Implementation of a deferred proceedings program for enterprises: why wait?

October 20, 2016

On October 3 2016, Table Justice-Québec, a roundtable organization grouping the main actors of the law and justice community in Quebec, made public its action plan and proposed 22 measures relating to the administration of justice in Quebec. One of the subjects discussed by the participants to this roundtable was that of increasing the use of alternative dispute resolution measures, such as the non-judicial processing of several adult offences and alternative measures for teenagers. Is it not now time for applying similar measures to legal persons through the implementation of a deferred proceedings program for enterprises?

The deferred proceedings agreement, already implemented in several countries such as the United States and England, is defined as a negotiation procedure used in the context of penal and administrative proceedings. When a person collaborates with the prosecuting authority, either by acknowledging the facts giving rise to matter, by paying compensation or a fine or performing rehabilitation, the prosecuting attorney abandons the proceedings pending against that person.

As early as 1970, this type of diversion, better known in Quebec as alternative measures for minors or diversion program for adults was put to the test in the context of a pilot project. Moreover, since 1995, a diversion program applicable to some criminal offences applies at the DPCP (Direction des poursuites criminelles et pénales) and also municipal courts. This diversion program allows the prosecutor under the authority of the DPCP to deal with the matter on a non-judicial basis (DPCP directive NOJ-1).

Hence, various factors are taken into consideration for the application of the diversion program, such as the specific circumstances in which the offence was committed (degree of premeditation, subjective seriousness, particularly as to the consequences of the offence from the victim's point of view, degree of participation of the alleged perpetrator and the interest of justice, degree of collaboration, risk of recurrence). Sending a warning letter (or a formal notice only used in the case of breach of a probation order containing a repayment condition) is the mean used to apply this program.

The application of this diversion measures program directly reduces congestion in the courts and allow them to process other types of matters more speedily.

However, this program does not apply to matters involving legal persons. Enterprises (as well as individuals) who run afoul of penal justice currently cannot avail themselves of the opportunity to avoid judicial proceedings.

In the wake of the *Jordan* case[1], would it not be time to implement such a measure for enterprises? In this case, the Supreme Court of Canada reminded all participants in the criminal justice system

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that they had to make efforts and coordinate in order to make additional structural and procedural changes. The highest court of Canada ordered a stay of the proceedings against Mr. Jordan since he had had to wait for 49 months (between the charges being laid and him being found guilty) to know the outcome of his case.

The Supreme Court created a new analysis framework to determine what is a reasonable period of time for undergoing trial within the meaning of section 11(b) of the *Canadian Charter of Rights and Freedoms*. According the Court, changes must be made. Accordingly, it is highly important for the judicial system to make substantial efficiency gains.

In the light of these teachings, it seems to us that public authorities must now consider the implementation of alternative measures for enterprises. Moreover, concerning the advisability of instituting proceedings, it is important to note that DPCP directive ACC-3 currently requires the prosecutor to consider the existence of an alternative solution. Therefore, to the current requirement that prosecutors consider the application of the diversion program in the case of natural persons who committed criminal offences, should be added that of considering the application of a similar program to legal persons.

The very efficiency of our judicial system, which, like any other public institution, has limited financial resources, is at stake.

Why wait?

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1. *R* c. *Jordan* 2016 CSC 27 08-07-16.

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