Canada

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A well thought out internal investigation can turn the tide for an organisation in crisis. When conducting an internal investigation, it is crucial to account for the nuances of the jurisdiction in which the investigation takes place. Although there are similarities between conducting an investigation in Canada and other jurisdictions, such as the United States and the United Kingdom, the Canadian legal landscape features unique considerations that make its investigations distinct. This chapter sets out some of these uniquely Canadian considerations.

Principles of corporate culpability in Canada

One of the key goals of an internal investigation is often to uncover sufficient information to assess an organisation's potential liability. Determining the criminal liability of an organisation, such as a corporation, involves unique considerations in Canada, as the Canadian approach to corporate criminal culpability differs from the US and UK. Until 2004, under the doctrine of 'identification theory', corporations in Canada could only be found guilty of offences committed by the 'directing mind' of the corporation.[1] A corporation's 'directing mind' consisted of individuals with the capacity to exercise decision-making authority on matters of corporate policy.[2] In 2004, the government of Canada amended the Canadian Criminal Code[3] to expand corporate culpability.[4]

The Criminal Code expands the criminal liability of corporations from the actions and intentions of a corporation's 'directing mind' to its 'senior officers'.[5] The Criminal Code defines a 'senior officer' as 'a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.'[6] The term 'representative' is broadly defined in the Criminal Code as 'a director, partner, employee, member, agent or contractor of the organization.'[7]

The ability of manager level employees to constitute 'senior officers', and therefore create criminal culpability for a company, was considered in *R v Pétroles Global Inc*.[8] In that case, the Superior Court of Quebec found Pétroles Global criminally liable for a price-fixing scheme in violation of the Canadian Competition Act[9] carried out by one of its general managers and two other employees. In *Pétroles*, Justice Tôth held that a manager lever employee could be considered a 'senior officer' for the purpose of the Criminal Code and can create criminal liability for an organisation if that manager holds sufficient responsibility.

Section 22.2 of the Criminal Code makes an organisation a party to an offence (other than negligence) through the acts of its senior officers in three circumstances:

> *22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers*
>
> *(a) acting within the scope of their authority, is a party to the offence;*
> *(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or*
> *(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.*

Section 22.2(c) of the Criminal Code is noteworthy because it imposes an affirmative obligation on a senior officer who knows that a representative of the organisation (eg, a director, partner, employee, member, agent or contractor) is, or is about to be, a party to an offence to take 'all reasonable measures to stop them from being a party to the offence.'

Section 22.1 makes an organisation a party to a negligence offence if a representative of the organisation, acting within the scope of his or her authority, is a party to a negligence offence and the senior officer responsible for that aspect of an organisation's activities markedly departs from the standard of care that could reasonably be expected to prevent a representative of the organisation from being a party to the offence.

An organisation cannot avoid criminal liability in Canada by stipulating in contracts with senior officers or representatives that individuals are not to engage in criminal acts. Both sections 22.1 and 22.2 refer to a senior officer or representative acting 'within the scope of their authority'. In the past, organisations have tried to avoid culpability by asserting that the organisation did not authorise the commission of an offence.

The Supreme Court of Canada discredited this defence in *Canadian Dredge*. In that case, Justice Estey held that to allow such a defence would reduce corporate culpability to virtually nothing. Instead, where an act falls within the managerial area of a senior officer, that individual is presumed to have the necessary authority to commit the act.

In Canada, the defence of lack of authority may only succeed in limited cases where the senior officer or representative in question defrauds the organisation, commits an act to destroy the organisation, or commits the improper act solely for his or her benefit.

When conducting internal investigations in Canada, it is important to consider the roles and responsibilities of individuals involved in the conduct at issue, as well as individuals in a supervisory role. As was the case in *Pétroles*, even middle management level employees can create corporate culpability in Canada, either directly or through the oversight of employees or agents.

