

Improving our legal system to ensure the sustainability of our companies

*Recommendations from the Chamber of Commerce of Metropolitan Montreal as
part of the consultations of the Government of Canada on deferred prosecution
agreements.*

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Preamble

With a network of over 7,000 members, the CCMM is active on two fronts: being the voice of the Montréal business community and delivering specialized services to businesses and their representatives. With its finger on the pulse of current events, it acts on issues that are decisive for the prosperity of the city's businesses. With the support of the Acclr experts, the CCMM's goal is to accelerate the creation and growth of businesses of all sizes, at home and around the world.

Introduction

Since the beginning of the 2000s, the Government of Canada has been trying to increase its ability to fight corporate crime. Until now, the Government has focused most of its efforts on strengthening laws and increasing the severity of penalties. Until now, hardly any work has been done on the measures implemented. Currently, the Canadian legal system only has two options at its disposal to fight corporate crime: halt the prosecution of a company due to a lack of evidence or commit to undertaking court proceedings that are often long and costly for every party involved. In this context, a deferred prosecution agreement (DPA)¹ represents an additional tool for the Canadian court system.

Globally, various countries have doubled their efforts to fight corporate crime and many have relied on a DPA regime, such as the United Kingdom and the United States. France adopted a similar system in 2016 and Australia has begun public consultations in view of implementing the same tool².

Canada must rely on the best international practices to fight corruption while making sure our companies are not put at a disadvantage on the international market. The CCMM supports the Government's willingness to integrate a DPA system into its legal framework. In fact, DPAs can potentially improve the enforcement of our laws, promote the voluntary disclosure of corporate wrongdoing, and limit the economic impact caused by criminal prosecution.

The CCMM recommends that the Government adopt the DPA regime while taking account the following:

I. Making it easier for economic actors to voluntarily admit to corporate crime

Canada must equip itself with an additional tool to incite economic actors to admit to or disclose wrongdoing. Currently, when a Canadian company finds out that a current or past employee has admitted to fraud or any other economic crime, there is no system in place to encourage them to disclose this misconduct and cooperate with authorities. Quite the opposite, in fact. If a company says they've committed wrongdoings, they run the risk of being faced with lawsuits that can seriously impact their employees, shareholders, investors, and pensioners. The DPA is an opportunity to shed light on fraudulent actions that would never have been revealed otherwise and to obtain monetary compensation that legal proceedings would not have recovered.

The DPA is an alternative that may be profitable for both public authorities and the companies targeted by allegations of misconduct. Countries that have implemented a DPA regime have reaped the benefits of this

¹ A DPA is a voluntary agreement negotiated between an accused party and legal authorities that often involves financial penalties, heavy fines, or non-monetary penalties (a reform of the company's governance, board of directors, the firing of responsible employees; an admission of guilt; an agreement to cooperate; and a determined probationary period). In return, the company will not face prosecution as long as they respect the terms of the agreement. ALEXANDER & COHEN (2015), cited by: 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*.

strategic incentive for businesses to cooperate with authorities during investigations and to identify individuals responsible for corporate crime³.

Ultimately, this system allows prosecutors to gather evidence to penalize the responsible parties and make it easier for victims of the crime to obtain compensation. DPAs have also been proven to improve corporate governance thanks to mandatory reforms. When the company complies, there are less likely to commit future wrongdoings⁴.

II. Finding the right balance: penalizing criminal acts while preventing damage to the economy

Corruption has a major negative effect on the economy and the resulting inefficiency slows down the pace of business while eroding public confidence. Canada must play a key role in the fight against corruption and serious white-collar crime and guilty companies must be severely penalized.

Canada's current regime is a strict one in order to discourage any company from committing wrongdoings. Legal proceedings end with an admission of guilt, thereby excluding companies from Canadian and foreign government contracts, robbing them of significant market share.

