research, and workplace initiatives.

We are grateful for the opportunity to comment on the important questions posed by the consultation. We have had the opportunity to review the submission of as well as the responses it brings to the questions of the consultation papers.

We on behalf of BCE, invite your government to take it into account as you consider changes to Canada's Integrity Regime or consider the adoption of a DPA regime in Canada.

We remain available should you wish to discuss any of the foregoing.

Sincerely,

Mirko Bibic
Chief Legal & Regulatory Officer and
EVP, Corporate Development

Attachment

Pages 215 to / à 228

are withheld pursuant to sections

sont retenues en vertu des articles

20(1)(b), 20(1)(c)

of the Access to Information

de la Loi sur l'accès à l'information

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December 8, 2017

Delivered via Email

Government of Canada
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Gatineau, QC K1A 9S5

Dear Sir/Madam:

Re: Integrity Regime and DPA Consultations (Corporate Wrongdoing)

We write in regard to the Government of Canada's Integrity Regime public consultation on corporate wrongdoing in Canada. Thank you for providing the opportunity to comment on these important issues. Our firm's Investigations and White Collar Defence Group is regularly involved in matters of alleged corporate wrongdoing and is thus well positioned to comment. We have reviewed the Canadian Bar Association's submission sent earlier this week, and fully support the CBA's recommendations.

Please do not hesitate to contact us if we can be of further assistance.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Borden Ladner Gervais LLP

Per: Graeme A. Hamilton
National Co-Leader, Investigations and White Collar Defence Group

Encl.

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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Addressing Corporate Wrongdoing in Canada

CANADIAN BAR ASSOCIATION
BUSINESS LAW, COMMODITY TAX, CUSTOMS AND TRADE, COMPETITION LAW, CRIMINAL JUSTICE, INTERNATIONAL LAW SECTIONS AND ANTI-CORRUPTION TEAM
December 2017

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Business Law, Commodity Tax, Customs and Trade, Competition Law, Criminal Justice and International Law Sections and the Anti-Corruption Team (collectively, the CBA Sections), with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform committee and approved as a public statement of the CBA Sections.

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Addressing Corporate Wrongdoing in Canada

Addressing Corporate Wrongdoing in Canada

I. INTRODUCTION

The CBA Business Law, Commodity Tax, Customs and Trade, Competition Law, Criminal Justice, International Law Sections and Anti-Corruption Team, (collectively, the CBA Sections) welcome the opportunity to comment on a possible Deferred Prosecution Agreement (DPA) regime and enhancements to the Integrity Regime as part of the government's consultation on expanding Canada's toolkit to address corporate wrongdoing.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day.

II. DPA REGIME

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Key advantages

DPAs encourage voluntary disclosure, foster a compliance culture and can provide a more effective way of holding organizations accountable without the cost, time and uncertainty associated with criminal trials. They offer more flexibility to prosecutors.

Corporate wrongdoing cases are often complex, taking time and resources to work their way through the court system. This new tool would alleviate some of the pressure Canada's courts are facing, brought to light in the Supreme Court of Canada judgment in *R. v. Jordan.*[1]

DPAs can reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors. They may also enhance the prospects for prosecuting the actual individuals who were responsible for the wrongdoing.

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1 R. v. Jordan [2016] 1 S.C.R 631

They can also encourage cooperation from a corporation to gather evidence for investigations. These investigations are particularly difficult in foreign anti-corruption cases and criminal activity involving non-Canadian parties.

DPAs negotiated in the United States and recently in the United Kingdom have highlighted the importance of transparency and meaningful cooperation. Without DPAs, far fewer cases of wrongdoing would be brought to the public's attention.

For competition matters, DPAs would complement the Competition Bureau's existing Immunity Program[2] and Leniency Program.[3] Depending on how the DPA regime is structured, the availability of a DPA could offer an alternative for cooperating with the Crown, particularly since participation in the Leniency Program requires an applicant to plead guilty to an offence (and debarment under the current Integrity Regime).

Key disadvantages

Common concerns are that DPAs can weaken the deterrent effect of a prosecution. There may also be a perception that DPAs allow companies to "buy their way out of trouble" and are just the cost of doing business. This perception can lead to lack of respect for the administration of justice and erode public confidence.

These concerns should be put in context. The same concerns are present in many other situations, not just economic crime, and have not deterred other Canadian law enforcement agencies from offering remedial tools short of prosecution. Where a corporation displays this attitude, it can be addressed by prosecutorial discretion in deciding whether to offer or accept a DPA.

Question 2: For which offences do you think DPAs should be available and why?

DPAs should be available in cases of economic crime. This includes offences such as fraud, false accounting, corruption, foreign bribery and money laundering (or dealing with the proceeds of crime), exportation and/or importation of prohibited or restricted goods and related offences.

DPAs should be available for all offences which can result in debarment under the Integrity Regime. A key motivation for an organization to seek a DPA would be to avoid debarment.

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2 Competition Bureau, Bulletin – Immunity Program under the Competition Act (June 7, 2010). (http://ow.ly/1byV30gEF2B)

3 Competition Bureau, Bulletin – Leniency Program (September 29, 2010). (http://ow.ly/MiQd30gEEWe)

Debarment can lead to the kinds of harm to blameless persons that DPAs are intended to avoid. Excluding some debarment offences from DPA eligibility would leave litigation as the only option (unless the Integrity Regime allows for discretion for the debarment period).

DPAs should be available for offences under the *Competition Act,* including offences of coordinated conduct. While cooperation programs exist at the Competition Bureau, DPAs would complement those programs – particularly if an organization doesn't qualify for a Bureau program or is otherwise reluctant to come forward given the onerous requirements of these programs. The US Antitrust Division operates a Leniency Program[4] similar to the Competition Bureau's Immunity and Leniency Programs, but the US Antitrust Division is nonetheless willing to enter into DPAs in appropriate cases.

As Canada becomes more comfortable and experienced with this new tool, the government could expand the scope of DPAs to include more offences.[5]

Death or serious injury: A DPA should not be available in situations of permanent serious bodily injury or death. A DPA would not be appropriate and, in some cases, could bring disrepute to the criminal justice system.

Individuals and corporations: The DPA Discussion Paper suggests that DPAs would be available to corporations. For greater certainty, we suggest that all entities doing business with the government (e.g. companies, firms, partnerships, etc.) be eligible for DPAs. DPAs should be available to an "organization" as defined in section 2 of the *Criminal Code*. Generally, DPAs should not be available to individuals. Entities seeking DPAs should be required to cooperate fully with authorities to bring the individuals who engaged in misconduct to justice.

Question 3: What role do you think the courts should play with respect to DPAs?

One option is that the court could approve the DPA (similar to the UK regime). Another option is that a court could provide independent "judicial scrutiny" of the proposed DPA but it would ultimately be approved by the prosecutor and the organization. For example, a court could offer its views on whether the proposed DPA is fair and proportionate to the parties.

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4 See US Department of Justice, Antitrust Division, Leniency Program (www.justice.gov/atr/leniency-program).

5 The DPA Discussion Paper points out that in some jurisdictions where DPAs are available only for certain specified offences, the use of DPAs seems to be more limited. For example, DPAs are not as broadly available in the UK as they are in the US and, to date, the UK DPA regime has been used only three times. However, the limited use of UK DPAs may also relate to some of its other characteristics, such as the role of the courts, publication of the terms of the DPA, etc.

The fundamental determination for the court would be whether the proposed DPA brought the administration of justice into disrepute. For example, some US courts have rejected DPAs where the organization was to pay a fine but there were no consequences for the employees who conducted the wrongdoing. The court found that letting these individuals escape justice was unacceptable.

However, some lawyers suggest that DPAs should not be conditional on court approval as they represent an exercise of prosecutorial discretion. A court approval process could involve multiple court appearances, create significant uncertainty and undermine the attractiveness of the DPA process.[6] Moreover, court approval may create additional risks and exposure for the organization, when it is otherwise willing to reach a resolution with the Crown in Canada.

If court filings were required, one model to consider is, where a DPA is filed with the court, it is open for public comment for the prosecutor's consideration for a set period (e.g. 30 days). After the consultation period, the DPA becomes binding. This approach is used with some antitrust settlements in the US.

Another option would be to enter into Non Prosecution Agreements (NPA). In short, an NPA is similar to a DPA but does not result in laying any charges or any agreement. Again, the US Department of Justice (Antitrust Division) has used NPAs in certain cases to achieve the goals of effective law enforcement.

Question 4: What factors should be taken into account in offering a DPA?

First, to maintain and uphold independence, the offer to enter into DPA discussions should be at the discretion of the prosecutor.

However, an organization should also be able to proactively submit a DPA proposal without prejudice to any future proceeding or to the independence of the prosecutor. DPAs should be available to an organization that wants to cooperate with the authorities and approaches the Crown with a hypothetical set of circumstances[7].

The following factors should be considered:

- Has the organization accepted responsibility for the conduct?

6 In the US, it appears that DPAs are registered with courts only in cases where prosecution is resumed. The courts generally do not play a role in approving or in overseeing DPAs.

7 This process is part of the US DPA regime.

- Has the organization demonstrated that it genuinely seeks to reform its practices and corporate culture?
- Has the organization mitigated the damage caused by the conduct?
- Does the offending conduct represent the actions of individuals or is it sanctioned by company policies and practice and are those individuals still with the organization?
- Is a criminal conviction likely to have disproportionate negative impacts on innocent people (e.g. shareholders, pension plan holders, employees, suppliers)?
- Is the organization a repeat offender?

Reasonable prospect of conviction: DPAs should not be the default option for a questionable or borderline case. A DPA should be considered only if it otherwise meets the prosecution[8] threshold of a reasonable prospect of conviction. The Crown must know its case and have evidence on the material elements of the offence.

We offer the following comments on some of the factors listed in the DPA Discussion Paper:

Seriousness of the offence and collateral impact on third parties: It is not clear how the seriousness of the offence and impact on third parties may factor in the decision to offer a DPA. All offences warranting consideration for prosecution, potential debarment under the Integrity Regime and a DPA would presumably be serious. In addition, the impact on victims and third parties is a matter that could be addressed through restitution obligations in the DPA. An implication that the government may deem some offences or the impact on third parties as too serious for a DPA could undermine the predictability or certainty required for organizations to come forward and propose a DPA.

Level of involvement by senior management: Involvement by senior management should not necessarily disqualify an organization for DPA consideration. The level of involvement by senior management would drive the degree of remedial measures required by the organization to demonstrate that it genuinely seeks to reform its business practices and corporate culture. Deliberate and harmful actions from the organization's directing minds would be aggravating factors that may lead the Crown to not offer a DPA.

8 The Public Prosecution Service of Canada (PPSC) and provincial Crown Attorneys would work with DPAs.

Reporting: The factor of reporting wrongdoing without undue delay should be qualified to give an organization reasonable time to conduct an internal investigation after the matter comes to its attention.

Identification of implicated individuals: The government should recognize that, in some cases, despite an organization's willingness to cooperate, it may be difficult to identify implicated individuals.

Question 5: When would a DPA not be appropriate?

It would not be appropriate to offer a DPA when:

a) the conduct raises national security or foreign affairs issues, or where the DPA would not be in the public interest generally;

b) the corporate wrongdoing led to death or permanent serious bodily injury;

c) the organization is not a bona fide business, exists only for the purposes of illegal conduct or is part of, or associated with, a criminal enterprise;

d) the organization has been previously warned or sanctioned, or criminal charges have been laid with no substantial changes to prevent such conduct in the future.

Question 6: What terms should be included in a DPA?

The DPA Discussion Paper notes that DPA terms would be customized to fit each case. That said, most DPAs should include the following:

- statement of facts relating to the offence;
- acknowledgement of responsibility for the conduct;
- implementation of applicable compliance programs (e.g. addressing anti-corruption, respect for human rights, or environmental requirements);
- where appropriate, a period of supervision by a monitor and funding of independent monitor by the organization;
- payment of fines, disgorgement of profits made from the misconduct;
- where applicable, restitution and compensation of victims;
- expiry date.

DPAs should not be a cost of doing business and they need to reflect true contrition from the organization. However, insisting on an express admission of guilt – which could be quickly used by class action plaintiffs – would likely have a chilling effect on DPAs and undermine

their very purpose. We suggest a regime similar to the UK where no express admission of guilt is required, though agreement on fundamental facts, compensation of victims and a commitment to remediation is required.

Again, the flexibility to tailor the terms of a DPA would allow the Crown to negotiate an agreement that achieves the goals of law enforcement while recognizing an organization's potential exposure to civil litigation.

Accuracy of information: The suggested warranty in the DPA Discussion Paper on the accuracy of the information provided during negotiations should be qualified as to the "best of the organization's knowledge after due inquiry."

Guidance material: In the interests of transparency and promoting certainty, the government should issue and regularly update a policy statement on DPAs similar to the Competition Bureau's Leniency Program Bulletin. Similarly, once the government has experience with DPAs, it should issue a template DPA to give potential applicants a sense of what to expect.

Question 7: What factors should be taken into account in setting the duration of a DPA?

The duration of a DPA will turn on the circumstances of each case. We recommend that each DPA should have an expiry date and the following factors should be taken into account in setting its duration:

- duration of the underlying wrongful conduct;
- if the organization made a good faith attempt to reform its business practices (as evidenced by corrective actions);
- if the organization is a repeat offender.

The presumption of innocence is suspended during the negotiation of a DPA. A DPA involves an acknowledgement of responsibility (or an agreement not to contest the Crown's allegations) and a formal commitment to rectify the action that caused the wrong in the first place. As such, the "suspension" of a prosecution while the DPA takes effect cannot be for a prolonged period and a party wishing to use a DPA must do so expeditiously. Therefore, we recommend that a time period for the negotiation of a DPA be established up front.

Question 8: Under what circumstances should publication be waived or delayed?

A careful balance needs to be maintained between ensuring public confidence in DPAs as a tool to combat economic crime and giving organizations certainty and confidentiality to negotiate the DPA. Organizations are less likely to come forward if their position might be compromised with early publication of facts, etc. Therefore, there should be no publication in the initial stages of the DPA negotiation. Moreover, the process should respect settlement privilege that applies in negotiating pleas or alternative resolutions with the Crown.

It would generally be appropriate for the government to announce when it has entered into a DPA and indicate the relevant conduct and key terms, but not necessarily file the entire DPA (as some terms may be commercially confidential)[9].

This would provide a degree of transparency, enable victims to seek redress and allow customers, suppliers and potential business partners to make their own decisions on whether to deal with the organization.

Ultimately, the prosecution should have the flexibility to waive or delay publication and publish selected parts of the DPA.

Question 9: How should non-compliance be addressed?

Generally, there should be flexibility to address the specific circumstances of non-compliance. Serious instances of non-compliance demonstrating lack of corporate resolution to comply with the DPA may warrant criminal charges, or extension or termination of the DPA. On the other hand, isolated or technical violations may warrant less onerous measures, such as warnings or renegotiated terms of the DPA.

The prosecutor should give the organization an opportunity to address allegations of non-compliance. If repeated incidents are beyond the organization's control, it may be useful to renegotiate some terms of the DPA.

Given that the Crown best knows its case and the chief issues, we recommend that a determination of non-compliance be made by a prosecutor in consultation with any compliance monitors. The Crown is in a good position to know if a proposed compliance plan is in earnest and if it will address the issue that caused the wrongdoing in the first place.

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9 This could be similar to the model in France under La loi sur la transparence, la lutte contre la corruption et la modernisation de la vie économique, commonly referred to as Sapin 2.

When it appears that a DPA will not be successfully negotiated, we recommend that new Crown counsel be appointed to alleviate concerns of bias and that the prosecution move swiftly to trial.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

Prosecution against the cooperating organization

An accused person has a right to silence pursuant to section 11(c) of the *Charter of Rights and Freedoms* and the right to a fair trial pursuant to section 7. Relevant cases[10] confirm that a person or a corporation[11] cannot be compelled to incriminate themselves and that settlement privilege applies in negotiations with the Crown relating to a potential resolution.[12] As such, any information gleaned in the course of a DPA negotiation should never be used in subsequent proceedings against the organization.

The government should provide assurances to this effect, similar to those in the Competition Bureau's Leniency Program Bulletin.[13]

Should a DPA negotiation fail, we also recommend that new Crown counsel be appointed to ensure that any information communicated during the course of the negotiations remain outside the scope of the prosecution. However, if charges are laid against individuals responsible for the wrongdoing, then this material may be relevant and admissible.