Considerations when sharing privileged information with third parties during an investigation in Canada

Situations often arise in the course of an internal investigation where an organisation may wish to share privileged information with third

parties. Historically, Canadian case law has supported the position that parties can share privileged investigative information without waiving privilege in a number of circumstances, including:

- sharing privileged information with authorities during resolution discussions;
- sharing privileged information during a transaction; and
- sharing privileged information with auditors.

However, recent case law has made the preservation of privilege over information shared with third parties in these contexts more challenging.

Recent case law for settlement privilege in Canada

Like many jurisdictions, discussions aimed at resolving a potential prosecution or dispute are protected by settlement privilege in Canada. It is well accepted that information disclosed to authorities in this setting cannot be used in court against the accused by prosecution; however, there are instances where information protected by settlement privilege may be disclosed to third parties by Canadian prosecutors. This disclosure occurs particularly in the context of the prosecution's obligation to disclose all information in its possession to a party charged with a criminal offence in Canada as part of the accused's right to full answer and defence.[10]

In *R v Nestlé Canada*,[11] a recent decision from the Ontario Superior Court of Justice, Justice Nordheimer held that, although settlement materials cannot be used against the settling party in a criminal or civil proceeding, where a disclosing party has resolved the charges (or potential charges) against it, settlement privilege does not protect settlement materials disclosed to prosecution from disclosure to another accused, where the other accused has a right to such disclosure. In *Nestlé*, two parties allegedly involved in a price-fixing cartel sought protection through the Competition Bureau's Immunity and Leniency Programmes, respectively.[12] As part of their obligations under those programmes, the parties provided information they had collected during internal investigations to prosecutors, including interviews. Conventionally, information disclosed in this setting could be considered protected by settlement privilege in Canada. A remaining member of the alleged cartel still under investigation sought disclosure of this information from prosecution during its trial.

Justice Nordheimer held that Canadian courts must balance the right of an accused to receive disclosure from the prosecution against the public interest of promoting the resolution of disputes with settlement privilege. On the facts of *Nestlé*, Justice Nordheimer found that the accused's right to full answer and defence must 'win out'. Furthermore, he found that settlement privilege does not prohibit the disclosure of factual information provided to prosecutors with respect to a proposed criminal prosecution in circumstances where the person providing that information does so with the knowledge that prosecutors intend to rely on some or all of that information for the purposes of that criminal prosecution.

In light of *Nestlé*, an organisation conducting an investigation in Canada must be prepared for the possibility that information disclosed in the course of negotiations aimed at the resolution of charges may be disclosed by the prosecution to another accused.

Recent case law for common interest privilege in the transactional context in Canada

Until recently, Canadian courts embraced common interest privilege in the transactional context, regardless of contemplated or existing litigation; however, recent case law has made this uncertain.

Historically, Canadian courts recognised that common interest protected privileged information disclosed to a third party in the context of a commercial transaction where: (i) solicitor-client and/or litigation privilege applies to the information; (ii) the third-party recipient of information has a common interest in the transaction, and disclosure furthers this common interest; and (iii) privilege has not otherwise been lost through waiver, disclosure, operation of law, or with the consent of all parties that hold privilege over the information.[13]

A recent Federal Court decision, *Minister of National Revenue v Iggillis Holdings Inc*,[14] has cast doubt on the certainty of common interest privilege in the context of a transaction in Canada. Notwithstanding clear Canadian jurisprudence to support the existence of common interest privilege in the transactional context,[15] Justice Annis elected in *Iggillis* to follow principles set out in the New York Court of Appeals' decision *Ambac Assurance Corp v Countrywide Home Loans Inc*.[16] Justice Annis held that, despite common interest in the context of transactions being 'strongly implanted in Canadian law and indeed around the common law world',[17] it should no longer be recognised in the absence of contemplated or existing litigation where parties do not share legal counsel in Canada.

Iggillis has been appealed to the Federal Court of Appeal, but for the time being, it has created uncertainty with respect to the protection and scope of common interest privilege for transactions in Canada. Organisations conducting an investigation in Canada should pay special care and attention to the nature of privileged investigative information shared in the context of a transaction until the *Iggillis* appeal is decided.

