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SENT BY E-MAIL

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

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.

Respectfully,

Bruce McMeekin