Prosecution against another organization

Facts disclosed during DPA negotiations could be admissible in a prosecution against another company or rogue employees for other crimes, subject to the law on settlement privilege and any necessary measures to protect the credibility and proceedings against the "confessing" corporation.

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10 R. v. White [1999] 2 S.C.R 417; R. v. Nedelcu [2012] 3 S.C.R.311

11 Section 2 of the *Criminal Code* defines a "person" to include an "organization". The definition of "person" is included under the definition of "everyone". The definition of "organization" includes a company, firm or corporate body.

12 *R. v. Delchev*, 2012 ONSC 2094, at para. 19.

13 Where a leniency applicant withdraws from the Leniency Program at any time before concluding a plea agreement, the applicant is assured that the information provided under the Leniency Program will not be used directly against it and will be treated as either confidential or settlement privileged. See Competition Bureau Bulletin – The Leniency Program (September 29, 2010) para. 34.

Question 11: How should compliance monitors be selected and governed?

Where compliance monitoring is required, the selection of independent monitors should be based on agreed criteria. Independent compliance monitors should report directly to the prosecutor but be engaged and compensated by the organization. The selection process used in the Integrity Regime by Public Services and Procurement Canada (PSPC) could serve as a model. Independent compliance monitors could be of great assistance to the DPA process and would relieve the already large burden put on Crown counsel.

However, active compliance monitors may not always be required and periodic certified reports subject to audit may be sufficient. Again, there should be flexibility to fit the particular circumstances.

Question 12: What use should be made of compliance monitoring reports?

Compliance monitoring reports provide an effective review of implementation programs. However, they should not form part of the DPA.

If court oversight is part of Canada's DPA regime, these reports could be used in the same way a probation report is used in sentencing – to inform the court of the organization's compliance and appropriateness of remedial measures. These reports should not inhibit the efforts of an organization trying to right a wrong.

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

As a general principle, it is appropriate to include victim compensation where applicable.

It may be appropriate to limit victim compensation under a DPA to persons who suffered direct harm (e.g., the customer whose contract was subject to a bribe), but not to shareholders of the organization entering into the DPA.

Any anticipatory restitution should take into account other actions and proceedings before the courts (to the extent possible where multiple jurisdictions are involved). For example, if the government imposes a material fine, such as a penalty fully reflecting the profit earned from the misconduct, in some cases, it may not be appropriate to impose further restitution.

The DPA regime should be flexible enough to allow for charitable donations but not establish an expectation or bias towards them. The selection of the charity and use of the funds by the recipients are often problematic.

III. INTEGRITY REGIME

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

In general, we recommend building more flexibility into the regime. The duration of ineligibility and suspension should be commensurate with the public interest, the seriousness of the misconduct and the organization's willingness to redress the misconduct. To this end, the factors considered when deciding to offer a DPA to an organization would also be relevant to its debarment (see question 4 of the DPA regime above).

An automatic five to ten year debarment carries significant consequences and may effectively dissolve a firm that is highly dependent on government contracts. Discretion to modify the term of ineligibility (and even waive debarment) could avoid overly punitive outcomes negatively impacting blameless persons.

Imposing a fixed temporal ban also departs from the approach taken by most other countries and organizations, including the World Bank, which uses discretionary and criteria-guided policies in assessing debarment periods. Since the existing Integrity Regime does not consider mitigating factors or remedial measures when assessing a debarment period, the regime does not encourage companies to cooperate. This is contrary to approaches taken by many regulators (including the Ontario Securities Commission and the U.S. Department of Justice) in formalizing credit for cooperation policies.[14]

For example, an automatic ten year suspension currently applies if a supplier provides a false or misleading certification or declaration. A more practical approach could be to limit the automatic suspension to failures to disclose charges or convictions for *specified offences* by the supplier or its *controlled* subsidiaries. Suspension for failures to disclose charges or convictions for a *broader category of offences* or a *broader category of affiliates* would be a discretionary decision. In those cases, PSPC could evaluate all the circumstances and have the option to not disqualify the supplier or to reduce the period of ineligibility.

This flexibility would be even more important if the government does not proceed with DPAs, which presumably are intended, in part, to offer an opportunity to negotiate a resolution that addresses criminal conduct but avoids application of the Integrity Regime.

14 See CBA Letter to Minister Diane Finlay of PWGSC dated April 9, 2015. (http://ow.ly/beqn30gEJXp)

We suggest that the government align its procurement ineligibility and suspension guidelines to that of its major trading partners and specifically to the US.

In addition, we recommend that the government incorporate an exemption to align the Integrity Regime with pre-existing cooperation programs, particularly in the competition area. From October 2010 to November 2012, an express exemption under the Integrity Regime provided that participants in a "leniency program" were not subject to debarment. This exemption served an important public policy goal as it preserved the strong incentive for organizations to cooperate with the Competition Bureau.[15] However, in November 2012, the government, without significant consultation, removed this exemption from the regime.

This 2012 policy change discouraged many companies from cooperating with the Competition Bureau, since it could result in debarment from federal contracting for a long time. Competition counsel now regularly advise clients about the risks and benefits of applying for immunity or leniency, including the fact that cooperation with the Bureau and participation in the Leniency Program may subject them to a lengthy debarment. An organization may decide not to cooperate with the Bureau and assume the risk of defending criminal charges merely to avoid the potentially devastating consequences of debarment.

The Immunity and Leniency Programs are some of the Competition Bureau's most important and effective tools for discovering, investigating and prosecuting criminal anti-competitive conduct. We encourage the government to reinstate the exemption that existed prior to 2012 to exempt participants in the Competition Bureau's Immunity and Leniency Programs from debarment.

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15 These concerns arises largely in connection with a voluntarily plea by a participant the Leniency Program, since a participant in the Immunity Program is not required to plead to an offence under the *Competition Act*. In a 2013 Memorandum of Understanding, PWSGC agreed it would not disqualify a party under the Integrity Regime that had been granted immunity under the Bureau's Immunity Program. See MOU between Competition Bureau and PWSGC regarding the Prevention, Detection, Reporting and Investigation of possible Cartel Activity (May 30, 2013), s. 4.

However, with subsequent amendments to the Integrity Regime, PWSGC may now temporarily suspend any party that "admits guilt" to a listed offence for 18 months, and a participant under the Immunity Program is generally required to admit the underlying elements of the offence to participate in the program. As a result, it is unclear whether the earlier 2013 MOU would preclude a suspension based on an immunity applicant's admission of guilt in accordance with existing and future requirements of the Immunity Program, particularly since the Immunity Program is currently under review by the Bureau. We encourage the government to confirm that the policy embodied in the MOU 2013 continues to apply under the current regime, as well as to incorporate this understanding expressly in any revised policy.

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

Rendering an organization ineligible is a serious action and debarment should not be imposed unless it is clearly in the public interest. The following factors should be considered in determining whether a supplier should benefit from discretion to avoid debarment that the Integrity Regime would otherwise impose:

- Has the organization put in place appropriate standards of conduct and internal compliance controls, including review procedures as well as ethics and compliance training programs?
- Did the organization bring the misconduct to the attention of the government in a timely manner?
- Did the organization engage in a full investigation of the ineligibility?
- Has the organization agreed to an appropriate penalty and agreed to make restitution related to the offending activity?
- Has the organization taken appropriate action against the individuals responsible for the misconduct?
- Does the organization's senior management acknowledge the seriousness of the misconduct and have fully supported measures to prevent recurrence?
- Is the organization a repeat offender

In addition, the debarment regime should incorporate additional elements of due process. A debarment can have devastating consequences for a business, innocent employees and other stakeholders. PSPC should incorporate the following enhanced procedural protections:

- An opportunity to make submissions as to whether debarment is justified in the circumstances;
- A procedure to appeal the debarment;
- A procedure to revise or modify the debarment terms;
- Under certain circumstances, a procedure to seek to have the debarment lifted following a set period where the entity has demonstrated rehabilitation and a strong record of compliance;
- The publication of additional enforcement guidelines that govern PWGSC's discretion, such as the factors considered in imposing a debarment based on the existence of charges alone, and the factors considered in negotiating an "administrative agreement".

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

The government should be careful when adding offences to the Integrity Regime. An Integrity Regime that takes into account civil or provincial offences, other federal offences related to corporate wrongdoing, mere allegations or debarment decisions in other jurisdictions should not be made without full regard for the jurisprudence, leniency provisions and rules of other jurisdictions.

Question 4: What factors should be considered in determining whether new offences should be included?

The government should consider offences where the misconduct indicates a lack of integrity that directly impacts the responsibility of the government as a contractor.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The government should not suspend or render ineligible an organization based only on allegations of corporate wrongdoing.

A determination of debarment (suspension or ineligibility) before charges or conviction may violate due process rights. However, if a disqualification is on the basis of a contractual violation (e.g., failure to perform) the government could take that into account.[16]

As noted above, the Integrity Regime should reinstate the exemption for competition leniency programs in existence from October 2010 to November 2012. The Integrity Policy should also expressly state that a corporation may not be debarred by virtue of entering into a DPA or applying for (or receiving) immunity or leniency under competition or antitrust laws. One reason for entering into a DPA , in particular, is to avoid debarment, but the Integrity Regime Discussion Paper suggests that the government might debar an organization even in the absence of a charge or conviction.

16 While some jurisdictions, such as the US, permit debarment before charges or convictions in specific circumstances, the regime requires adherence to a specific process (e.g., adequate evidence to support suspension).

Section 7(d) of the Integrity Regime raises a similar issue with its potential to suspend a supplier for admitting guilt. As noted above, it is not clear how this provision operates in light of PWGSC's 2013 Memorandum of Understanding with the Competition Bureau.

In addition, it should be expressly provided that a supplier is not required to advise PSPC that it admitted guilt to a *Competition Act* offence when applying for immunity or leniency under one of the Competition Bureau's programs. These admissions are made on a confidential basis and disclosure would undermine the Competition Bureau's cooperation policies.

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

In our view, Integrity Regime determinations of ineligibility should not be applied to non-procurement federal services. A debarment determination is based on a myriad of factors and may be a nuanced decision. It would be inequitable to allow one unfavourable decision on public procurement to deny a Canadian company access to other government services.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

Debarment decisions in other jurisdictions or by another organization should not have an automatic impact on a supplier's status under the Integrity Regime. It is crucial that PSPC retain discretion to make its own determination.

The Discussion Paper refers to the practice of cross debarment by the five multilateral development banks (MDBs). This is an especially questionable practice that would sacrifice the jurisdictional independence of Canadian federal agencies. It also results in *ad hoc* decision making that may be subject to the policy priorities of other governments.

Cross debarment can lead to confusion between jurisdictions who are parties to cross debarment agreements and those who are not party to the provisions in other jurisdictions. Further, the Government of Canada's criteria and process to determine eligibility will likely differ from those of MDBs.

If an organization is debarred by a provincial agency using similar criteria to the Government of Canada, it may make sense for the federal government to consider that decision. The reverse is also true. If a provincial agency, such as the Quebec's *Authorité des Marchés Financiers* does

not debar an organization, using its own criteria, the Government of Canada could consider this provincial decision as it relates to the supplier's status under the Integrity Regime.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

We reiterate that the government should generally not take actions to preclude, suspend or debar on the basis of mere allegations.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

Provided the Integrity Regime itself has an appropriate balance, we have no objection to expanding the scope of government contracts subject to the Integrity Regime to other federal entities.

The Integrity Regime Discussion Paper points to Crown corporations. As the Integrity Regime may impose significant burdens on some Crown corporations, we recommend that it be left to individual Crown corporations to decide whether to opt in to the Integrity Regime.

Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

To the extent that the scope of debarment offences moves away from offences directly relevant to government contracting, the rationale for debarment may become less clear.

While the goal is laudable, using debarment to achieve other social, economic and environmental policy objectives could create uncertainty and inadvertently limit the number of companies prepared to bid on government contracts. Broader debarment adversely affects not only the debarred company, its employees and shareholders, but also taxpayers who are left with a less competitive process and may pay more or receive lower quality services.

If the government wants to take a wider scope of offences into account, it should consider issuing guidance on the weight it will give to such offences, rather than rendering an organization completely ineligible regardless of the type of offence.

When making procurement decisions, the government could encourage the participation of corporations that adopt corporate social responsibility norms such as:

- well-funded enforceable programs that promote robust health and safety requirements, living wages and diversity in their warehouses, factories and offices around the world.
- taking an active role in tracking their own greenhouse gas emissions and looking for ways to reduce those emissions, and transition to renewable energy;
- corporate social responsibility certifications.

IV. OTHER COMMENTS

Importance of promoting cooperation

The existing Integrity Regime does not promote cooperation with authorities. Its punitive consequences – five to ten years debarment from bidding or working on federal contracts (with a potential cascading effect on provincial governments, foreign governments and private sector contracts) – preclude many companies from reporting misconduct.

By discouraging cooperation, the Integrity Regime makes it harder for companies to dismiss employees for misconduct: establishing employee misconduct publicly in court (where the employee opposes the "for cause" termination) exposes the company to potential debarment.

On the other hand, if the company quietly dismisses the employee and pays compensation rather than prove "cause" publicly in court – to minimize the debarment risk under the Integrity Regime, the company may appear to be rewarding an employee for the wrongdoing. Also, the absence of a safe-harbour for coming forward may expose companies to blackmail by current or former employees who are aware of misconduct – their own or that of other employees.

The Integrity Regime should have a safe-harbour provision for self-disclosure and should not punish companies that have disavowed their employee's misconduct in ways that make it clear that no others in the company had any criminal intent to commit the misconduct.

Certificates of compliance

Given the significant consequences of debarment, the government should ensure that the Integrity Regime is clear and well defined. For example, it is difficult for corporations to provide the requisite certificates of compliance in the bidding and contracting process given

the open ended and unclear definitions of "affiliate" and foreign offences that are "similar" to the listed Canadian offences.[17]

Obligation to inform Registrar

The continuing obligation to inform the Registrar within ten working days of "any charge, conviction, or other circumstance relevant to the Policy with respect to itself, its affiliates and its first-tier subcontractors" is onerous, particularly for large multi-national companies. There seems to be a large scope for error, even by a company making diligent efforts to comply. Consideration should be given to revising this obligation to require notice within ten working days of the relevant entity *becoming aware of the conduct.*

V. CONCLUSION

We thank the government for consulting on its plans to expand Canada's toolkit to address corporate wrongdoing, namely enhancements to the Integrity Regime and a possible Deferred Prosecution Agreement regime. These new tools are especially welcomed given the pressures that Canada's courts are facing, brought to light in the Supreme Court of Canada judgment in *R. v. Jordan.*

17 The definition of "affiliate" includes controlled persons, and the concept of "control" includes "deemed control". "Deemed control" has a non-inclusive and circular definition – section (b) of the definition essentially says that deemed control includes a situation where a person is deemed to be controlled by an entity. PSPC should amend this definition to make it meaningful, if only to say something like "deemed control" means a situation in which PSPC determines that an entity is controlled in fact by another entity. (A number of legislative schemes, such as the CRTC, have control in fact concepts that could be incorporated by reference.) In any event, section (c) of the definition of "affiliate" makes clear that affiliates might include entities with which a company shares facilities or employees, implying a potentially the very broad concept of "control" and "affiliate".

Submission received on Friday, October 6, 2017.

Dear review

There is a growing practice of crown entities of delegating tasks to non crown self regulating and industry funded ombudsman

For example the banking financial industry oversight. Fcac is a repeat practicioner of this

The concern is there is very little accountability follow up

Further this practice appears to be used more to deflect responsibility from the crown and government bureaucracy rather to enhance legislative reach in an ethically consistent manner

If the process wrked as it was assumed and set up to do that would be one thing but it isnt

Whether depfered prosecution would work again it depends on how ethical the crown enetiy is and it's own integrity of compliance

Outsourcing is a growing concern especially with intangle goods and services

And there is a signficant risk of compliance failure given the unfortunately typically weak kneed apparaoch in Canada. Atleast from what is happening in the consumer arena. Where the threat of not using the vendors services again isn't much of a threat practicably

You will also run up against issues raised in askov potentially

And there is the issue of the integrity of the party actually overseeing the do this or else.

What makes you think this will work any better than other issues. Take a hard look at the very weak consumer protection we have right up to the performance of the competition bureau

Is there a reason for government procurement purposes this would work any better? And why should there be a lesser track system for consumers eg retail vs government as consumer?