Sharing privileged information with auditors in Canada

Unlike some jurisdictions, Canadian law allows an organisation to provide privileged information to accountants for the purpose of an audit when the information is compelled by a statutory obligation.

In *Interprovincial Pipe Line Inc v Canada (Minister of National Revenue)*,[18] a corporation delivered privileged documents to auditors pursuant to section 170(1) of the Canada Business Corporations Act.[19] Canadian tax authorities later sought disclosure of these documents. Justice Gibson held that the privileged documents were involuntarily disclosed and that the corporation preserved every intention to maintain privilege while complying with the auditor's demands. As such, the disclosure constituted a 'limited waiver' for the purposes of the audit and the documents remained privileged.

Interprovincial Pipe Line was followed in *Philip Services Corp v Ontario (Securities Commission)*.[20] In *Philip Services*, in-house counsel provided auditors with privileged legal documents regarding a senior officer's admission that he had fraudulently diverted company funds. The Ontario Securities Commission sought to admit these documents as evidence against the company. Justice Lane explained that there is a strong societal interest in the production of fair financial statements that are certified by fully informed auditors which protects privileged information disclosed at the auditor's behest.

To ensure that privilege is preserved over investigative information required for an audit, an organisation should set out in a letter to auditors that the privileged information is disclosed pursuant to a statutory obligation, that the organisation intends to maintain privilege over the documents, and that the auditor should not disclose the privileged information to any third parties.[21] As an additional precaution, an organisation can specify a privilege protection protocol with respect to the documents to reinforce the sincerity of its request that the information remain protected.

Self-reporting considerations in Canada

Unlike other jurisdictions that have developed sophisticated regimes to facilitate self-reporting of illegal conduct identified during the course of an internal investigation, the impact of, and procedure for, self-reporting remains uncertain for many offences in Canada. Outside of Competition Act offences, there are currently no guidelines or guaranteed benefits for an organisation to self-report in Canada.

Self-reporting violations of the Competition Act

Canada's Competition Act criminalises agreements to fix or control prices or output, to allocate sales, territories, customers or markets, or to rig bids. The Commissioner of Competition and his enforcement agency, the Competition Bureau (the Bureau), investigate alleged violations of the Competition Act. If they determine that a violation has occurred, they refer the matter to government prosecutors.

The Competition Act has an amnesty process that includes an Immunity Programme and a Leniency Programme. Participation in these programmes is voluntary, confidential and on a 'without prejudice' or settlement basis.

Immunity

The Bureau will assign an 'immunity marker' to an individual or organisation that is first to request immunity; for organisations, immunity (if granted) generally extends to all existing and former directors, officers and employees. To obtain immunity, the requesting party must provide a proffer to the Bureau, which provides evidence of an offence of which the Bureau is currently unaware, or of which the Bureau is aware but on which the Bureau has not obtained enough proof to mandate criminal prosecution.

Once a party has received a marker (on a 'no-names' basis by indicating the relevant product) and has indicated to the Bureau that it wishes to participate in the Immunity Programme, the Bureau will confirm the continuation of the marker for a period of 30 calendar days (absent extensions, which are not typically provided) to allow the applicant to provide a proffer. Thus, an internal investigation is required for purposes of the proffer and, if provisional immunity is granted, for purposes of the disclosure obligations required of an immunity applicant. These obligations are onerous and include disclosure of any and all conduct that may violate any criminal provision of the Competition Act.

Leniency

Where the 'immunity spot' is no longer available, a cooperating party may qualify for lenient treatment under the Bureau's Leniency Programme. An applicant to the Leniency Programme who receives a marker will also have 30 calendar days (absent extensions, which are not typically provided) during which to complete its proffer to the Bureau, and will have the same investigative and disclosure obligations as an applicant to the Immunity Programme.

The first-in applicant to the Leniency Programme is generally eligible for a 50 per cent reduction in the fine that would otherwise have been prosecuted. Subsequent applicants to the Leniency Programme are eligible for a reduction of 30 per cent, but later applicants are not eligible for a greater discount than prior applicants.