Growing global competition and the increasingly complex nature of business present major challenges for our companies. Even though any organization must take full responsibility for their actions, we must be aware that our companies can be particularly at risk when they target a new market or apply for a government contract with a consolidation strategy. In fact, businesses with no intention of resorting to illegal practices can be pressured on foreign markets to do so, or associate with partners and providers susceptible of misconduct⁵. This type of situation can happen when companies become active in developing countries in key industries such as mining, infrastructure, and technology.

Sometimes, due diligence fails and the security of companies is compromised. In cases where third parties commit wrongdoings, the reputation of every partner is affected, including foreign affiliates. These situations also negatively impact employees, investors, and pensioners, who are all blameless in these situations. The effects can be significant on our economy by causing:

- Closing an established company
- Tax losses
- The loss of high added-value jobs
- A discounted sale of a national flagship company to foreign investors
- A loss of local talent

The CCMM is insisting on the importance of adopting a DPA in Canada to limit these losses for the Canadian economy. This system must be supervised by courts and be transparent for companies that have stated their intention to negotiate an agreement. For eligible companies, a DPA is an opportunity to demonstrate their goodwill, review their governance, and implement the appropriate compliance reforms. It's a tool that has the potential to unclog the judicial system while avoiding, in certain cases, long and costly procedures. Ultimately, it is a win-win for both the Government and the accused company⁶.

³ TRANSPARENCY INTERNATIONAL CANADA (2017), *Another Arrow in the Quiver: Consideration of a Deferred Prosecution Agreement Scheme in Canada*.

⁴ *Ibid.*

⁵ GOVERNMENT OF CANADA (2017), *Paying the price: Confronting corruption in international business* [Online: <http://tradecommissioner.gc.ca/canadexport/0000655.aspx?lang=eng>]

⁶ TRANSPARENCY INTERNATIONAL CANADA (2017), *Op. cit.*

III. Finding inspiration from best practices to modernize the Canadian legal system

Adopting a DPA plan would fix the current situation that puts our companies at a disadvantage for Canadian and international government contracts. In fact, the status quo is preventing Canadian companies from signing major contracts abroad because their integrity is put into question by competitors who are citing pending corruption charges. By being unable to take advantage of these business opportunities, Canadian companies lose millions of dollars.

Moreover, our companies remain at a competitive disadvantage because their American or British counterparts can rely on a DPA regime and remain eligible for government contracts in Canada. We must modernize the Canadian legal system and implement the best international practices. To this effect, the Government should study the United Kingdom's approach, whose legal system is more closely related to Canada's. The British DPA regime is interesting because it includes countermeasures to the model used by the Americans, such as a stricter judicial oversight. In fact, the United Kingdom's model requires rigorous judicial oversight in business matters involving a DPA and British courts are implicated in every step of the process⁷.

The CCMM invites the Government of Canada to implement a transparent DPA regime that is closely regulated to make sure it is accepted by companies and citizens alike. The Government must make sure that the use of a DPA is in line with the public interest and under the supervision of the court system. We must absolutely prevent DPAs from turning into just another operating cost for companies⁸.

Conclusion

The CCMM believes that the Government must move forward and implement a DPA regime in Canada and study the factors of its success in countries that have decided to use this kind of system. It's an opportunity to improve our legal system to ensure the sustainability of our companies. Canadian companies are the engine of our country's economic growth. They create jobs and foster innovation. We must equip ourselves with the right tools to fight corporate crime and make it easier for these wrongdoings to be disclosed, without negatively affecting employees, investors, and third parties who are not at fault for this misconduct.

We ask the Government to adopt a DPA regime that will require companies to come forward quickly, cooperate with authorities, disclose any illegal act discovered, adopt a compliance program, and pay compensation. They will have to undertake major organizational reforms to avoid future misconduct. If the process is transparent and predictable, the public will have more confidence in the system and authorities will have an invaluable tool in their fight against corruption, fraud, bribery, and other white-collar crimes committed by companies.

⁷ *Ibid.*

⁸ INSTITUTE FOR RESEARCH ON PUBLIC POLICY (2016), *Op. cit.*