And there is the cost and the why do this. How much time and cost will be saved even assuming this proposal is effective?

Look at parallel issues re contract workers ;job safety and outcome of let's make a deal offers?

Sent from my BlackBerry 10 smartphone.

s.19(1)

Jade Pearson

rom:
Sent: October-10-17 3:33 PM
To: DGS IGGJ APD Consulter / DOB IFAMG DPA Consult (TPSGC/PWGSC)
Subject: "DPA Consultation"

This was brought to my attention today. Please be advised that my opinions do NOT reflect those of the Attorney General of Justice.

prosecuted cases where DPA's were considered by prosecutors in those countries. It is important to note that what a DPA does is that it tends to serve corporate interests more than it does the interests of justice.

That being said there may be times when the two competing interests align, i.e. does it make sense to prosecute a large corporation where a result of the present system (i.e. conviction which results in de-barrment) which could result in large scale damage to the Canadian economy.

However, in my view the debarment process must include two things:

1. A process of enforcement of conditions;
2. A transparent process of application

A TRANSPARENT PROCESS OF APPLICATION:

would suggest that any debarment decision be one which is made public. It would include the reasons for choosing debarment over a formal prosecution and include the terms and conditions of debarment. Anything short of this leaves open a criticism that the government is favoring one accused over another, i.e. similar cases end up with differing results.

A formalized and public process which outlines the criteria for debarment should be created and followed. This would allow third parties such as World Bank, Transparency International or other NGO's to assess the Canadian effort. In the area of corruption any lack of transparency by the Canadian government would be ironic and fatal to public acceptance of the concept.

Part of this application should also include how far the DPA will go and limit offences where a DPA is allowed. A DPA must not be seen to be a sentence. If it is seen as a sentence Charter applications will be set out. In my view the existing paradigm for YCJA or other criminal diversion programs works as the legal authority for the DPA. The DPA process can take place within that existing law, just with its own transparent regulations.

ENFORCEMENT OF DPA

In *R. v. Niko* the probation order which was imposed was one which reflected many conditions which are often used in American DPA's. The challenge which Canada must consider is the ability to actually monitor a DPA.

In Niko the decision was made to have NIKO carry the majority of costs of the probation compliance.

For example there is no probation officer in Canada who would be qualified to access books and records of a company to ensure compliance with a DPA.

It requires specialized training in accounting, business, law and police investigations. The cost of DPA enforcement must be largely borne by the entity which benefits from the DPA.

Finally, if DPA's are not enforced this will just enforce the public perception that the system is choosing favorites and going easy on the entity which receives the DPA.

Enforcement and prosecution where there is a breach of a DPA must be part of the solution.

Thank you in advance for your consideration of this matter.

Introduction

This paper addresses Question 4 of the consultation: when should DPAs be offered to a company? It will analyze this question by examining the explicit and implicit rules applied in the US and UK, ultimately coming to two conclusions:

1) These rules can be conceptualized as a risk assessment matrix similar to the ones currently used to assess due diligence in Canada; and
2) If implemented along the lines of the British jurisprudence, DPAs can fill a significant gap in due diligence incentives.

The paper is split into five parts. Part I identifies the circumstances in which DPAs advance the public interest. Parts II and III examines American and British DPAs, respectively, identifying the rules applied by prosecutors and courts for when to offer or accept a DPA, respectively. Part IV shows how the rules in Parts I and III are analogous to risk assessment matrices for due diligence. Part V explains how they differ, and in so doing highlights the gap that a DPA regime would fill.

Part I

DPAs carry several advantages, including[1]:

1) Discovering corporate criminality that would otherwise go unreported;
2) Preventing future criminality with improved compliance procedures; and
3) Protecting innocent stakeholders and getting rapid restitution for victims.

[1] Government of Canada, "Public Consultation", supra note 8 at 6. See also IRPP, "Round Table", supra note 6 at 8-9; Transparency International Canada, "Another Arrow", supra note 7 at 3, 6-8.

The first suggests that DPAs will be particularly advantageous when the criminality would not otherwise be discovered. The second is more important when the criminality at issue is more pervasive, requiring significant corporate investment to resolve. The third applies most vigorously when dealing with large companies which employ many workers and have a significant place in the national economy.

DPAs also carry several disadvantages, including[2]:

1) Dulling pre-incident disincentives to engage in criminal behaviour; and

2) Undermining public confidence in the criminal justice system.

The first can be muted if more serious offences require more proof of exemplary cooperation to open the possibility of a DPA. The second suggests that big companies should find it no easier to access a DPA than smaller companies, lest the public start to believe that justice is a function of one's economic influence.

Part II

In the US, the authority to offer and conclude a DPA rests solely in the hands of the prosecutor – the court has no power to examine a DPA on substantive grounds unless it is "clearly contrary to manifest public interest."[3] Prosecutors have guidelines on when to offer DPAs,[4] but these are not binding.[5] Thus, this part will consider a recent quantitative analysis of hundreds of signed DPAs, comparing the

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[2] Government of Canada, "Public Consultation", supra note 8 at 6. See also IRPP, "Round Table", supra note 6 at 9-11; Transparency International Canada, "Another Arrow", supra note 7 at 8-9.
[3] *United States v HSBC Bank USA, N.A.*, Docket No. 16-308 (2d Cir 2017) at p 37.
[4] The most relevant guidelines are USAM 9-28.1100, which apply to the Department of Justice, but the SEC has its own guidelines under ss. 6.1 and 6.2.2 of its Enforcement Manual.
[5] *United States v. Booker*, 543 US 220 at 233–4

circumstances in which they were signed to the circumstances leading to plea agreements.[6] Some of its conclusions include:

1) They are used for the most cooperative defendants;[7]

2) They are used for offences with the most serious penalties;[8] and

3) They are typically used by parent companies with government contracts.[9]

The first of these is a reflection of the first two advantages of DPAs listed in Part I, as the most compliant corporate officers are those who bring undiscovered issues to prosecutors and make a concerted effort to prevent future criminality. Clearly, rewarding cooperation is fundamental to a good DPA regime.

The last two conclusions, however, raise the concern noted in Part I about justice being applied unevenly, as the public may perceive that only the largest, most influential companies are "escaping justice".

Part III

In the UK, unlike in the US, the court has final authority to approve or reject a DPA depending on whether it is "in the interests of justice" and its terms are "fair, reasonable and proportionate".[10] Also unlike the US, only three DPAs have been

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[6] Cindy R. Alexander & Mark A. Cohen, "Trends in the Use of Non-Prosecution, Deferred Prosecution, and Plea Agreements in the Settlement of Alleged Corporate Criminal Wrongdoing" (April 2015), *Law & Economics Center, George Mason University School of Law* (report), online: <http://masonlec.org/site/rte_uploads/files/Full%20Report%20-%20SCJI%20NPA-DPA%2C%20April%202015%281%29.pdf>.

[7] *Ibid* at 40.

[8] *Ibid.*

[9] *Ibid* at 42, 44.

[10] *The Criminal Procedure (Amendment No. 2) Rules 2013*, SI 2013/3183, s 12.4.

signed in the UK. These three cases involved Standard Bank (2015),[11] XYZ (2015),[12] and Rolls Royce (2017).[13] I will analyze each in turn.

In *Standard Bank*, the corporate offender paid $6,000,000 USD to bribe an official of the Tanzanian government in order to obtain an underwriting deal.[14] The court found that this fell into the highest severity category for bribery offences.[15] Nevertheless, the company's senior officers were not involved in the criminality,[16] investigated thoroughly (3 weeks) after discovering the bribery, and informed the Serious and Organised Crime Agency and the Serious Fraud Office.[17]

The court accepted that a DPA with Standard Bank was in the interests of justice, noting that "[o]f particular significant was the promptness of the self-report, the fully disclosed internal investigation and co-operation of Standard Bank."[18] After also finding the terms of the DPA fair, reasonable, and proportionate, the court concludes by repeating a remark that provides insight into their rationale:

> "Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report ... to a DPA".[19]

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[11] *Serious Fraud Office v Standard Bank PLC*, [2015] EWHC No. U20150854 (Queen's Bench) [*Standard Bank*].
[12] *Serious Fraud Office v XYZ Limited*, [2016] EWHC No. U20150856 (Queen's Bench) [*XYZ*].
[13] *Serious Fraud Office v Rolls-Royce PLC*, [2017] EWHC No. U20170036 (Queen's Bench) [*Rolls-Royce*].
[14] *Standard Bank*, supra note 11 at para 8.
[15] *Ibid* at para 16; cross-referenced with UK, Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline*, (sentencing guidelines) (Sentencing Council, 2014) at 50 [Sentencing Council, *Guidelines*].
[16] *Standard Bank*, supra note 11 at para 11.
[17] *Ibid* at paras 8-9.
[18] *Ibid* at para 14.
[19] *Ibid* at para 22.

In sum, in *Standard Bank*, a serious crime was committed, the corporate officials conducted an investigation commensurate to the severity of the crime, the company promptly reported the criminality, and the court believed that this investigation and self-reporting was integral to bringing the offenders to justice.[20]

In *XYZ*, the criminality was of greater severity, with bribes of £17,240,000 paid over a period of 9 years.[21] The prosecutors sought a lower culpability multiplier, which the court accepted, but this still fell within the highest severity range.[22] Just as the severity of the offence here was slightly greater than in *Standard Bank*, so too was the laudability of the corporate response. After acquiring XYZ, its new parent proactively implemented a global compliance programme which prevented future criminality and discovered the past bribery, upon which discovery an internal investigation was conducted and two self-reports were made.[23] Thus, *XYZ* matches *Standard Bank* in all of the conclusions noted above.

The only significant difference is that, in *XYZ*, the court also weighs the fact that "prosecution and conviction would lead to significant legal costs and financial penalty at an unfavourable time in the industry, a context where XYZ currently operates on an 'economic knife-edge': XYZ would risk insolvency harming the interests of workers, suppliers, and the wider community".[24] In this respect, the British court follows American courts in weighing justice as a function of the offender's economic interests.

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[20] The last of these is implied at *Ibid.*
[21] *XYZ*, supra note 12 at para 9.
[22] *Ibid* at para 23, cross-referenced with Sentencing Council, *Guidelines*, supra note 15 at 50. For completeness, a discount of 50% was extended to *XYZ* "to encourage others to conduct themselves as XYZ has when confronting criminality".
[23] *XYZ*, supra note 12 at para 11.
[24] *Ibid* at para 18.

In *Rolls-Royce*, the severity of the criminality is taken to a whole new level. As the court explains, "the conduct resolved by the DPA spans eight jurisdictions, three of Rolls-Royce's business divisions and over 20 years of conduct."[25] The DPA calls for a total financial penalty exceeding £500,000,000,[26] in addition to £196,000,000 in fines imposed by American and Brazilian authorities.[27] The court nevertheless justified the use of a DPA on the grounds that Rolls-Royce had made a Herculean effort to discover evidence of the violations and report those results to the authorities:

> "The full and extensive nature of this co-operation has led to the acquisition, and application of digital review methods to over 30 million documents."[28]
>
> "[T]he costs of the work done by Rolls-Royce ... amounted to £123,115,643 and will doubtless continue to increase."[29]

As with *Standard Bank* and *XYZ*, then, *Rolls-Royce* stands for the proposition that a DPA might be available if the extensiveness of investigation and cooperation is commensurate to the severity of the criminality. Additionally, since prosecutors would not have £123,115,643 to devote to an investigation, it is hard to imagine that this criminality would have been discovered, much less vigorously prosecuted, without cooperation on the part of the company. Thus, *Rolls-Royce* suggests that DPAs might only be available where discovery depended on cooperation.

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[25] *Rolls-Royce*, supra note 13 at 135.
[26] *Ibid* at para 127.
[27] *Ibid* at para 128.
[28] *Ibid* at para 20.
[29] *Ibid* at para 39.

Unfortunately, *Rolls-Royce* also follows *XYZ* in seemingly being swayed by the economic influence of the corporation, referencing in particular the need to protect Rolls-Royce's "incumbency" benefits[30] and "share price",[31] and avoid "adverse effect to the UK defence industry" and "financial effects on the supply chain".[32] In short, the British courts have deemed Rolls-Royce too big to jail.

Thus, these three cases raise four conclusions:

1) The crimes for which DPAs have been signed were of the highest severity;

2) The court is (only?) willing to accept DPAs when the probability of bringing the offender to justice without cooperation is very low;

3) As the severity of the criminality increases, the level of cooperation required to justify a DPA increases; and

4) The economic position and interests of the company matter.

The second and third of these match the theoretical optimum conclusion shown in Part I. The first may be explained as a company-level incentive: only when criminality is severe, such that prosecution would carry dramatic and ex ante self-evident consequences will a corporation consider self-reporting, rather than risking limited penalties at trial. The fourth matches the American cases, and serves as a reminder of the conflict noted in Part I. On one hand, more economic influence means conviction harms more innocent actors. On the other hand, more economic influence raises a greater fairness of justice concern.

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[30] *Ibid* at para 54. Given the context of Rolls-Royce's competition primarily with non-British companies, at worst, this may be seen as a subtle nod to protectionism.
[31] *Ibid* at para 55.
[32] *Ibid* at para 56.

Part IV

We can represent the non-controversial conclusions (the probability of conviction without cooperation and the severity of criminality) as a risk assessment matrix:

	Low Probability of Catching Criminality Without Cooperation	High Probability of Catching Criminality Without Cooperation
Very Severe Criminality	DPA Available with Exemplary Cooperation	DPA Unavailable
Severe Criminality	DPA Available with Significant Cooperation	DPA Unavailable

From the analysis in Part III, it is easy to see how *Standard Bank* and *XYZ* fall into the box on the bottom left, while *Rolls-Royce* is the archetype of the top left box. It is also easy to see how this matrix is in line with the theoretically optimal incentives described in Part I. It is also worth noting the similarity of this risk assessment matrix to the one used in Canadian due diligence analysis:

	Low Probability of Injury	High Probability of Injury
High Cost of Accident	Due Diligence Available with Significant Caution	Due Diligence Available with Exemplary Caution
Low Cost of Accident	Due Diligence Available	Due Diligence Available with Significant Caution

The first matrix can be seen as an asymmetric version of the second matrix, where above a certain probability of getting caught, no amount of due diligence is sufficient, and the axes are relabelled to reflect legal costs, not societal costs.

Part V

The key difference between these matrices is that the first assesses post-incident behaviour, while the second assesses pre-incident behaviour. Currently, Canadian courts probably do not consider post-incident cooperation in determining liability.[33] Thus, in the status quo, there is minimal incentive for a corporation to be forthcoming when they discover their organization has committed a crime – no matter what they do, they cannot escape liability, and given the nature of corporate crimes, it would probably take a tip and significant prosecutorial resources to discover these crimes.

It is worth considering the fact that post-incident cooperation is considered in sentencing, potentially reducing fines by up to an order of magnitude.[34] However, where there is a sufficiently low probability of being caught without cooperation – the area in the matrix for which DPAs would be available – this incentive would be insufficient. Thus, the current framework fails to incentivize cooperation in precisely the circumstance in which a DPA regime would have the most effect.

In conclusion, a regime in which DPAs are offered only in line with the first table on page 8 would create efficient incentives (Part I), avoid the American problem (part II), follow British jurisprudence (Part III), be consistent with Canadian principles for corporate criminal liability (Part IV), and fill an important gap in Canadian incentives for post-incident cooperation (Part V). Please consider it.

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[33] I say probably because there have been some cases which can be interpreted as removing liability as a result of post-incident actions. See, for instance, *R v Woolworth Canada Inc.*, 2000 CarswellOnt 175. However, that case involved criminality which was ongoing, such that it is not entirely clear whether the court saw the laudable actions as ex ante or ex post.

[34] See Todd L. Archibald & Kenneth E. Jull, *Risk Management, Financial Crimes, and Corporate Compliance* (Toronto: Thomson Reuters, 2017) at 17-41.

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SENT BY E-MAIL

November 2, 2017

Government of Canada
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Dear Sirs/Mesdames:

RE: DPA Consultation

I write in my own capacity to provide feedback on the possible adoption of a Deferred Prosecution Agreement ("DPA") regime in Canada.