Immunity plus is available should an organisation provide the Bureau with probative evidence of a second conspiracy or other criminal conduct unrelated to the Bureau's current investigation or in respect of products not being examined by the Bureau under its current investigation.

Treatment of individual participants

Where a business qualifies for immunity or first-in leniency, all current (and generally former) directors, officers and employees (and possibly agents), will not be subject to imprisonment, fines or other penalties, as long as they cooperate. For the second and any subsequent leniency applicant(s), current and former directors, officers, employees and agents may be charged depending on their role in the offence.

Self-reporting outside the Competition Act

Outside of the Competition Act, Canadian law does not currently provide civil resolution or alternative non-criminal resolution vehicles, such as deferred prosecution agreements (DPAs) or non-prosecution agreements,[22] as options to resolve criminal or quasi-criminal charges. Current resolution vehicles available to organisations in Canada are (i) to convince the authorities not to proceed with criminal charges (such as by attempting to persuade the authorities to pursue individual rogue employees instead of the organisation); (ii) plead guilty to a criminal offence; or (iii) fight the matter at trial.

Unlike the US, there are no guidelines that set out what credit may be earned for self-reporting to, and cooperating with, authorities in Canada. While credit, such as a reduced fine or decision not to require a third-party compliance monitor, is more likely if an organisation enters a guilty plea, the precise amount of credit is uncertain and at the discretion of the prosecutor and judge.

Despite this uncertainty, Canadian law enforcement has publicly stated that, for Corruption of Foreign Public Officials Act[23] offences, the extent of the credit for self-disclosure and cooperation will be material, provided that it was fulsome, not selective. This statement is supported in the limited case law available with respect to self-reporting under the CFPOA. For example, in *Her Majesty the Queen v Niko Resources Ltd.*[24] the court imposed a C$9.5 million dollar fine and onerous probationary conditions for an improper payment of C$200,000 in violation of the CFPOA. In contrast, in *Her Majesty the Queen v Griffiths Energy International*[25] the court only imposed a C$10.35 million dollar fine and no probation for an improper payment in violation of the CFPOA in excess of C$2 million. A distinguishing feature of these cases is that in *Niko Resources* there was no self-disclosure and more limited cooperation, whereas in *Griffiths Energy*, the guilty organisation self-reported and fully cooperated. Accordingly, while there are no fixed guidelines in Canada for self-disclosure and cooperation, it will likely be a material factor for the sentence of a corporate accused.

Conclusion

In the high-stakes environment of internal investigations, subtle differences between jurisdictions can have a significant impact on the outcome of an internal investigation. This chapter has set out several features of Canadian law that make conducting investigations in Canada unique: corporate culpability in Canada, recent developments to the law of privilege in Canada, and Canada's developing self-reporting regime. By accounting for these distinct considerations, an organisation can be confident in its ability to weather the storm of an internal investigation in Canada.

Notes

1 *Canadian Dredge and Dock Co v the Queen*, [1985] 1 SCR 662 (*Canadian Dredge*).
2 *The Rhone v The Peter AB Widener*, [1993] 1 SCR 497.
3 RSC 1985, c C-46 (the Criminal Code). The Criminal Code sets

out the majority of Canadian criminal offences and much of Canada's criminal procedure.

4 Corporate culpability for Criminal Code and other offences created by the government of Canada is determined by sections 22.1 and 22.2 of the Criminal Code (Interpretation Act, RSC 1985, c I-21, section 34). Corporate culpability for offences created by any provincial or territorial government in Canada may be governed by the statute creating the offence, the Criminal Code, or the 'identification theory', depending on the offence.

5 Criminal Code, sections 22.1 and 21.2.

6 Ibid, section 2: 'senior officer'.

7 Ibid, 'representative'.

8 2013 QCCS 4262 (*Pétroles*).

9 RSC 1985, c C-34 (the Competition Act).

10 *R v Stinchcombe*, [1991] 3 SCR 326.

