



ACEC Response to Government of Canada Consultation on Deferred Prosecution Agreements (DPAs)

The Association of Consulting Engineering Companies - Canada (ACEC) welcomes the opportunity 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.

We agree that corporate criminal conduct must be subject to effective, proportionate and dissuasive penalties and increasing detection and we support measures such as DPAs that improve compliance and corporate culture. 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.

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*

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

- Encourages self-reporting by companies and/or their employees.
- Primary objective is rehabilitation and corrective action that improves compliance and corporate culture.
- May be used to leverage or compel compensation of wronged parties in a timelier manner than through civil courts.
- Does not penalize stakeholders, employees, investors and other third parties who had no involvement in the wrongdoing.
- Less cost to taxpayers by avoiding lengthy prosecutions with uncertain outcomes.
- More flexibility for Crown to use the right solution for the right situation.

Disadvantages

- Perception that Crown is tolerant of corporate wrongdoing.
- Perception that DPAs resulting from corporate wrongdoing can become a "cost of doing business".
- Will require diligent monitoring of compliance with DPAs in order to be effective and earn public trust.

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

- The initial priority could be to apply DPAs in a similar fashion to DPAs available to major competitors such as the USA and the United Kingdom in order to level the playing field. Such offences could include fraud, tax evasion, bribery/bid-rigging and money laundering.
- If the DPA regime proves effective, it may be worth expanding the availability of DPAs to regulatory offences in areas such as environment, health and safety. In these areas, a quick resolution (as opposed to protracted prosecution) is essential to minimizing and mitigating long-term consequences.
- In context of this consultation, it is assumed that DPAs would only be available to corporate entities and that culpable individuals would continue to be subject to conventional prosecution.

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

- 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.
- Courts can ensure the integrity of the DPA process and provide confidence to victims and taxpayers.
- Courts can provide opinions on whether the draft terms and conditions of the DPA are fair, reasonable and proportionate.
- The courts should be available to the parties to rule on any disputes regarding compliance with a DPA.
- If not otherwise covered under the specific DPA, victims and wronged parties should still have the right to seek compensation from the civil courts

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

- Severity of alleged misconduct and its impact on victims.
- The impact on stakeholders including employees, investors and other third parties who had no involvement in the wrongdoing (this would include other partners in a consortium).
- The circumstances under which the alleged wrongdoing came to the attention of the Crown (e.g. was it self-reported).
- Past conduct of the corporate entity.
- Are there available actions, compensation and/or remediation that would adequately address the harm created by the wrongdoing and/or that would effectively deter future wrongdoing?
- The capacity of the corporate entity to fulfill the actions, compensation and remediation to be under taken as conditions of the DPA.

Question 5: When would a DPA not be appropriate?

- Significant harm is done to the public, or to victims of the alleged wrongdoing.
- 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.
- The corporate entity does not accept responsibility for its actions.

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

- Allocation by the corporate entity including a statement of relevant facts.
- A clear and detailed statement of the actions, compensation and remediation to be undertaken as conditions of the DPA, including expected outcomes and timelines.
- Mentoring, reporting and auditing requirements to ensure compliance with the DPA.
- Obligations to reimburse the Crown's costs to administer and verify compliance associated with the DPA.
- Conditions under which the DPA would be discharged, if any.
- Conditions under which the DPA would be rescinded and that the corporate entity would face prosecution.
- Identification of any individuals facing prosecution in relation to the wrongdoing.

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

- Severity of alleged misconduct and its impact on victims.
- The amount of time required to fulfill the actions, compensation and remediation to be undertaken as conditions of the DPA.

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

- 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 but exceptions should be considered on a case-by-case basis.
- Exceptions should be considered to protect victims of the wrongdoing, individuals that were not complicit in wrongdoing and to protect individuals who may have brought wrongdoing to the attention of the authorities.

- Exceptions should also be considered in order 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.

Question 9: How should non-compliance be addressed?

- The Crown should provide the corporate entity with an opportunity to address the non-compliance, especially in cases when the corporate entity is proactive and brings the non-compliance to the attention of the Crown.
- If non-compliance is beyond the organization's control, the corporate entity should have the opportunity to address the non-compliance and to negotiate the terms of the DPA with the Crown.
- The courts should determine, upon advice of the Crown, whether non-compliance has taken place.
- There should be a number of consequences for non-compliance of a DPA, available to the Crown to reflect to the degree of the non-compliance, including:
 - 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.

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 future prosecution against a company for other similar crimes.
- Specific exclusions could be negotiated between the Crown and the corporate entity if it is the opinion that such an exclusion would allow the "greater good" to be served.

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

- Compliance monitors should report directly to the Crown prosecutor but costs associated with the monitor should be borne by the corporate entity in accordance with the DPA between the Crown and the organization.
- Selection of monitors should be made on the basis of a mutually agreed set of criteria/terms in a similar fashion in which arbitrators are selected during alternative dispute resolution between parties.
- There should be a standardized set of criteria/terms available to the parties which would form the basis of monitor selection.

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

- Effective compliance monitoring reports allow review of the implementation and effectiveness of the ethics and compliance programme of the corporate entity, compared to its obligations under the DPA.
- Compliance monitoring reports would presumably be material to any determination of non-compliance.
- Effective compliance monitoring reports would also facilitate continuous improvement of the DPA regime.

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

- The “victim” in an economic crime is often the purchaser of goods and services from the corporate entity. Consequently, the losses being sought by victims could potentially include:
 - Replacement of or correction to goods and services if they are not adequate or not delivered;
 - Liquidated damages if non-delivered or inadequate delivery results in financial loss to the victim;
 - Reimbursement of victim costs associated with bribes or fraud.
- Victims could also include employees, investors or business partners that suffer direct financial loss, lost opportunity, and reputational damage as a result of the wrongdoing.
- Since, victim compensation generally falls within provincial jurisdiction, it may be difficult to demonstrate and apply in the case of a foreign-based offence.
- The Crown may be in a position to leverage negotiation of a DPA to leverage compensation for victims that may otherwise be difficult to quantify and obtain through traditional litigation.
- Should a DPA not include a commitment to compensation, the DPA should not preclude victims from seeking compensation through the civil courts outside of the DPA.

About the Association of Consulting Engineering Companies - Canada

The Association of Consulting Engineering Companies (ACEC) is the national voice of consulting engineering in Canada. Consulting engineers are experts in infrastructure and will be directly involved in delivering the federal government’s \$126 billion commitment to infrastructure.

ACEC is a federation of 12 provincial and territorial associations representing over 400 companies that provide engineering and other professional services to both public and private sector clients

across Canada. These services include the planning, design and execution of all types of infrastructure projects as well as providing independent advice and expertise in a wide range of engineering and engineering-related fields. Through offering these services, ACEC member companies have a direct influence on virtually every aspect of our economic, social and environmental quality of life in Canada.

Consulting engineering in Canada is a \$28.4 billion a year industry. ACEC member firms directly employ over 60,000 Canadians. Canada is globally recognized for its engineering services and is the second largest exporter of engineering services in the world. ACEC is an active and influential member of the International Federation of Consulting Engineers (FIDIC). ACEC is also an association member of Transparency International Canada.

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