1. The Advantages and Disadvantages of DPAs as Means of Addressing Corporate Criminal Liability in Canada

Some advantages are:

- DPAs can provide an efficient and effective means of addressing criminal wrongdoing without incurring the costs to the Crown associated with lengthy and sometimes complex trials. This is particularly attractive in the current environment where Canadian police, prosecutorial and judicial resources are under funded and under stress;

- The use of DPAs means that organizations can avoid conviction for financial and corruption crimes that engage the application of the Integrity Regime. That result is simply good public policy. The broad purpose of the criminal justice system – public protection – can be promoted by properly crafted, applied end enforced DPAs. The alternative, the registering of convictions, may needlessly wound organizations beyond what is required by Part XXIII of the *Criminal Code*, risking economic harm at a number of levels to the very society the criminal justice system is intended to protect; and,

- DPAs provide an additional incentive to organizations to invest in compliance systems intended not only to minimize the risk of unlawfulness, but also to detect it.

Some disadvantages are:

- Negative public perception, in the sense that DPAs are seen by the public as a well-resourced organization's path to avoid responsibility for serious crimes. This speaks to the need that DPAs must constitute, substantively, punishment, albeit without the stigma of a criminal conviction.

- The "floodgates" concern. If DPAs are successful, there is a risk that there will be increasing pressure to expand their application to include additional crimes and individual accused. DPAs should not be permitted to supplant, at large, the criminal law process of charge, trial, and, in the event of guilt, sentencing. This speaks to the need that the enabling legislation for DPAs (an amendment to the *Criminal Code*?) be styled as a narrow exception to the usual criminal procedure.

2. For Which Offences Should DPAs Be Available? Why?

In Canada, the reality is that criminal prosecutions of organizations are few. Most of the few are concerned with financial and corruption crimes. A growing exception is crimes of penal negligence such as criminal negligence causing death or bodily harm. These crimes frequently, but not exclusively, arise from workplace tragedies.

The availability of DPAs should be restricted to financial and corruption crimes. That is because they are offences that do not involve physical harm to a victim. Optically, many individuals may have difficulty accepting that an organization that is criminally liable for a fatality or serious bodily harm should be able to avoid the stigma of conviction through the use of a DPA.

A second reason is the public policy rationale for DPAs. They should be available to avoid collateral damage (like that caused by the Integrity Regime) to the economy and those that work within it. The Integrity Regime is not applicable to crimes against persons.

3. The Role of the Courts

Canada should follow the U.K. model of requiring the courts to administer and enforce DPAs. Once an indictment has been preferred and served on the organization, the prosecution should be stayed early in the process pursuant to the terms of the DPA which really takes on the form of a court order.

Although the DPA is a court order, it is important that the power of the court to intervene by challenging the terms or conditions of the draft DPA should be limited. In support of that recommendation, I refer to the reasons of Moldaver J. writing for a unanimous court in *R. v. Anthony-Cook*. DPAs are a form of joint submission as to how a prosecution should be resolved. Moldaver J. found that joint submissions are vital to the efficient operation of the criminal justice system. As a result, justices "should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."

What does that mean? Moldaver J. continued:

> A joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in

resolution discussions, to believe that the proper functioning of the justice system had broken down.

However, as to the Crown's decision that a prosecution is required because the accused has failed to meet one or more terms of the DPA, I think a greater role should be afforded to the courts. In this context, the Crown's decision is not completely discretionary in the sense that it has to be tied to the accused's failure to meet one or more terms. Before revoking the order permitting a prosecution to proceed, the presiding justice should be satisfied that, in fact, the accused has failed to meet one or more terms and extending the duration of terms will not assist in the successful completion of the DPA.

A similar approach should be taken in the circumstances where more time is required by the organization to comply with one or more terms of the DPA. Before amending the order extending a time limit, the presiding justice should be satisfied that the need is real and the prospect for successful completion promising.

The U.S. DPA process is less preferable than that of the U.K. Its informality in comparison to the U.K. process coupled with the wide discretion of U.S. DOJ attorneys does not ensure a transparent process, which is essential.

In addition, the U.S. process, if followed here, could expose the Crown to the heightened risk of claims of abuse of process. If an accused fails to meet the requirements of a DPA causing the Crown to decide that it must apply to the Court to revoke a DPA permitting a prosecution to proceed, the *fides* of that decision will be less open to challenge if ordered by a justice.

4. What Factors Should Be Taken Into Account In Offering a DPA?

Presumably, if the Crown is considering offering a DPA to an organization, it has already concluded that a prosecution has a reasonable prospect of conviction and there are no public interest criteria militating against preferring an indictment against the suspect organization. Consequently, if the Crown is considering a DPA, it is doing so as alternative to prosecution because it is the public interest.

The following is suggested as some of the factors the Crown might consider in deciding whether the public interest would be better served by a DPA:

Within the context of financial crimes and corruption, does the organization:

- Have a prior criminal conviction?
- Possess a culture of compliance intolerant of unlawfulness?
- Have a robust compliance policy including employee training and regular self-auditing?

In the situation wherein the organization detects the crime, was it reported immediately and completely (to the organization's honest knowledge) to law enforcement?

Did the organization fully co-operate with the criminal investigation?

It would be ill advised to include as a rigid requirement that the organization must have self-reported the crime. Some financial crimes and corruption (like that committed by rogue employees), are intended to be kept hidden from both the victims and employers, even when the latter has benefited. On the other hand, systems intended to detect unlawfulness are central to any effective compliance policy. In circumstances wherein crimes should have been self-detected and reported, a DPA may be less desirable. This factor should be left to the exercise of Crown discretion.

5. When Would a DPA Not Be Appropriate?

Whenever one or more of the foregoing and other included public interest factors are answered in the negative, meaning when a DPA would not serve the public interest.

6. What Terms Should Be Included in a DPA?

- That the Crown has concluded that the public interest is better served by a DPA as an alternative to a prosecution;

- An agreed statement of fact sufficient to establish the organization's guilt of the alleged crimes;
- Payment of a financial civil penalty to the Crown substantial enough in the circumstances to obtain general and specific deterrence and to denounce the crime;
- Exclusive of the financial penalty, when the crime has benefited the organization financially, the payment of an additional penalty to the Crown equal to the size of the benefit;
- Exclusive of the financial penalties, payment of the police costs of the investigation;
- Exclusive of the financial penalties, restitution to damaged organizations, individuals and classes of individuals;
- That the amounts paid to satisfy the financial penalties, costs and restitution, will be held in trust pending the successful completion of the remaining terms;
- A term that speaks to how the amounts held in trust should be dealt with if the DPA fails and is revoked (Should they continue to be held in trust pending the completion of the prosecution? Or, should they be returned to the organization on revocation?);
- Remedial work to compliance policies required to minimize the risk of a repeat of the crimes;
- The organization's consent to and co-operation with the independent monitoring, if any, of the remedial work;
- A time limit by which the foregoing terms must be met. Term-specific time limits might be considered; for example, requiring early payment of the financial requirements before the expiry of a time limit applicable to remedial work;
- A process whereby the time limits for completion of one or more terms may be extended. The bar should be high. Extensions

should be an exception to the rule that time limits are to be met. They should left to the discretion of the presiding justice (that is "may extend") when exceptional and unforeseen circumstances have intervened to cause non-compliance;

- That the prosecution of the alleged crimes are stayed pending the successful completion of the forgoing terms, along with a statement that, subject to orders permitting time extensions, the organization's failure to meet any of the foregoing terms will terminate the operation of the DPA and, subject to court order, permit the Crown to proceed with the prosecution. If the organization satisfies all of the terms, the Crown will advise the court and ask that the charges be withdrawn; and,

- Within the context of the accused's s.11(b) *Charter* right, if the DPA is revoked and a prosecution ensues, the accused's waiver of the post-indictment delay arising from the operation of the DPA.

7. What Factors Should Be Taken Into Account When Considering the Duration of the DPA?

Compliance with the financial requirements of the DPA are not time consuming, but compliance with remedial requirements could be, particularly if monitoring or auditing are part of the requirements. Presumably, the primary factor should be reasonableness, in the sense that, in the prevailing circumstances, what amount of time should the remedial work require?

If there are individual co-accused who intend to defend the charges in a trial, some thought will have to be given to the effect duration may have on the timing of their trials. For example, the Crown may prefer to delay the trial of an individual co-accused pending the successful completion of the DPA, permitting all the accused to be tried together *if* the DPA fails. But the ensuing delay could be prejudicial to the individual co-accused's s.11(b) *Charter* right.

8. Under What Circumstances Should Publication of the DPA be Waived or Delayed?

There are no circumstances in which publication should be waived.

Transparency is essential to public acceptance of DPAs, particularly when the accused may be well resourced and economically powerful.

Our courts are public institutions. Public access to the courts is a cornerstone of a well functioning liberal democracy.

Public access to the courts is also essential in promoting general deterrence and confidence in the criminal justice system by permitting the unhindered communication of law enforcement outcomes.

As to the delay of publication, there should be some consideration of delay when publication could negatively impact an individual co-accused; for example, when an individual is facing a trial on an indictment related to the same facts on which the DPR is based and there are legitimate concerns that its publication could infringe the individual's fair trial right.

9. How Should Non-Compliance Be Addressed?

As indicated in the foregoing, there should be some mechanism available permitting the courts to extend the duration of one or more terms if more time for compliance is required. But, the bar should be high and left to the discretion of the presiding justice.

If the failure to comply cannot is blatant, or, cannot be rectified through extending the duration of one or more terms, the justice should be obligated to pull the trigger by revoking the DPA/order permitting the prosecution to proceed.

10. When Should Facts Disclosed During a Negotiation Be Admissible in a Prosecution Against the Organization?

Respectfully, this question is somewhat confusing as framed.

It is important to distinguish between what is disclosed in a negotiation and what is contained in the agreed statement of fact (admitted facts) with in the DPA. The latter may be a subset of the former.

Assuming the negotiation is between counsel, facts admitted during the negotiation should never be admissible unless they are contained in the agreed statement of fact.

To facilitate productive negotiation, discussions between counsel need to be without prejudice.

In addition, if facts disclosed, *simpliciter*, during a negotiation were admissible, in the event of a dispute, both Crown and defence counsel would be placed in the position of being compellable witnesses as to whether there were admissions (not contained in the agreed statement of fact) and their content. That creates practical and, perhaps, ethical issues for counsel.

On the other hand, if a DPA fails and is revoked, facts admitted and *contained* in the agreed statement of fact within the revoked DPA (distinguished from those disclosed in a negotiation) should always be admissible. There are least three reasons:

- Common law rules governing the admissibility of confessions apply to statements by individuals, not organizations;
- Organizations do not have the same *Charter* protections against testimonial compulsion and self-incrimination as individuals; and,
- Prohibiting the use of facts agreed to in a revoked DPA (again, a court order) against the interest of the organization in a prosecution could open the door to huge mischief. The criminal law should not be making it palatable for an organization to fail to comply with a DPA.

I have no comments on Questions 11 and 12. I have provided comment on Question 13 under Question 6.

s.19(1) 10

Respectfully,

Submission Received on Tuesday, November 07, 2017

This letter responds to the request of the Government of Canada for feedback as it "consider[s] the possibility of introducing a Canadian deferred prosecution agreement (DPA) regime as an additional tool for prosecutors to be used in appropriate circumstances to address corporate crime."

Specifically, this letter responds to Question 1: "In your view, what are the key advantages and disadvantages of DPA as a tool for addressing corporate criminal liability in Canada."

To begin, I applaud the Government (as I likewise previously applauded the governments of the United Kingdom and Australia) for rejecting non-prosecution agreements ("NPAs") to resolve allegations of foreign bribery. I can only hope that the U.S. Department of Justice sees the wisdom of your decision and likewise abolishes NPAs (and other alternative resolution vehicles) in the FCPA context as I have long advocated.

Moreover, I applaud the Government for its critiques of the U.S. DPA regime including that the U.S. DPA model is "governed by policy" and "the role of the courts is fairly limited" in that "courts do not play a role in approving, or in overseeing the carrying out of, the terms of the agreement." To the extent, Canada is to adopt a DPA regime (which I encourage it not to for the reasons highlighted below), following the U.S. model is not the best way to proceed.

The consultation discussion paper includes a section titled "What Other Jurisdictions are Doing" and references how "DPAs have been used extensively in the U.S. since the early 1990's as an enforcement tool for corporate crime, particularly for Foreign Corrupt Practices Act offenses…". However, a glaring deficiency in this portion of the discussion paper is the complete absence of any discussion of why a legal system like Canada's, that only ascribes criminal liability to a business organization based on the acts or omissions of high-ranking corporate officials, even needs the DPA option.

Unlike the U.S. respondeat superior model in which a business organization can face corporate criminal liability to the extent any employee or agent engages in conduct in the scope of their employment or agency and intending to benefit, at least in part, the organization, Canadian law (generally speaking) requires that a "senior official" must be involved in the improper conduct for there to be corporate criminal liability. In other words, the main legal and policy reason for why the U.S. adopted DPAs is simply not present in Canada as a Canadian corporation does not face corporate criminal liability to the extent a U.S. corporation does.

Given that a business organization under Canadian law can only face legal liability based on the acts or omissions of high-ranking corporate officials, a DPA would seem to represent "under-prosecution" of egregious corporate conduct. The Government of Canada seems mostly concerned that a traditional criminal prosecution of such a company might result in the disqualification of the company from "receiving procurement contracts under conviction-based debarment regimes." If that is the concern, perhaps a better approach might be to revisit debarment regimes rather than advocating a radical departure from Canadian legal traditions.

The consultation discussion paper seems to suggest that the traditional way of prosecuting corporate crime in Canada is "often challenging," "time-consuming and resource-intensive" and that conduct may be "difficult to prove." These are not problems, at least to the extent one values quality over quantity, as accusing someone (whether a natural person or legal person) of a crime was never intended to be easy or quick.

Submission Received on Tuesday, November 07, 2017

In addition to the above, a concern I have with the discussion paper is it is based on assumptions from the U.S. DPA experience that either lack evidence, or more problematic, assumptions that are undermined by actual evidence.

One assumption in the discussion paper is that "the prospect of a DPA may encourage self-disclosure of misconduct, thereby enhancing detection and enforcement." Stated elsewhere in the discussion paper, "the prospect of being invited to negotiate a DPA may motivate companies to self-disclose wrongdoing since they may otherwise have to face the prospect of a formal criminal conviction, whether as a result of a guilty plea or following a trial."

However, there is no evidence that DPA's encourage self-disclosure. The DOJ has been using DPAs (and other alternative resolution vehicles) to resolve alleged instances of corporate FCPA liability since 2004 and have long encouraged business organizations to self-disclosure FCPA conduct. Yet there is no evidence that DPAs are encouraging self-disclosure. Indeed, the DOJ's launch of an FCPA Pilot Program in April 2016 was largely motivated by the DOJ's recognition that its long-standing efforts spanning over a decade (including through use of DPAs) to motivate self-disclosure were not successful. In the words of the DOJ's then Assistant Attorney General for the Criminal Division, the goal of the pilot program is to "encourage self-reporting" because companies have information about individuals who have violated the FCPA and have documents relevant to FCPA violations. If DPA's encouraged self-disclosure as the Government of Canada asserts, there would have been no reason for the DOJ to unveil the FCPA Pilot Program in April 2016.

Another assumption in the discussion paper is that DPAs can "deter wrongdoing" and "may be more effective than criminal prosecution in improving compliance and corporate culture ...". Here again, there is no evidence for these assertions and actual evidence undermines the assertions.

There is no reliable evidence to suggest that alternative resolution vehicles used to resolve alleged FCPA offenses has enhanced compliance or the accountability of business organizations resolving such offenses. Indeed, the Organization for Economic Co-operation and Development ("OECD") report on FCPA enforcement observed that the "actual deterrent effect [of NPAs and DPAs] has not been quantified," and it requested that the U.S. "[m]ake public any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials." The DOJ's response to this request stated:

"Scholars have recognized that quantifying deterrence is extremely difficult. This is equally true for the deterrent effect of DPAs and NPAs. Thus . . . measuring 'the impact of NPAs and DPAs in deterring the bribery of foreign public officials' would be a difficult task, save providing certain anecdotal and other circumstantial evidence. One of the best sources of anecdotal evidence demonstrating that DPAs and NPAs have a deterrent effect comes from the companies themselves. The companies against which DPAs and NPAs have been brought have often undergone dramatic changes."

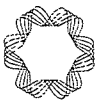
Moreover, the assertion that DPAs deter and/or increase compliance is undermined by the fact that several companies that resolved alleged FCPA offenses through DPAs (Aibel Group Ltd., Marubeni, Biomet, Orthofix, etc.) have since become FCPA repeat offenders or are currently under FCPA scrutiny yet again.

