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## Chapter 5

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# CANADA

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### I INTRODUCTION

In the aftermath of the global financial crisis, high-profile corporate scandals and growing public mistrust, there is a trend in Canada towards broadening the scope of corporate liability and strengthening the enforcement regimes for detecting and prosecuting corporate wrongdoing.

A regulatory or law enforcement investigation or prosecution against a corporation or a single individual within the corporation can be devastating and cause significant business disruption. Corporations facing allegations of wrongdoing should be prepared to react and respond in a timely and effective manner. The form of reaction and response will depend heavily on the nature and severity of the allegations; however, in all circumstances, the corporation must consider appropriate and necessary steps to mitigate potential business, legal and reputational risks.

There are a number of regulatory and law enforcement agencies in Canada empowered to investigate and prosecute not only corporations, but also their directors, officers and employees for corporate misconduct. The overlapping jurisdiction of these agencies has created a dense enforcement mosaic.

Federal, provincial and municipal police agencies are empowered to investigate suspected violations of Canada's Criminal Code,<sup>2</sup> such as fraud and insider trading, in

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2 RSC 1985, c. C-46 (Criminal Code).

addition to criminal offences under various other statutes.<sup>3</sup> The federal police agency, the Royal Canadian Mounted Police (RCMP), has exclusive authority to investigate and lay charges for foreign corruption and anti-bribery offences.<sup>4</sup> The RCMP currently has special investigation units in two major cities dedicated to the investigation of corruption offences. The RCMP also operates the Integrated Market Enforcement Team (IMET), which currently consists of 10 specialised investigative teams in four major financial centres, dedicated to the investigation of capital market offences.<sup>5</sup> Previously criticised for its lack of effectiveness and poor track record,<sup>6</sup> including its low conviction rate,<sup>7</sup> IMET's Toronto team recently relocated to the offices of the Ontario Securities Commission (OSC) in a bid to enhance cooperation and more effectively tackle white collar crime, including insider trading.<sup>8</sup>

Federal and provincial prosecution agencies in Canada share jurisdiction to prosecute certain criminal offences arising from corporate misconduct, including fraud. There are standing and *ad hoc* cooperation arrangements between the federal prosecution service, the Public Prosecution Service of Canada (PPSC),<sup>9</sup> and provincial prosecution services to enable cooperation and coordination over such criminal prosecutions. The PPSC has exclusive responsibility for prosecuting offences under more than 50 federal statutes, including the Competition Act,<sup>10</sup> the Income Tax Act<sup>11</sup> and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.<sup>12</sup>

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- 3 In Canada, constitutional jurisdiction over law enforcement is delegated to the provinces. In turn, the provinces typically delegate authority to large municipalities to establish police forces through provincial Police Acts. While the federal government does not have primary authority over police services, provinces may contract the RCMP to provide policing services.
- 4 An Act to amend the Corruption of Foreign Public Officials Act, SC 2013, c 26.
- 5 See RCMP, Integrated Market Enforcement Teams, online: Public Safety Canada, [www.publicsafety.gc.ca/cnt/cntrng-crm/rgnzd-crm/ntgrtd-mrkt-nfrcmnt-eng.aspx](http://www.publicsafety.gc.ca/cnt/cntrng-crm/rgnzd-crm/ntgrtd-mrkt-nfrcmnt-eng.aspx).
- 6 As of 2 March 2015, it was reported that IMET laid no charges in 2012, but laid charges against seven subjects in 2013 and 11 in 2014. See Janet McFarland, 'RCMP securities unit moving in to OSC offices', *The Globe and Mail* (2 March 2015), [www.theglobeandmail.com](http://www.theglobeandmail.com).
- 7 See Jeff Gray, 'After Nortel verdict, RCMP's fraud unit racks up dismal conviction record', *The Globe and Mail* (14 January 2013), [www.theglobeandmail.com](http://www.theglobeandmail.com). Two of the most noteworthy acquittals include former executives of Nortel Networks Corp and Royal Group Technologies Ltd. See *R v. Dunn*, 2013 ONSC 137, 104 WCB (2d) 1271; and *R v. De Zen*, 2010 ONCJ 630.
- 8 See Barbara Schechter, 'OSC and RCMP to fight white-collar crime under same roof as wire taps for insider trading come a step closer', *The Financial Post* (2 March 2015), [www.business.financialpost.com](http://www.business.financialpost.com).
- 9 See PPSC, 'About the Public Prosecution Service of Canada', online: Public Prosecution Service of Canada, [www.ppsc-sppc.gc.ca/eng/bas/](http://www.ppsc-sppc.gc.ca/eng/bas/).
- 10 RSC 1985, c. C-34 (Competition Act).
- 11 RSC 1985, c. 1.
- 12 SC 2000, c. 17.