11 2015 ONSC 810 (*Nestlé*).

12 See 'Self-reporting considerations in Canada: Self-reporting violations of the Competition Act', below.

13 *Maximum Ventures Inc v de Graff*, 2007 BCCA 510 (*Maximum Ventures*).

14 2016 FC 1352 (*Iggillis*).

15 *Maximum Ventures*; *Pitney Bowes of Canada Ltd v R*, 2003 FCT 214; *Barrick Gold Corp v Goldcorp Inc*, 2011 ONSC 1325.

16 (2016) 27 N.Y.3d 616.

17 *Iggillis* at para 91.

18 [1996] 1 FC 367 (*Interprovincial Pipe Line*).

19 RSC 1985, c C-44. Section 170(1) requires a company to provide access to records requested by auditors.

20 (2005) 13 BLR (4th) 69 (*Philip Services*).

21 *Interprovincial Pipe Line*, *Philip Services*, and *Canada (Minister of National Revenue) v Thornton*, 2012 FC 1313.

22 Transparency International Canada has recently released a well-researched paper supporting the implementation of a DPA regime in Canada, with appropriate safe guards ('Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada' [July 2017]: www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf). We believe the absence of a DPA regime in Canada to represent a significant gap in the current Canadian white-collar landscape and endorse the adoption of a DPA regime in Canada.

23 SC 1998, c 34 (CFPOA). The CFPOA is the Canadian equivalent to the Foreign Corrupt Practices Act (US) and the Bribery Act 2010, 2010 c 23 (UK).

24 Unreported (*Niko Resources*).

25 Unreported (*Griffiths Energy*).

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Randall Hofley is a former special counsel to the Commissioner of Competition and law clerk at the Supreme Court of Canada for (now) Chief Justice Beverley McLachlin. For over 25 years, he has been a trusted counsel for leading companies and trade associations operating in Canada. Randall advises on all aspects of competition law, with a focus on Competition Bureau cartel and monopolisation investigations, contentious merger matters and class actions defence; this practice has Randall appearing as lead litigation counsel before the Canadian Competition Tribunal and all levels of courts across Canada. Both inside the government and in private practice, Randall has worked on many of the most high-profile competition and trade law matters, substantially influencing the laws and policies that apply to companies doing business in Canada. In addition to his practice, Randall has been an adjunct professor of competition law at the Faculty of Law, McGill University, chair of the Canadian Bar Association's (CBA) International Law Section, chair of the American Bar Association's Canada Committee and chair of the CBA Competition Law Section's Criminal Matters Committee. He is consistently ranked as a leading competition lawyer and litigator in Canada, having been recognised in, among other publications, *Chambers Canada*, *Chambers Global*, *Canadian L'Expert*, *Benchmark (Litigation) Canada* and *The Legal 500*.

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Blakes business crimes, investigations and compliance group advises on and successfully defends clients in criminal, quasi-criminal, anti-corruption, regulatory and compliance matters. Multinational and domestic corporations and individuals subject to Canadian law retain us to advise and defend them in respect of a wide range of white-collar criminal charges, including under the Criminal Code, Corruption of Foreign Public Officials Act (CFPOA), Income Tax Act, Competition Act, Customs Act and provincial securities legislation. We also represent clients in pensions, environmental, tax and workplace safety matters, including preparing for audits, responding to regulatory inquiries and defending regulatory charges.

The group has experience directing multi-jurisdictional independent investigations on sophisticated white-collar, anti-corruption and competition matters. We regularly provide anti-corruption and compliance advice and have successfully defended clients charged with corruption and bribery of public officials. We are routinely engaged to conduct internal investigations, develop anti-corruption compliance programmes, review contract terms with foreign agents and joint venture partners, and conduct detailed anti-corruption due diligence during transactions. Prominent publicly traded companies regularly seek our advice in establishing anti-corruption and anti-bribery policies, compliance training, and reviewing the legality of proposed business practices.

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