Finally, it is interesting to note that the discussion paper contemplates DPAs to be used only in "appropriate circumstances." Well, that's how things started off in the U.S. In 2008 when NPAs and DPAs were first explicitly mentioned in DOJ official policy documents, the DOJ stated:

"In certain instances, it may be appropriate . . . to resolve a corporate criminal case by means other than indictment. Nonprosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."

Far from being used only "in certain instances" or functioning as a "middle ground," since 2010 approximately 90% of DOJ corporate FCPA enforcement actions have used, in whole in part, alternative resolution vehicles.

For all of the above reasons, Canada should say "no" to DPAs to resolve foreign bribery offenses.



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November 14, 2017

PRIVATE AND CONFIDENTIAL

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Dear Ms. Glover and Mr. Piragoff:

RE: Consultation on Key Measures to Effectively Address Corporate Misconduct in Canada

As a member of Finance Canada's Advisory Committee on Money Laundering and Terrorist Financing ("ACMLTF"), I wanted to take this opportunity to express my strong support for the Government of Canada's ongoing examination of the potential introduction of a Deferred Prosecution Agreement ("DPA") mechanism to combat corporate crime.

I am a Canadian CPA and have been working internationally for the past twenty years. Currently, I lead a consulting firm, Ortus Strategies, which serves as a strategic advisor to global organizations with a focus on white-collar criminal matters such as corruption and money laundering. On matters with a U.S. regulatory nexus, I work in partnership with a firm chaired by Judge Louis J. Freeh, who is a former director of the Federal Bureau of Investigation (FBI) in the United States. I am also a former forensics partner with PwC, where I co-founded the firm's European Securities Litigation Group.

From my perspective, as a Canadian CPA with extensive experience advising global organizations on responding to matters of corporate misconduct, I believe that DPAs – similar to those implemented in other countries such as the United States – provide a strong incentive for companies to pursue a robust and proactive approach against

corporate wrongdoing that includes self-policing, self-reporting, remediation, and extensive cooperation with government regulatory agencies and law enforcement. As such, DPAs also provide governments with an invaluable tool in gaining cooperation when investigating corporate crimes, holding individuals and corporations accountable for improper activities, and promoting the widespread adoption of effective corporate compliance programs.

Although DPAs provide opportunities for the rehabilitation of organizations, they should not be considered a substitute for the prosecution of individuals who do wrong or turn a blind eye to misconduct. Furthermore, certain safeguards are required to maintain their effectiveness and prevent abuse or recidivism.

As Joy Thomas (President and CEO of CPA Canada) and I communicated to Finance Canada earlier this year, Canada is facing increased scrutiny on its response to illegal activities that improperly benefit certain individuals and corporations. In my capacity as CPA Canada's representative on the ACMLTF, I submitted a proposal as part of CPA Canada's feedback on the issues to consider in the upcoming parliamentary review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and Canada's Anti-Money Laundering and Anti-Terrorist Financing regime. (Key excerpts from that proposal are attached for your reference.)

Taking a wider view – and echoing the current position of CPA Canada – I believe that the Government of Canada should continue to work with key stakeholders in the private and public sectors to develop a broad-based, strategic blueprint to protect Canada's international brand and reputation against the effects of corporate crime.

Such a strategic blueprint would help to create a robust system in Canada to effectively address corporate wrongdoing. Potential efforts to consider within this blueprint could include:

- The development of a legal framework, similar to those existing in other countries such as the United Kingdom and the United States, which would incentivize organizations in the public interest to self-report, cooperate with law enforcement, and remediate instances of misconduct. This legal framework would include implementing DPAs into Canadian law.

- The development of new, national standards outlining expectations for organizational integrity and compliance programs.

- The establishment of a framework around whistleblowing, including secure channels for whistleblowers to report potential misconduct without fear of reprisal or recrimination.

- The development of enhanced, transparent, and streamlined processes for law enforcement, prosecutors, and other parties to address allegations of misconduct.

- The creation of public registries of legal persons that enable Canadian businesses to know their customers better and gain insight into the ultimate beneficiaries of Canadian assets.

I appreciate the opportunity to provide these comments and wish to express my interest in supporting, however possible, Canada's efforts to examine and implement new measures to respond effectively to corporate misconduct.

Thank you for your consideration.

Sincerely,

José R. Hernandez, CPA, CA, Ph.D.
Chief Executive Officer, Ortus Strategies AG

Enclosure:
Presentation, "*Serving the Public Interest: Requested Input on Addressing Money Laundering and Other Forms of Organizational Misconduct in Canada*" (March 28, 2017)

PRIVATE AND CONFIDENTIAL – DISCUSSION DOCUMENT

Serving the Public Interest

Requested Input on Addressing Money Laundering and Other Forms of Organizational Misconduct in Canada

Submitted to the Department of Finance Canada, March 28, 2017

By José R. Hernandez, Ph.D.
Member of the Advisory Committee on Money Laundering and Terrorist Financing
CEO, Ortus Strategies AG

ORTUS EMPOWERING INTEGRITY

About My Role

I am a Canadian CPA and have been working internationally for the past twenty years. Currently, I lead a consulting firm, Ortus Strategies, which serves as a strategic advisor to global organizations with a focus on white-collar matters such as corruption and money laundering. On matters with a U.S. regulatory nexus, I work in partnership with a firm chaired by Judge Louis J. Freeh, who is a former director of the Federal Bureau of Investigation in the United States. I am also a former forensics partner with PwC, where I co-founded the firm's European Securities Litigation Group. I hold a Ph.D. in Economics and Business Administration from VU University Amsterdam, where I remain guest faculty, and have served on the Advisory Council of the School of Accounting and Finance at the University of Waterloo.

My professional practice has focused on advising European corporations faced with enforcement cases involving prosecutors in the United States and Europe, although I have also advised a number of Canadian companies on similar matters. My commentary and perspective on AML/CTF issues reflects this experience.

Disclaimer: *The views expressed in this document represent my personal perspective and may not reflect those of other parties.*

A Strategic Blueprint

Canada should consider initiating a cooperative and consultative process with key stakeholders in the private and public sector to develop a strategic blueprint to protect Canada's brand and the integrity of our financial system. Such a strategic blueprint would revisit the roles and responsibilities of all key stakeholders and outline efforts to improve the effectiveness of Canada's efforts in the AML/CTF area, and in the handling of organizational misconduct more generally. The blueprint should also reflect recent developments such as CPA Canada's ethics initiatives, G7/G20 AML/CTF expectations, and Current House of Commons priorities on informants and tax evasion.

Blueprint to Address AML/CTF and Other Forms of Misconduct

The Blueprint: Potential Specific Efforts to Consider

1. Development of **a legal framework**, similar to those existing in other countries such as the United States and United Kingdom, that would incentivize organizations in the public interest to self-report, cooperate with law enforcement, and remediate instances of misconduct. Such a legal framework would reward organizations with lower fines and penalties in cases of misconduct where an organization can demonstrate the adoption and implementation of an effective integrity and compliance program.

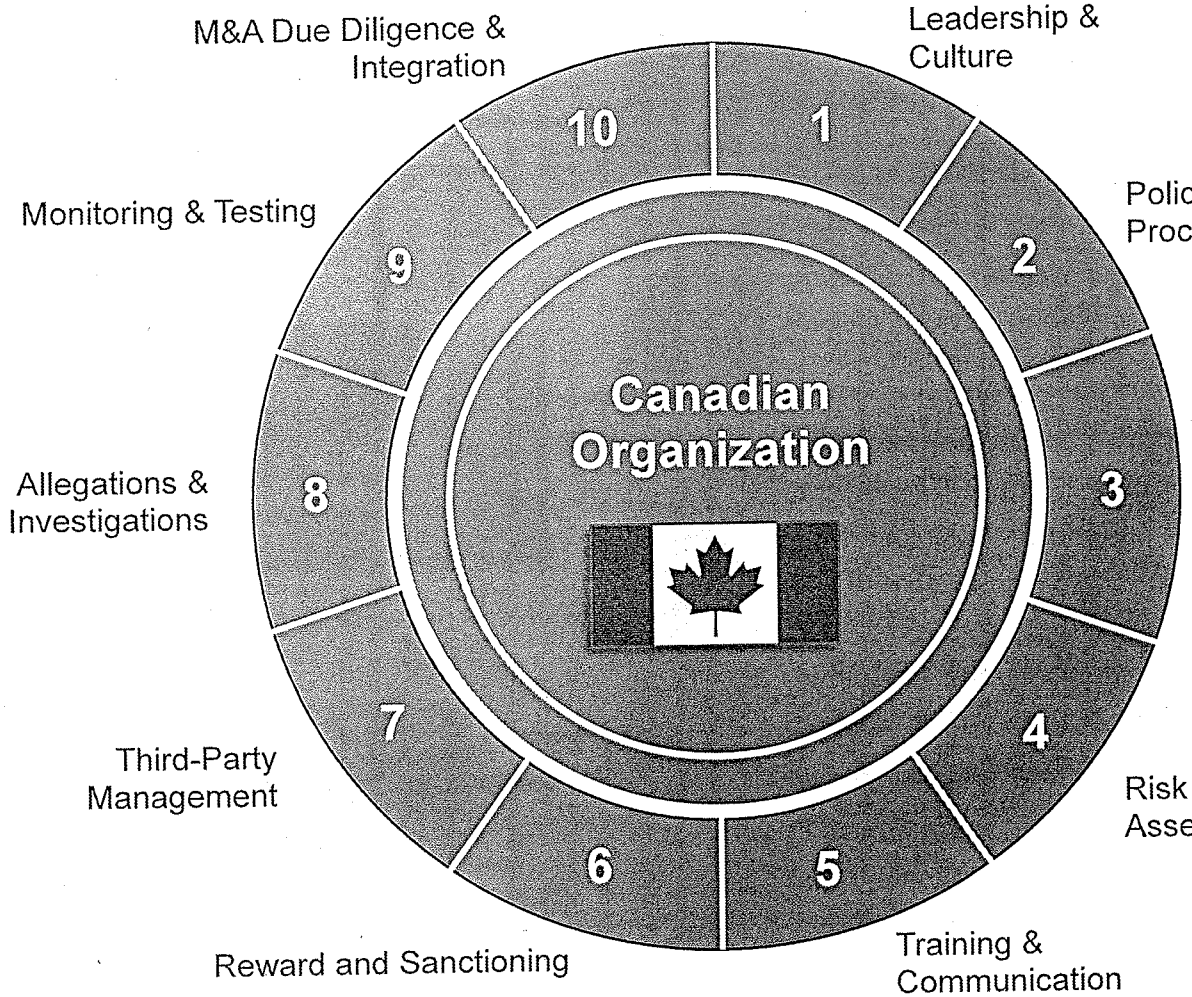
2. Development of **new, national standards** outlining expectations for organizational integrity and compliance programs.

3. Establishment of **secure channels for whistleblowers** to report potential misconduct without fear of reprisal or discrimination.

4. Development of enhanced, transparent, and streamlined **processes for law enforcement**, prosecutors, and other parties to address allegations of misconduct.

5. Creation of **public registries of legal persons** that enable Canadians to know their customers better and gain insight into the ultimate beneficiaries of Canadian assets.

Towards National Standards: Components of an Integrity and Compliance Program*



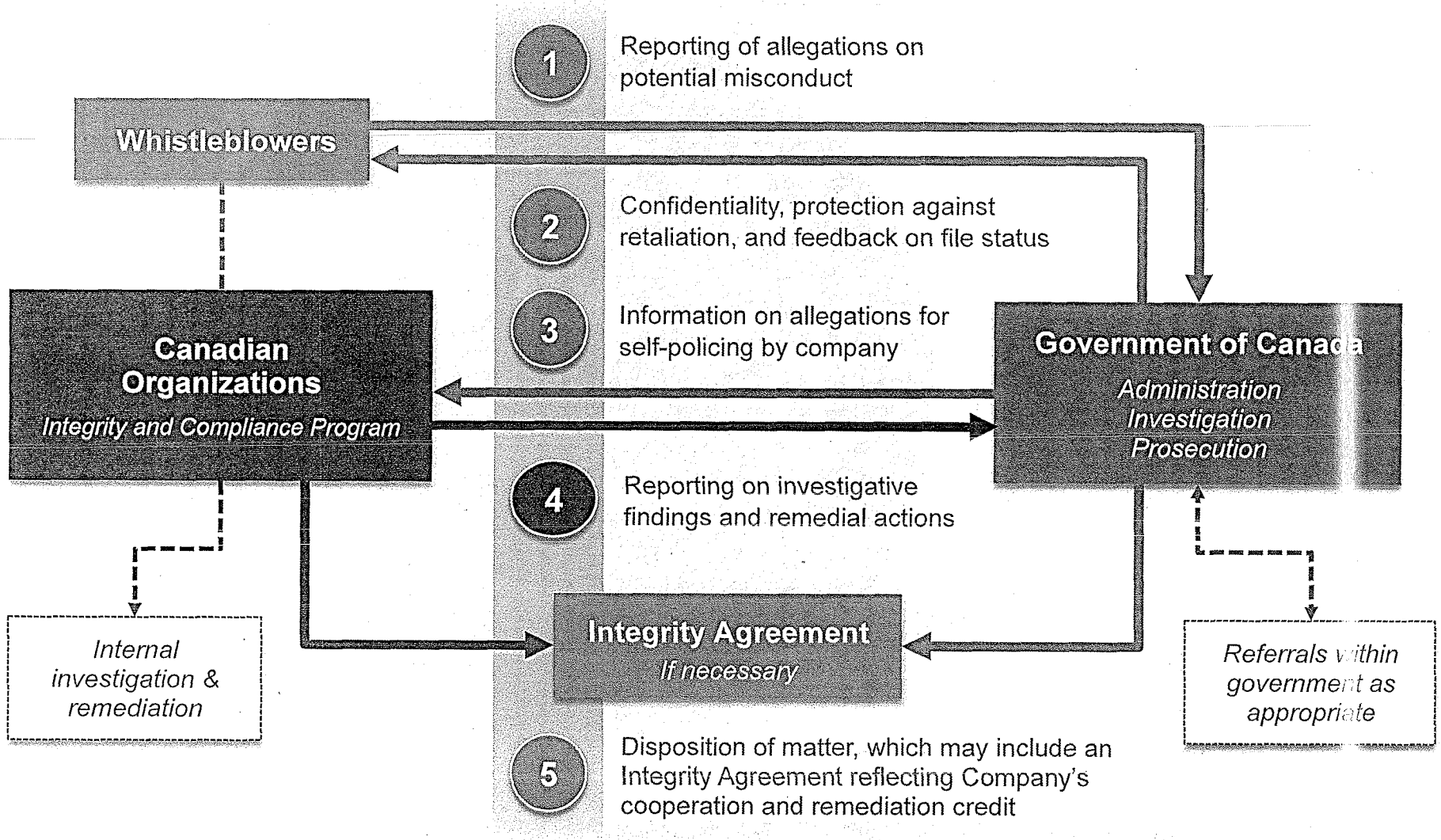
Overall Program Functions

- Prevent
- Detect
- Respond

*Adapted from U.S. and U.K. sentencing and regulator guidance

Illustration of a Framework to Address AML/CTF

Spotlight on Handling of Allegations from Whistleblowers



For More Information

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ORTUS EMPOWERING INTEGRITY

fccq | Fédération des chambres de commerce du Québec

CHAMBRE DE COMMERCE ACCRÉDITÉE 2017-2018

Consultation : Élargir la trousse d'outils du Canada afin d'éliminer les actes répréhensibles des entreprises

Volet : Accords de poursuite suspendue

Position de la FCCQ

Document présenté à Services publics et Approvisionnement Canada

Novembre 2017

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Sommaire exécutif

La FCCQ salue l'initiative du gouvernement du Canada de consulter les Canadiens et Canadiennes sur l'adoption possible du régime d'accord de poursuite suspendue (APS) et est tout à fait favorable à ce que le Canada se dote de cet outil additionnel pouvant être utilisé par les autorités responsables des poursuites afin de mieux répondre aux actes répréhensibles des entreprises.

Sans contredit, les entreprises doivent respecter les lois et règlements en vigueur au pays. Elles ont également la responsabilité de mettre en place des règles de gouvernance et des moyens de contrôle qui leur donnent le maximum de garantie que l'ensemble des employés et des administrateurs se conforment aux lois et ont un comportement éthique. Il arrive néanmoins que des individus contreviennent aux lois et posent des gestes illégaux dans le cadre de l'exercice de leur fonction. C'est dans ce contexte que les APS représentent un moyen efficace pour répondre aux crimes de nature économique commis par certains employés ou dirigeants sans affecter toute la réputation d'une entreprise.