In May 2013, the OSC established an enforcement partnership, the Joint Serious Offices Team (JSOT), to work collaboratively with federal, provincial and municipal police agencies in investigating and prosecuting serious capital market violations, including Ponzi schemes, boiler rooms and other fraud-related matters. For fiscal year 2015–2016, the OSC continues to focus on fraud-related and recidivist cases, improved investigative tools (including technological support through enhanced computer forensics)<sup>13</sup> and implementation of legislative changes necessary to facilitate the use of wiretaps and other electronic surveillance investigation techniques for investigations of insider trading and other capital market-related offences.<sup>14</sup>

During a criminal investigation, law enforcement agencies may exercise a range of powers, including searching corporate offices, searching and seizing electronic and other documents, and engaging in electronic surveillance. The investigatory powers of police are not without limitation and under ordinary circumstances, prior authorisation, in the form of a warrant, is required. The investigating officers must show that they have ‘reasonable grounds’ to conduct the search.<sup>15</sup> In the case of more extreme measures such as wiretapping, in the absence of imminent harm, investigators must seek prior authorisation and demonstrate that the surveillance is in the best interests of the administration of justice and that there is ‘investigative necessity’.<sup>16</sup> Police authorities are also increasingly using production orders, which are court orders used to obtain disclosure of relevant documents or electronic information from organisations and individuals not under investigation.<sup>17</sup> Canadian law enforcement agencies are increasingly using more aggressive investigation techniques, traditionally reserved for narcotics and organised crime offences, such as wiretaps, search warrants and other electronic surveillance, to investigate and prosecute corporate misconduct.<sup>18</sup>

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13 Ontario Securities Commission Draft Statement of Priorities 2015–2016 (2015), OSC Notice 11-771

14 OSC, Notice, Notice 11-770, ‘Notice of Statement of Priorities for Financial Year End to March 31, 2015’ (26 June 2014), [www.osc.gov.on.ca/documents/en/Securities-Category1/sn\\_20140626\\_11-770\\_sop-fiscal-2014-2015.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20140626_11-770_sop-fiscal-2014-2015.pdf), p.10.

15 Section 487 of the Criminal Code.

16 See *R v. Araujo*, 2000 SCC 65, at paragraphs 24–26. ‘Investigative necessity’ reflects Section 186(1)(b) of the Criminal Code, which requires that other investigative procedures have been tried and have failed, other investigation procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

17 Section 487.012 of the Criminal Code.

18 In *Imperial Oil v. Jacques (et al)*, 2014 SCC 66, the Competition Bureau obtained wiretap orders under the Criminal Code and intercepted over 220,000 private conversations as part of a price fixing conspiracy. In the ongoing investigation and prosecution of foreign and domestic bribery involving SNC Lavalin Group Inc. (SNC-Lavalin) (and related entities), the RCMP obtained information through authorised search warrants and wiretapped recordings. See ‘Same Bebawi, former SNC-Lavalin exec, released on \$200k bail’ *CBC News*, [www.cbc.ca/news](http://www.cbc.ca/news).