En premier lieu, il faut noter les avantages des APS en tant qu'outils pour reconnaître la responsabilité criminelle des entreprises. Plus précisément, les APS évitent que des personnes tierces subissent les contrecoups causés par une poursuite judiciaire envers une entreprise (faillite, pertes d'emplois, etc.). De plus, ils obligent les entreprises à reconnaître leurs torts, à collaborer de bonne foi avec les autorités compétentes et à adopter des mesures correctives qui sont justes et équitables. Également, en évitant le recours aux procédures judiciaires, les APS permettent d'économiser temps et argent aux contribuables et enfin, ils améliorent la compétitivité des entreprises canadiennes à l'échelle internationale.

Pour toutes ces raisons, nous croyons que les entreprises qui ont des pratiques exemplaires, adoptent des mesures d'autodisciplines et de contrôle et collaborent de bonne foi avec les autorités devraient avoir recours à un APS. Par contre, afin de décourager et d'éviter la répétition d'actes illégaux ou contraires à l'éthique, la FCCQ estime que les entreprises qui ont recours à cet outil doivent payer des amandes, rembourser leur dû, faire la démonstration qu'elles ont mis en place des mesures rigoureuses de contrôle et collaborer de bonne foi avec les autorités. Également, les personnes reconnues coupables doivent être sanctionnées et traduites en justice.

Dans l'éventualité où ces conditions strictes sont respectées, les poursuites contre une entreprise pourraient être suspendues et les répercussions indirectes sur les personnes tierces pourraient être évitées.

Recommandations de la FCCQ

La FCCQ demande donc au gouvernement du Canada de :

- Mettre en place rapidement un mécanisme d'accord de poursuite suspendue qui permet aux procureurs de la couronne de prendre entente avec des entreprises dont un employé ou un dirigeant a commis un geste illégal ;

- Collaborer avec les gouvernements provinciaux et territoriaux à l'application de ce mécanisme.

Préambule

La Fédération des chambres de commerce du Québec (FCCQ) a été fondée en 1909 avec la mission de rapprocher les différentes associations d'affaires québécoises « pour assurer l'unité d'action en ce qui regarde les usages du commerce ». Elle représente aujourd'hui plus de 50 000 entreprises actives dans tous les secteurs de l'économie et dans toutes les régions du Québec.

La FCCQ est à la fois une fédération de chambres de commerce et une chambre de commerce provinciale. Elle regroupe en effet 138 chambres de commerce locales et 1 100 membres corporatifs, ce qui en fait le plus vaste réseau d'affaires de la province.

Depuis sa fondation, la FCCQ s'emploie à promouvoir la liberté d'entreprendre et à défendre les intérêts de ses membres au chapitre des politiques publiques, afin de favoriser un environnement d'affaires innovant et concurrentiel qui contribuera à la richesse collective du Québec.

À ces fins, la FCCQ se fait un devoir de participer aux débats publics et de formuler des recommandations sur les enjeux politiques, économiques et sociaux qui font les manchettes de même que sur les enjeux qui préoccupent ses membres.

Introduction

En septembre dernier, le gouvernement du Canada a lancé une consultation publique sur l'instauration possible d'un régime canadien d'accords de poursuite suspendue (APS). D'emblée, la Fédération des chambres de commerce du Québec (FCCQ) salue cette initiative et souscrit entièrement à cette volonté de doter le Canada de cet outil additionnel pouvant être utilisé par les autorités responsables des poursuites afin de mieux répondre aux actes répréhensibles des entreprises.

Dans une économie de plus en plus globalisée, la FCCQ estime que les États doivent instaurer un environnement d'affaires qui assurent la compétitivité de leurs entreprises face aux concurrents étrangers. Il existe à l'échelle internationale un consensus croissant selon lequel les APS et les régimes similaires constituent une pratique exemplaire pour traiter les divers actes répréhensibles de nature éthique ou économique des entreprises. Ces régimes font désormais partie de l'environnement d'affaires de plusieurs pays, dont les États-Unis et le Royaume-Uni, deux partenaires commerciaux importants du Canada. Également, plusieurs pays comme la France, l'Australie et l'Irlande envisagent de se doter de ce type de régime. Le Canada accuse donc un retard en étant un des seuls pays développés à ne mettre aucun outil à la disposition des procureurs pour négocier avec les entreprises, ce qui affecte la compétitivité de ces dernières à l'échelle nationale et internationale.

À la FCCQ, nous croyons que les APS représentent un moyen efficace pour encourager la conformité des entreprises et les inciter à ne pas commettre d'actes répréhensibles.

Évidemment, nous reconnaissons que les gestes ou actes illégaux commis par certains dirigeants et employés doivent être dénoncés et punis. Par contre, nous croyons excessif que les gestes commis par certains individus viennent ternir l'ensemble de la réputation d'une organisation. Nous sommes d'avis que les répercussions indirectes sur les personnes tierces que sont les employés, actionnaires, fournisseurs et consommateurs doivent être considérées.

Pour ces raisons, nous recommandons au gouvernement du Canada de :

- **Mettre en place rapidement un mécanisme d'accord de poursuite suspendue qui permet aux procureurs de la couronne de prendre entente avec des entreprises dont un employé ou un dirigeant a commis un geste illégal ;**

- **Collaborer avec les gouvernements provinciaux et territoriaux à l'application de ce mécanisme.**

Dans ce présent document, nous répondons à certaines questions énoncées dans le document de consultation du gouvernement du Canada portant sur les APS. Nous portons une attention particulière aux avantages économiques de ces accords.

À la FCCQ, nous croyons que la confiance du public, des consommateurs et des investisseurs envers les entreprises est essentielle pour l'activité économique. Pour cette raison, nous croyons que des facteurs de considération (exemple : première offense de l'entreprise, collaboration, etc.) et des conditions strictes doivent être inclus dans un APS. Nous en faisons l'élaboration dans ce document.

La FCCQ ne se prononce pas sur les aspects spécifiquement juridiques, notamment le rôle des tribunaux, la durée de l'APS, la publication, la surveillance et l'indemnisation des victimes qui sont des sujets pour lesquels elle s'en rend à des acteurs spécialisés en ces matières.

Réponses aux questions de la consultation

Question 1. À votre avis, quels sont les principaux avantages et désavantages des APS en tant qu'outil pour reconnaître la responsabilité criminelle des entreprises au Canada?

À la FCCQ, nous croyons qu'il est clairement avantageux d'inclure les APS en tant qu'outils mis à la disposition des procureurs de la couronne pour reconnaître la responsabilité criminelle des entreprises. Les principaux avantages du recours à ces accords sont mentionnés ci-dessous.

i. Évite d'importants préjudices économiques

Au cours des dernières années, les enjeux liés au respect de l'éthique ont pris une importance notable dans les entreprises et plusieurs d'entre elles ont mis en place des mesures d'autodiscipline et de contrôle pour s'assurer que leurs comportements soient exemplaires. Toutefois, les entreprises ne sont pas à l'abri des gestes ou actes illégaux que pourraient commettre certains dirigeants ou employés.

Au Canada, certaines entreprises qui ont connu ce genre de difficulté ont dû faire face à des poursuites devant les tribunaux, puisqu'au Canada, il n'existe généralement pas de déjudiciarisation pour les entreprises. Durant la période de procès, l'entreprise ne peut plus effectuer de contrats avec des organismes publics et parfois privés, diminue ses activités, voit sa réputation de détériorer, perd des clients et est parfois conduite à la faillite. S'ensuivent de nombreuses pertes d'emplois et d'argent pour les employés, les actionnaires et fournisseurs.

À l'échelle internationale, certaines entreprises canadiennes ont longtemps été exclues de certains marchés publics et ont perdu d'importants contrats à l'étranger, les empêchant ainsi d'exporter et de faire rayonner l'expertise canadienne et québécoise.

À la FCCQ, nous sommes d'avis que les impacts négatifs sur les tierces personnes doivent être limités. Les APS permettent cela, car ils offrent aux procureurs de la couronne la possibilité de négocier avec les entreprises des ententes pour régler certains litiges en sanctionnant les personnes coupables en traitant leur geste devant les instances judiciaires. Les personnes fautives répondent donc de leurs actes, tandis que les autres n'en subissent pas les conséquences indues.

ii. Améliore la conformité et la culture des entreprises en matière d'éthique

Les APS améliorent généralement la culture d'éthique des entreprises. En fait, il est dans leur intérêt d'instaurer des mécanismes d'autodiscipline et de contrôle puisque les entreprises qui le font sont plus susceptibles de pouvoir avoir recours à un APS.

De plus, les APS obligent les entreprises à admettre leurs torts, à collaborer avec les autorités en divulguant volontairement les actes d'inconduite et à instaurer des mesures correctives justes et équitables afin de décourager la répétition de gestes illégaux.

Il est à noter que parmi les opposants aux APS, certains évoquent le fait que cet outil permet aux entreprises d'échapper à la justice. Il n'en est rien. En fait, les APS représentent un outil additionnel pouvant être utilisé par les tribunaux et n'excluent aucunement des poursuites pénales ou criminelles si l'entreprise a commis des délits qui justifient un tel recours.

iii. Évite le recours à des procédures judiciaires longues et coûteuses

Les poursuites des entreprises devant les tribunaux sont des procédures qui sont généralement longues et durent quelques années. Les APS, lorsqu'ils sont mis en place, permettent d'éviter le recours à une procédure coûteuse pour les contribuables.

iv. Améliore la compétitive des entreprises canadiennes à l'échelle internationale

Tel que mentionné préalablement, plusieurs juridictions ont déjà mis en place un système d'APS ou des mesures similaires. Nous croyons que le Canada devrait être au même niveau que ses principaux partenaires commerciaux puisque les entreprises ne sont pas insensibles à l'environnement fiscal, économique et juridique d'un État. Certains investisseurs pourraient hésiter à s'établir au Canada étant donné les risques encourus par d'éventuelles poursuites judiciaires et leur impact sur leur réputation.

Question 2 : À votre avis, pour quelles infractions le recours aux APS devrait-il être permis et pourquoi?

Le système d'APS implanté au Canada devrait s'inspirer davantage du modèle britannique parce que ce modèle vise spécifiquement les crimes économiques et les personnes morales.

En fait, nous estimons que cet outil doit avant tout être utilisé pour éviter que les entreprises subissent les soubresauts causés par l'inconduite de certains individus en matière de criminalité économique. En fait, « *bien que les entreprises aient une entité légale propre, ce sont les individus qui prennent des décisions en leur nom* [1]». Ainsi, les personnes qui ont commis des gestes illégaux doivent répondre de leurs actes. C'est pour cette raison que nous croyons que les ASP doivent s'appliquer aux entreprises et non aux personnes.

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[1] Transparency International Canada (Juillet 2017) : *Another arrow in the quiver*? http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf.
Traduction de : « *while corporations have a distinct legal persona, it is individuals who make decisions on behalf of corporations* »

Question 4 : Quels sont les facteurs qui devraient être pris en considération pour offrir le recours à un APS?

Nous croyons que le recours à un APS est justifié si :

- L'entreprise n'a aucun antécédent de conduite similaire ;
- Il existe dans l'entreprise des règles de gouvernance et de contrôle en matière d'éthique ;
- L'entreprise collabore de bonne foi avec les autorités responsables et reconnaît ses torts ;
- Une éventuelle poursuite engendrerait des conséquences négatives importantes et injustifiées pour des personnes tierces ;
- L'inconduite provient d'actions individuelles.

Un autre facteur important réside dans la déclaration volontaire. Il importe d'inciter les entreprises à signaler des actes d'inconduite. Tel que mentionné dans le cahier de consultation du gouvernement du Canada [2]: « *Compte tenu des structures organisationnelles complexes et des moyens de plus en plus en plus complexes de canaliser des fonds et de dissimuler des agissements illégaux, la criminalité des entreprises est souvent difficile à détecter.* » Ce passage démontre toute l'importance d'inciter les entreprises à divulguer de façon proactive les actes d'inconduite et selon nous, la déclaration volontaire devrait être prise en considération pour offrir le recours à un APS.

Question 5 : Quand le recours à un APS ne serait-il pas approprié?

Nous sommes d'avis que le recours à cet outil n'est pas approprié si les délits touchent de façon importante le public et minent l'intégrité envers les institutions publiques (exemple : les délits touchent plusieurs juridictions).

Également, nous croyons que les entreprises récidivistes qui ne mettent aucune mesure corrective ou programme de conformité en place ou qui refusent de collaborer ne devraient pas être admissibles à un APS. Il en va de même pour les actes qui impliquent plusieurs dirigeants ou l'approbation des membres du conseil d'administration.

[2] Gouvernement du Canada : *Élargir la trousse d'outils pour répondre aux actes répréhensibles des entreprises*, Volet Accords de poursuites suspendues : https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-fra.pdf

Question 6 : Quelles sont les conditions qui devraient être incluses dans un APS?

Pour avoir recours à un APS, une entreprise devrait se conformer à des conditions strictes. Ces conditions permettent notamment de punir les entreprises fautives et de maintenir la confiance du public envers le système judiciaire, en plus de favoriser la conformité et ainsi, la diminution de la criminalité économique des entreprises.

1. D'abord, les entreprises doivent être contraintes à **payer des amendes et à rembourser leur dû**. Cette condition renforce l'effet dissuasif d'un APS et incite les entreprises à mettre tout en œuvre pour que leurs employés et dirigeants aient des comportements sans reproche. Nous estimons que les entreprises ont la responsabilité de mettre en place des règles de gouvernance et des moyens de contrôle qui leur donne le maximum de garantie que l'ensemble des employés et des administrateurs se conforment aux lois et règlements.

2. Dans le cas où une entreprise a recours à un APS et que des individus ont été reconnus coupables, il est essentiel que celle-ci fasse la démonstration qu'elle a **mis en place des mesures rigoureuses de contrôle juste et équitable afin d'éviter et décourager la répétition d'actes répréhensibles**.

3. Par ailleurs, nous croyons que les entreprises doivent reconnaître leurs torts et que les personnes fautives doivent répondre de leurs actes. Pour ce faire, il est impératif que **les entreprises collaborent de bonne foi avec les autorités responsables de la poursuite, et ce, tout au long de l'enquête**, afin de faire en sorte que les **personnes responsables soient sanctionnées et traduites en justice**.

4. Dans le cas où l'entreprise respecte et se conforme aux conditions inscrites pendant la période déterminée dans l'accord, les poursuites contre celle-ci sont retirées à l'échéance de l'accord. À l'inverse, la condition selon laquelle **les autorités ont la possibilité d'annuler un APS** est importante, spécifiquement dans le cas où l'entreprise ne respecte pas les conditions inscrites.

Conclusion

La Fédération des chambres de commerce du Québec (FCCQ) a pour mission d'appuyer le développement des entreprises de l'ensemble des secteurs économiques du Québec et des régions. Elle favorise un environnement d'affaires qui favorise la compétitivité des entreprises et la prise de risque.

Actuellement, la FCCQ est préoccupée par la lenteur avec laquelle la criminalité des entreprises est traitée et par les conséquences qu'ont les poursuites judiciaires sur ces dernières et leurs employés, fournisseurs et actionnaires.

Certes, la criminalité économique des entreprises doit être dénoncée et punie avec sévérité. Toutefois, nous trouvons excessif que les gestes illégaux commis par certains employés ou dirigeants affectent toute la réputation d'une entreprise et menacent de nombreux emplois.

Il importe que le Canada se dote d'outil qui incite les entreprises à dénoncer les actes répréhensibles commis à l'intérieur de leur organisation et à adopter des mesures d'autodisciplines et de contrôles.

En plus d'éviter que de tierces personnes subissent les contrecoups d'une poursuite judicaire, les APS améliorent la conformité des entreprises et les incitent à collaborer pleinement avec les autorités dans le cas où des gestes illégaux sont commis.

Pour toutes ces raisons, nous croyons que le Canada devrait se doter rapidement d'un système d'APS et collaborer avec les provinces à l'application de dernier.

Comments on DPA proposal

Submitted on behalf of the Canadian Centre of Excellence for Anti-Corruption (CCEAC) – University of Ottawa.

Submitted by Pat Poitevin CACM / Co-Founder – Senior advisor of CCEAC

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Advantages:

- CFPOA and other corruption investigations are highly complex and lengthy. According to the OECD and what has been shown from experience is that an average international corruption investigation can last from 5 to 7 years. As such, while many investigations may be on-going, the number of prosecutions remain low. Canada has only 4 cases that have resulted guilty plea or verdict since the CFPOA was enacted. Consequently, Canada suffers from a visibility deficit in terms of prosecution and deterrence. With few companies in Canada being seen as being prosecuted and paying a price for corruption conduct, potential wrongdoers perceive low risk/high reward in corruption and are more likely to take that risk. Additionally, the fact that we only have a criminal prosecutorial process that can result in a criminal conviction which can also lead to debarment forces organizations to fight, delay and not cooperate with authorities – which adds to the lengthy time frame for investigations and prosecutions.
- Having a DPA regime will provide an incentive for companies to voluntarily disclose wrongdoings, cooperate with authorities and seek quick resolutions which will save time, money and resources for both the companies and the state. This in turn will increase the number and frequency of cases being adjudicated and increase the visibility of anti-corruption enforcement action which acts as a deterrent effect.
- DPA's will not replace criminal prosecutions as some bad actors may not qualify or merit DPA's but it can be a powerful tool in the toolbox of police and prosecutors to more effectively and more quickly deal with wrongdoing while ensuring that potential fines and conditions have the appropriate deterrent effect.
- Companies
- Because a company will get mitigating credits or even a declination for having a strong anti-corruption compliance program under a DPA regime, companies will be incentivised to be pro-active and ensure that they implement or improve their anti-corruption compliance measures. This incentive is very important in terms of prevention and changing the corporate culture.
- Under a DPA regime, more companies will voluntarily disclose wrongdoings, investigations and DPA settlements will increase and the number of cases making headlines will also increase the deterrent effect.
- A DPA regime will assist the investigations of bad actors operating in a targeted company by incentivising the company to collaborate and provide information on the wrongdoing of those bad actors. Borrowing from the US Yates memo and the US DOJ pilot project on corruption, companies will be credited for facilitating the investigation and prosecution of bad actors. This in turn will save time, money and resources while ensuring that justice is served.

Disadvantages

- We must ensure that the regime is not used for companies to avoid criminal prosecution when the evidence demonstrate a disregard for ethics, rules and a corporate culture of corruption.
- Learning from the lessons from the US and UK, the DPA process needs to be validated and approved by the courts and that the fines and conditions are proportional to the gravity of the offence and a high level of deterrence. DPA's should not be seen or dismissed as a "cost of doing business".
- DPA's should be seen as another tool for police and prosecutors and should be used when companies and/or individuals meet certain conditions and demonstrate that they qualify under certain parameters. We need to strike the right balance in the use of DPAs so that they do not become the defacto process where criminal prosecution is warranted.

Question 2: For which offences do you think DPAs should be available and why?

DPA's are in line with should be limited to a very few offences

Question 3: What role do you think the courts should play with respect to DPAs?

The CCEAC favors adapting the UK Bribery Act DPA model which ensures that all DPAs are validated and approved by the courts. This court approval is necessary to provide judicial review and credibility to the process and will ensure that any fines and conditions have proper judicial oversight.

Question 4: What factors should to be taken into account in offering a DPA?

- The severity of the offence
- The impact and time frame of the offence
- The quality, scope and breath of anti-corruption measures of the company
    - The evaluation of the company's compliance program is a critical step in demonstrating culpability and negligence
- The level of involvement of senior executives and other directing minds
- The complexity of the corruption offence in terms of measures taken by bad actors to develop and hide the scheme and circumvent existing controls
- The level, timing and breath of cooperation with authorities
- Was case the result of voluntary disclosure or whistleblowing
    - Did company disclose wrongdoings to authorities before allegations were know to authorities
- What remedial steps were taken after discovery of wrongdoings
- What remedial steps does the company plan to take under the DPA agreement
- Level of fine and DPA conditions proportional to gravity of offence and needed level of deterence

Question 5: When would a DPA not be appropriate?

Speaking strictly on corruption offences in general and CFPOA offences in particular, DPA's would not be appropriate when the offending party such as a company fails to cooperate with authorities, when it can be demonstrated that the company has no or very weak anti-corruption compliance measures, has overtly failed to implemented proper controls, has no or ignored

polices and procedures and where it can be demonstrated that the directing minds of the company have supported a corporate culture that supports corruption conduct.

Question 6: What terms should be included in a DPA?

- Remedial action to improve anti-Corruption compliance measures
- A time line and plan for remedial action
- Assigning of Independent monitors paid by company to ensure DPA conditions and remedial actions by company are implemented.
- Full collaboration in assisting authorities in investigating and prosecuting bad actors
- Full disclosure of any other potential wrongdoing
- No promise of immunity for wrongdoings and other offences discovered from DPA arrangement if not disclosed as part of DPA arrangements
- Fines should be high enough to act as a strong deterrent but should be part of a scale that should be reviewed to ensure both predictability, transparency and impact
- Where warranted and appropriate, directing the company to terminate the employment of bad actors or others when those have been shown to have been involved in the wrongdoings
- Using a lesson learned from the Siemens case, a portion of any fine should be directed to support anti-corruption education, prevention and outreach efforts.

Question 7: What factors should be taken into account in setting the duration of a DPA?

- The severity of the offence
- The scope of the remedial actions needed to improve the anti-corruption compliance program and measures
- The size and footprint of the company (remedial actions will take longer in a larger company operating in multiple jurisdictions)
- The financial health of the company

Question 8: Under what circumstances should publication be waived or delayed?

To ensure transparency and accountability and to build public trust in the process, publication of DPAs should be the default approach since it also serves a deterrent. Only where there would be a demonstrated threat to national security should publication be possibly waived or delayed. The reality is that either in an IPO, joint venture or other commercial transaction, the existence of corruption related wrongdoing is material information that needs to be disclosed and can be injurious to the acquiring party or potential partner and investor. The publication of DPAs should be a welcome action since it demonstrates to the market that the company has discovered some wrongdoings and has taken steps to deal with it.

Question 9: How should non-compliance be addressed?

- In the current global business environment with an ever-growing demand for transparency, accountability, ethics and anti-corruption measures, compliance is now becoming a competitive business advantage. As such, non-compliance should be treated seriously and severely. A DPA regime can help incentivise the need for compliance and promote the benefits of implementing a robust anti-corruption compliance program. Under a DPA regime, non-compliance to DPA terms and

conditions should be viewed as aggravating factors and should trigger consequences severe enough to act as a deterrent.
- The credibility of the DPA regime will rest on how the DPAs are applied and monitored.

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

- The very definition of DPA implies that the prosecution of the offending party is differed IF conditions are met and respected but that the party can be prosecuted for the wrongdoings should the conditions are not met. The offending party enters into this agreement with the full knowledge that they can be prosecuted with the evidence that was gathered and provided under the terms of the agreement. This process provides a strong incentive as well as a legal obligation on the offending party to ensure that the conditions under the DPA are respected. It is this threat of possible prosecution that ensures that the DPA conditions are taken very seriously. As such, facts disclosed during the DPA negotiations should be admissible in a prosecution against a company. If you remove this admissibility, you also remove the threat and incentive for the company to abide to the DPA conditions. Having entered into this agreement in the full knowledge of that fact, the company, there is nothing prejudicial to the arrangement.

Question 11: How should compliance monitors be selected and governed?

- Compliance monitors should be selected from a pool of experts in the field of compliance, ethics and anti-corruption that are know and recognized for their experience, competency and reliability.
- Due diligence need to be done on any potential monitor to ensure that there are no conflict of interest to ensure that the monitor is unrelated to the company and has no bias for or against the company.
- A code of ethics and governance should be developed that will govern the roles and responsibilities of monitors and ensure transparency, accountability and ethical standards by which all monitors must be governed.
- A pool of qualified candidates should be drawn-up that the courts can pick from when needed.
- A process for independent reporting of the monitor evaluation and assessments of a company's DPA conditions should be established to ensure consistency and quality control measures should be instituted to validate the work of the monitors.

Question 12: What use should be made of compliance monitoring reports?

- Report to the courts on the company's efforts in meeting the DPA conditions
- Used by the monitor, the courts and company to ensure that the company meet milestones, make appropriate and recommended changes and are made aware of serious gaps or deficiencies that could threaten their ability to meet the DPA conditions
- Reports should be aggregated and analysed to extract best practices, lessons learned and other data that will serve to evaluate and improve the process.
    - Lessons learned could also be used for training and outreach in helping other companies
    - Data could be made accessible to universities for empirical studies

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

- Corruption is the root cause of most social ills around the globe and contributes to social, political, economic and environmental harm and decay. Any company that pays a bribe to a corrupt official in any jurisdiction contributes to the perpetuation of that the culture of corruption and its related harm. Victim impact statements and restitution to victims should be part of the DPA process as a step to compensate for the harm caused by corruption. Introducing restitution in a Canadian DPA regime would send a very strong signal as to the seriousness and impact of such wrongdoings. It would also serve to support the anti-corruption prevention and outreach efforts being done by governments, NGOs and civil society.
- The terms of restitutions in a DPA should reflect the severity, scope and impact of the offence.
- As mentioned above, taking a lesson from the Siemens case, a percentage of the fine should be allocated to support anti-corruption prevention and outreach efforts and Canada and abroad.
- A special trust or fund should perhaps be created to manage this restitution portion of the fine that could be distributed, under specific guidelines, to vetted and relevant bodies and institutions that would support victims as well as prevention and outreach efforts.

Please add any other comments or suggestions regarding DPAs.

It is believed that the UK Bribery Act DPA model and now the DPA model being used in the new Australian anti-corruption which was based on the UK model should used to create a Canadian model. The U.S. DPA model is fraught with issues and lack the judicial oversight that the UK and Australian models have.

DPA's are very much needed in Canada to provide much needed tools for police and prosecutors to more effectively tackle corruption. It will also bring Canada in line with other jurisdictions and provide an incentive for companies to improve their compliance measures and to voluntarily disclose wrongdoings.

The mandate of the Canadian Centre of Excellence for Anti-Corruption (CCEAC) is to promote compliance, ethics and anti-corruption measures and help companies mitigate their risk and exposure to bribery and corruption. As such, we applaud the efforts of the Government of Canada in increasing anti-corruption efforts by introducing a DPA regime.

Should you have any questions about the CCEAC or wish further input from us on the DPA process or the review of the Integrity Framework, please contact us.

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November 16, 2017

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Dear Ms. Glover and Mr. Piragoff,

RE: Expanding Canada's Toolkit to Address Corporate Wrongdoing – Deferred Prosecution Agreement Stream

Chartered Professional Accountants of Canada (CPA Canada) applauds the Government of Canada's ongoing commitment to take action against corporate wrongdoing. We welcome the government's consultation on whether to expand Canada's toolkit to address corporate crimes.

CPA Canada is pleased to comment on the possible introduction of a deferred prosecution agreement (DPA) regime in Canada. In its recent report, Transparency International (TI) Canada notes that "...in the Canadian context - where enforcement activity levels are chronically low – DPAs, if properly designed and implemented, have the potential to support increased enforcement of anti-corruption laws and increased self-disclosure and compliance by corporations." [1] For its part, the government has an important balancing act to play when considering the adoption of a DPA mechanism, while ensuring that the design and implementation of such a regime supports the public interest.

[1] Transparency International Canada. *Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada.* July 2017. Page 6.

The development of a DPA regime could be a valuable part of the government's efforts to strengthen the integrity regime for public procurement. Equally however, the government should consider a DPA in the context of efforts to combat money laundering, terrorist financing and other forms of corporate crimes. These are complex areas, where unintended consequences may arise if a holistic approach is not taken. Therefore, we encourage the government to consider the prospect of a DPA as an element of a new, multifaceted framework that can better serve the public interest with respect to tackling corporate crimes, and encouraging cooperation from both whistleblowers and the organizations themselves.

CPA Canada and the Public Interest

CPA Canada is the national organization which represents Canada's accounting profession, with more than 210,000 members at home and abroad. The Canadian CPA designation was created through the unification of three legacy accounting designations (CA, CGA, and CMA). We represent highly qualified professionals who demonstrate an ongoing commitment to providing the highest standards of accounting, ethics and best business practices. Ethics is at the core of every CPA's professional reputation.

CPA Canada acts in the public interest and contributes to both economic and social development, according to its mission. We support the setting of accounting, auditing, and assurance standards for business, not-for-profit organizations, and government. We contribute to accountability and transparency through practices that foster healthy capital markets. Additionally, we provide guidance on a range of subjects, including the profession's role in the fight against financial fraud, money laundering and corruption.

The Canadian Context

Canada enjoys a very strong national and international brand that is closely connected to our global reputation for transparency and responsible business practices. However, in recent years, Canada has faced increased scrutiny on its response to illegal activities that improperly benefit certain individuals and corporations such as corruption, tax evasion, and money laundering.

CPA Canada recognizes the real threat posed by money laundering, terrorist financing, and other forms of illegal and unethical conduct such as corruption, to Canada's national reputation, economy, and society.

As part of our commitment to taking a leadership role in the fight against these activities and protecting Canada's brand and reputation, we would suggest that Canada consider developing a strategic blueprint that addresses the most pressing challenges and opportunities.

A Strategic Blueprint - DPA Regime

In our view, the government should continue its cooperative and consultative process with key stakeholders, including regulators, in the private and public sector to develop a strategic blueprint to protect Canada's brand. Such a strategic blueprint will help create a robust and fair system in Canada to effectively address corporate wrongdoing. Potential efforts to consider could include:

1. Development of a legal framework, similar to those existing in other countries such as the United Kingdom and the United States, which would incentivize organizations in the public interest to self-report, cooperate with law enforcement, and remediate instances of misconduct. This legal framework would include implementing DPAs into Canadian law.
2. Development of new, national standards outlining expectations for organizational integrity and compliance programs.
3. Establishment of a framework around whistleblowing, including secure channels for whistleblowers to report potential misconduct without fear of reprisal or recrimination.
4. Development of enhanced, transparent, and streamlined processes for law enforcement, prosecutors, and other parties to address allegations of misconduct.
5. Creation of public registries of legal persons that enable Canadian businesses to know their customers better and gain insight into the ultimate beneficiaries of Canadian assets.

CPA Canada made this proposal to Finance Canada earlier this year when commenting on the issues to consider in the upcoming parliamentary review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and Canada's Anti-Money Laundering and Anti-Terrorist Financing regime.

While CPA Canada has not responded to the specific questions raised in the government's discussion paper, our commentary above strives to highlight the importance of considering the relevance of a DPA regime to achieve a more effective and transparent process for corporate compliance. We are mindful that jurisdictions with DPAs must not be perceived as enabling government and corporations to negotiate "deals behind closed doors." Therefore, transparency, disclosure and independent oversight will be seen as critical features to include if a DPA regime is created in Canada.

The time is ripe to consider if the public interest might be better served with this additional means to hold offenders to account, to encourage self-reporting of wrongdoing and to potentially deter corporate misconduct and improve compliance.

International Ethics Development

In providing this input, we also wish to note an international ethics development that Canada's CPA profession is currently reviewing. In July 2016, the International Ethics Standards Board for Accountants (IESBA) announced changes to its Code of Ethics for Professional Accountants (IESBA Code) concerning *Responding to Non-Compliance with Laws and Regulations* (NOCLAR). The revised IESBA Code sets out a framework for the response of professional accountants to known or suspected NOCLAR, including whether the known or suspected NOCLAR should be disclosed to an appropriate authority.

In Canada, the rules of professional conduct established by provincial CPA bodies must be as stringent as the IESBA Code unless there is a legal, regulatory or public interest reason to differ. The CPA profession's Public Trust Committee is currently considering the NOCLAR changes to the IESBA Code in relation to the CPA profession's existing ethical standards and within the context of Canadian laws, regulations and the public interest.

We appreciate the chance to provide these comments and look forward to the government's next steps on this important issue.

Yours truly,

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la Chambre de commerce du Montréal métropolitain

Équilibrer notre cadre juridique pour assurer la pérennité de nos entreprises

Recommandations de la Chambre de commerce du Montréal métropolitain dans le cadre des consultations du gouvernement du Canada portant sur les accords de poursuite suspendue

16 novembre 2017

Préambule

Forte d'un réseau de plus de 7 000 membres, la Chambre de commerce du Montréal métropolitain (CCMM) agit sur deux fronts : porter la voix du milieu des affaires montréalais et offrir des services spécialisés aux entreprises et à leurs représentants. Toujours au fait de l'actualité, elle intervient sur des dossiers déterminants pour la prospérité des entreprises et de la métropole. Avec l'appui de ses experts Acclr, la CCMM vise à accélérer la création et la croissance des entreprises de toutes tailles, ici et à l'international.

Introduction

Le gouvernement du Canada a entrepris depuis le début des années 2000 de renforcer son système pour lutter contre la criminalité économique. Jusqu'à maintenant, le gouvernement s'était surtout concentré sur le renforcement des lois et sur la sévérité des peines imposées. Peu de travail avait été fait sur les mécanismes mis en place. Ainsi, à l'heure actuelle, le pouvoir judiciaire canadien n'a que deux options à sa disposition dans la lutte contre la criminalité économique : renoncer à poursuivre une entreprise faute de preuves ou s'engager dans un procès, souvent long et coûteux pour toutes les parties impliquées. Dans ce contexte, l'accord de poursuite suspendue (APS)[1] représenterait un instrument supplémentaire pour les procureurs et les tribunaux canadiens.

Sur la scène internationale, différents pays intensifient leurs efforts pour combattre les crimes économiques et l'APS s'avère être un instrument privilégié par plusieurs. Le Royaume-Uni et les États-Unis ont déjà mis en place le régime d'APS. La France a adopté un mécanisme semblable en 2016 et l'Australie a effectué cette année des consultations publiques pour se doter du même outil[2].

Le Canada doit s'appuyer sur les meilleures pratiques internationales pour lutter contre la corruption, tout en faisant en sorte de ne pas désavantager nos entreprises face à la concurrence étrangère. Ainsi, la CCMM appuie la volonté du gouvernement d'intégrer un mécanisme d'APS à son cadre juridique. En effet, les APS ont le potentiel d'améliorer l'application de nos lois, de favoriser la divulgation volontaire d'infractions commises en entreprise en plus de limiter les dommages économiques engendrés par les poursuites judiciaires pénales.

La CCMM recommande au gouvernement d'adopter le régime d'APS en tenant compte des considérations suivantes :

I. Favoriser la divulgation volontaire des crimes économiques

Le Canada doit se doter d'un outil supplémentaire pour inciter les agents économiques à déclarer ou à divulguer les actes répréhensibles. Présentement, lorsqu'une entreprise canadienne découvre qu'un employé actuel ou passé s'est rendu coupable de fraude ou d'autres délits économiques, aucun mécanisme ne l'encourage à se manifester et à coopérer avec les autorités. En réalité, c'est plutôt l'inverse. Si une entreprise déclare avoir commis des actes répréhensibles, elle court le risque de subir des poursuites pouvant causer des dommages importants à ses employés, à ses actionnaires, à ses investisseurs et à ses pensionnés. L'APS constitue donc une occasion de mettre à jour des actes frauduleux qui n'auraient autrement jamais été révélés et d'obtenir, en compensation, des sommes que des poursuites judiciaires pénales n'auraient pas permis de recouvrer.

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[1] L'accord de poursuite suspendue (APS) est une entente volontaire négociée entre un accusé et l'autorité responsable des poursuites. Il consiste généralement en des sanctions pécuniaires; de lourdes amendes; des sanctions non pécuniaires : réforme de la gouvernance, du conseil d'administration et licenciement d'employés responsables; un aveu de culpabilité; un accord de coopération et une période probatoire déterminée. En retour, les poursuites contre l'entreprise sont levées aussi longtemps que la société respecte les clauses de l'accord. (ALEXANDER & COHEN (2015), cités par : INSTITUTE FOR RESEARCH ON PUBLIC POLICY (2016), *Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement).*

[2] INSTITUTE FOR RESEARCH ON PUBLIC POLICY (2016), *Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement.*

Les APS représentent une alternative susceptible de dégager des bénéfices, autant pour les pouvoirs publics que pour les entreprises visées par des allégations d'inconduite. Les pays qui se sont dotés du régime d'APS constatent des effets bénéfiques en ce sens qu'ils sont des incitatifs stratégiques pour les sociétés à coopérer avec les autorités tout au long de l'enquête et à identifier les individus responsables des actes criminels.[3]

Ultimement, ce mécanisme permet aux procureurs de récolter des preuves pour sanctionner les parties responsables et facilite le versement de réparations aux victimes de l'offense. Il est également démontré que les APS permettent d'améliorer la gouvernance d'entreprise grâce à des réformes obligatoires. En cas de conformité, ils permettent de réduire la probabilité d'actes répréhensibles futurs dans les entreprises impliquées[4].

II. Viser un juste équilibre : sanctionner les actes criminels tout en évitant des dommages importants à l'économie

La corruption est un frein important à l'économie et l'inefficacité qu'elle engendre ralentit le rythme des affaires, tout en minant la confiance du public. Le Canada doit jouer un rôle de leader dans la lutte contre la corruption et les crimes économiques graves commis par des entreprises, qui doivent être sanctionnés sévèrement.

Le régime actuellement en vigueur au Canada est strict et ferme afin de décourager toute entreprise à commettre un acte répréhensible. Ainsi, lorsqu'une poursuite se conclut par une reconnaissance de culpabilité, les entreprises responsables sont exclues des marchés publics canadiens et étrangers, ce qui les prive d'importantes parts de marché.

Toutefois, la concurrence mondiale croissante et la complexification des affaires présentent leur lot de défis pour nos entreprises. Bien que toute organisation doive assumer pleinement la responsabilité de ses actes, nous devons être sensibles au fait que nos entreprises peuvent être particulièrement à risque lorsqu'elles ciblent un nouveau marché ou qu'elles approchent un marché public en utilisant une stratégie de consolidation. En effet, des firmes n'ayant aucune intention de s'engager dans des pratiques commerciales illégales peuvent subir des pressions sur des marchés étrangers, ou encore s'associer avec des partenaires et des fournisseurs susceptibles de commettre des fautes[5]. Ce contexte plus sensible s'observe par exemple chez des entreprises actives dans certains pays en développement œuvrant dans des industries clés telles que les secteurs des mines, des infrastructures et des technologies.

Or, le processus de vérification diligente n'est pas sans faille et ne garantit pas la sécurité aux entreprises. Ainsi, dans le cas où des tiers commettent des actes répréhensibles, la réputation de tous les partenaires est minée, y compris celle de leurs filiales étrangères. Au-delà de la réputation même, ces situations ont également des conséquences négatives pour les employés, les investisseurs et les pensionnés, pourtant sans reproche. Les effets peuvent être importants pour notre économie en entraînant :

- La fermeture d'une entreprise bien établie;
- Des pertes fiscales;
- La suppression d'emplois à haute valeur ajoutée;
- La vente à rabais d'un fleuron à des intérêts étrangers;
- Une perte d'expertise locale.

La CCMM insiste donc sur l'importance d'adopter l'APS au Canada pour limiter ces pertes pour l'économie canadienne. Ce mécanisme devrait être mis en œuvre sous la supervision des tribunaux et être transparent quant aux entreprises ayant annoncé leur intention de négocier une entente. Pour les entreprises admissibles, l'APS s'avèrerait une occasion de démontrer leur bonne volonté, de revoir leur gouvernance

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[3] TRANSPARENCY INTERNATIONAL CANADA (2017), *Another Arrow in the Quiver: Consideration of a Deferred Prosecution Agreement Scheme in Canada.*

[4] *Ibid.*

[5] GOUVERNEMENT DU CANADA (2017), *Le prix à payer : S'attaquer à la corruption dans le commerce international*, [En ligne : http://delegues commerciaux.gc.ca/canadexport/0000655.aspx?lang=fra]

et d'adopter des réformes de conformité appropriées. Cet outil a également le potentiel de désengorger le système judiciaire en évitant dans certains cas des procédures longues et onéreuses. Ultimement, le gouvernement et l'entreprise accusée y gagneraient[6].

III. S'inspirer des meilleures pratiques pour moderniser le cadre juridique canadien

L'adoption d'un régime d'APS permettrait de résoudre la situation actuelle, qui désavantage nos entreprises face à la concurrence étrangère sur les marchés publics canadiens et internationaux. En effet, le statu quo écarte des entreprises canadiennes d'importants contrats à l'étranger, car leur intégrité peut être remise en question par leurs concurrents sur la base d'accusations de corruption toujours en instance. En étant privées de ces occasions d'affaires, les entreprises canadiennes voient leurs pertes se chiffrer en millions de dollars.

De plus, nos entreprises sont en position de désavantage concurrentiel par rapport à leurs contreparties américaines ou britanniques, qui ont déjà accès à un régime d'APS et sont admissibles aux contrats publics au Canada. Nous devons moderniser le cadre juridique canadien et l'uniformiser aux meilleures pratiques sur la scène internationale. Sur ce point, le gouvernement devrait étudier l'approche du Royaume-Uni, qui serait plus conforme à la tradition juridique canadienne. Le régime d'APS britannique est intéressant, car il comprend des contrepoids aux limites du modèle américain, notamment de meilleures garanties en matière de surveillance judiciaire. En effet, le modèle du Royaume-Uni exige une supervision judiciaire forte dans les affaires comportant un APS, et les tribunaux britanniques sont impliqués à chaque étape du processus[7].

La CCMM invite le gouvernement du Canada à mettre sur pied un mécanisme d'APS transparent et étroitement encadré pour s'assurer de son acceptabilité par les entreprises et la population. Le gouvernement devra veiller à ce que le recours à l'APS soit conditionnel au respect de l'intérêt public et soumis au contrôle des tribunaux. Nous devons à tout prix éviter que les APS n'en viennent à être considérés que comme un simple coût de fonctionnement pour les entreprises[8].

Conclusion

La CCMM soutient que le gouvernement doit aller de l'avant et mettre en place un régime d'APS au Canada, en étudiant les facteurs de succès dans les pays s'étant dotés d'un tel système. C'est une occasion d'équilibrer notre cadre juridique pour assurer la pérennité de nos entreprises. Les entreprises canadiennes sont le moteur du développement économique, de la création d'emplois et de l'innovation au pays. Nous devons donc nous doter des outils nécessaires pour répondre aux crimes économiques des sociétés et favoriser la divulgation volontaire, sans engendrer des conséquences néfastes pour les travailleurs, les investisseurs et les tierces parties qui ne sont pas responsables des actes d'inconduite.

Nous demandons au gouvernement d'adopter un régime d'APS qui imposera aux entreprises de se manifester rapidement, de coopérer avec les autorités, de divulguer tout acte illégal découvert, d'adopter un programme de conformité et de verser des dédommagements. Elles devront entreprendre des réformes organisationnelles importantes pour éviter de futures inconduites. Si le processus est clair et prévisible, il jouira de la confiance du public et représentera pour les autorités un outil essentiel dans la lutte contre la corruption, les fraudes, les pots-de-vin et autres crimes économiques commis par des entreprises.

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[6] TRANSPARENCY INTERNATIONAL CANADA (2017), *Op. cit.*

[7] *Ibid.*

[8] INSTITUTE FOR RESEARCH ON PUBLIC POLICY (2016), *Op. cit.*

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Friday/Vendredi, November/Novembre 17, 2017 at/à 16:19:34

Title: Consultation sur les accords de poursuite suspendue

q1: L'APS permet de lutte contre la criminalité tout en favorisant une rapide réhabilitation et en remplissant certains objectifs pénologiques avec efficacité. Il permet la prévention des crimes futurs. Il est rapide et permet à l'entreprise et à l'État d'éviter un procès long et coûteux. L'entreprise s'en sort sans conséquences judiciaires traditionnelles et sauvegarde ainsi sa réputation. Par ailleurs, l'APS permet de s'adapter à la nature particulière du crime économique et de la criminalité en col blanc. Il permet de protéger les entreprises en tant qu'entités collectives incapables d'agir d'elles-mêmes et ainsi sauvegarder les intérêts des personnes innocentes comme les employés, les investisseurs, les actionnaires et autres parties prenantes. Son adoption par le Canada permettra de faire face aux effets de la mondialisation de façon coordonnée avec d'autres États occidentaux qui possèdent ce mécanisme comme les États-Unis, la France, le Royaume
e Uni et bientôt l'Australie. Enfin, ce mécanisme permet à l'État de collecter des sommes importantes d'argent contribuant, non seulement à punir efficacement le contrevenant, mais aussi à restituer les biens aux victimes ou à les indemniser.

Mais l'APS peut aussi être perçu comme contraire au principe de la primauté du droit qui veut que tout le monde soit soumis à la même règle de droit quelle que soit sa puissance. Mais les inconvénients sont moins nombreux que les avantages.

q2: Toutes les infractions économiques à l'exception des infractions règlementaires.

q3: Valider l'accord en y apportant des ajustements nécessaires et non pas l'annuler. Les tribunaux devraient aussi se prononcer sur la défaillance à remplir les conditions contenues dans l'APS.

q4: L'autodénonciation, la collaboration aux enquêtes, la prise en charge spontanée des victimes s'il y en a, les mesures correctives adoptées dans la foulée pour éviter la commission du même crime. En résumé, un APS devrait être concédé en cas de:
1. coopération divulgation volontaire d'actes illégaux;
2. absence d'antécédents de criminalité/irrégularités;
3. adoption d'un programme de conformité pour éviter la récidive;
4. autres mesures correctives mises en place après le crime notamment le changement de direction, de spécialisation, ou de gouvernance de l'entreprise pour démarquer des irrégularités; la punition aux auteurs de la conduite illégale
5. nature isolée du crime commis ;
6. durée et gravité moins importantes de l'infraction

q5: En cas d'implication systémique de hauts dirigeants faisant de l'entreprise une organisation criminalisée et en cas de récidive sur une courte période ou lorsque les responsables des actes illégaux sont seulement des individus.

q6: La mise en place des programmes ou mesures de conformité; le paiement des pénalités substantielles; la clause de réparation y compris la réhabilitation des victimes de l'infraction; la clause de coopération pour dénoncer les autres parties ou employés impliqués dans le crime.

q7: L'étendu et l'ampleur des manquements à la loi et leur complexité; la taille de l'entreprise, le nombre d'acteurs et /ou employés impliqués, la durée de la conduite illégale reprochée.

q8: Lorsque cela compromet la sécurité des individus ou lorsque cela nuit aux enquêtes et procès connexes. Il en serait de même lorsque les parties ne sont pas parvenues à s'entendre

q9: Si c'est un manquement mineur, donner une 2e chance. Si c'est important comme défaillance, reprendre les poursuites. Dans tous les cas, il appartiendrait au tribunal de déterminer les manquements et leur ampleur.

q10: Lorsque l'entreprise n'a pas collaboré de bonne foi.

q11: Les sélectionner parmi les gens de certains ordres professionnels ou parmi les avocats, les policiers ou les comptables à la retraite.

q12: Pour évaluer si les clauses de l'APS ont été bien mises en oeuvre.

q13: Lorsque les victimes sont des personnes physiques ou morales identifiables. En cas de victimes qui sont des États, l'indemnisation devrait tenir compte de la non implication des dirigeants politiques dans la commission de l'infraction, autrement l'indemnisation devrait être retardée ou faite à une oeuvre caritative.

comments: Il s'agit d'une belle initiative. Toutefois, leur efficacité ne sera pas à la hauteur de ce que nous observons ailleurs comme aux États Unis ou au Royaume uni parce que ici les crimes économiques sont difficiles à poursuivre. En effet, comme il est difficile d'attribuer la responsabilité pénale aux entreprises, celles-ci ne se sentiront pas nécessairement obligées de s'auto-dénoncer ou de collaborer à une enquête de la police. Autrement dit, sauf dans des rares cas comme dans l'affaire SNC-Lavalin, il n'y a pas d'incitatif qui fait que les entreprises cherchent à se prévaloir du mécanisme de l'APS. Pour améliorer les choses, il faudrait changer les règles d'attribution de la responsabilité pénale aux entreprises comme on l'a fait au RU. En effet, la tendance maintenant est de laisser de côté la doctrine de l'identification, qui reste la règle au Canada, pour favoriser une attribution de la responsabilité pénale aux entreprises basée sur le défaut d
e conformité. Il faudrait aussi améliorer le système de dénonciation éthique "whistleblowing" et en faire un régime fort qui favorise la dénonciation des actes répréhensibles tout en protégeant efficacement les lanceurs d'alerte. Le système de dénonciation créé par Revenu Canada devrait être étendu à tous les cas de crimes économiques.