Despite efforts at both the federal and provincial levels, there is presently no national securities regulator in Canada.<sup>19</sup> Each of the 13 provincial and territorial securities commissions has the power to investigate and prosecute securities-related misconduct.<sup>20</sup> These provincial regulators also provide assistance and cooperation to each other under various voluntary cooperation protocols and through an umbrella organisation, the Canadian Securities Administrators. Each of the provincial and territorial securities commissions has broad powers for both the commencement and conduct of an investigation under separate securities statutes.<sup>21</sup> Investigators and examiners appointed by the securities commission have the right to: (1) examine documents, (2) enter into the business premises of any person or company named in an investigation order to inspect documents or other things used in pursuit of the company's business, (3) compel testimony or the production of documents or other information or things, and (4) apply to the court without notice for an order authorising the search of any premise or place and the seizure of any item specified in the order. The provincial and territorial securities commissions have jurisdiction to prosecute securities law violations administratively or quasi-criminally.

## II CONDUCT

### i Self-reporting

Self-reporting or voluntary disclosure of corporate misconduct is encouraged by various regulatory and law enforcement agencies in Canada, including through the use of leniency or immunity programmes for self-reporting as a means to increase the detection of criminal misconduct. In certain circumstances self-reporting is required, such as the

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- 19 On 19 September 2013, the Ministers of Finance of Canada, British Columbia and Ontario announced their agreement to establish a cooperative capital markets regulatory system, designed to better protect investors, enhance Canada's financial services sector, support efficient capital markets and manage systemic risk. See 'Ministers of Finance of British Columbia, Ontario and Canada Agree to Establish a Cooperative Capital Markets Regulator' (19 September 2013). Department of Finance Canada, [www.fin.gc.ca/n13/13-119-eng.asp](http://www.fin.gc.ca/n13/13-119-eng.asp). Yukon joined the cooperative capital markets regulatory system on 15 April 2015. See 'Cooperative Capital Markets Regulatory System: Important Developments' (16 April 2015), <http://ccmr-ocrmc.ca/cooperative-capital-markets-regulatory-system-important-developments/>. It is currently anticipated that the cooperative system will be operational in the fall of 2016. See Cooperative Capital Markets Regulatory System, [www.ccmr-ocrma.ca/about](http://www.ccmr-ocrma.ca/about).
- 20 These securities regulators have also delegated some of their responsibilities relating to investigations and prosecutions of certain conduct to self regulatory organisations.
- 21 For example, see Sections 11, 12 and 13 of the Securities Act, R.S.O. 1990, c. S.5 (Securities Act), which establish the investigative powers of the Ontario Securities Commission (OSC) and Sections 19 and 20, which establish the power of the OSC to require production of books and records and conduct compliance reviews of market participants, including public companies.

duty to report the spill of pollutants under the Environmental Protection Act.<sup>22</sup> Apart from self-reporting, a public company may otherwise be required to disclose corporate misconduct or the fact of an internal investigation as part of its continuous disclosure obligations under provincial securities law regimes.

While many Canadian regulatory and law enforcement agencies state that voluntary disclosure will result in a more lenient resolution, few provide any specific guidance or guidelines. With little or no assurance as to the likely benefit from self-reporting, the amount of any reduction on sanction or the circumstances that would warrant no enforcement action, corporations are faced with uncertainty as to whether their cooperation will be appropriately or fairly recognised. In addition to this uncertainty as to the likelihood or extent of leniency, corporations must consider the costs of voluntary disclosure, including reputational damage and the consequences of such admissions on other potential or existing civil proceedings, such as class actions, or other cross-border investigations or proceedings in determining whether and how to voluntarily disclose. Finally, unlike in certain jurisdictions, such as the United States, deferred or non-prosecution agreements (DPAs and NPAs) are not available in Canada, creating an inherent limitation when it comes to self-reporting.

In the securities regulatory context, some Canadian securities regulators have formal policies that recognise and encourage self-reporting.<sup>23</sup> In 2014, the OSC revised its formal Credit for Cooperation programme, which allows potential respondents to benefit from a variety of leniency measures if they have acted responsibly during the course of the investigation and have self-policed, self-reported and self-corrected the matters under investigation. The revised policy provides clarification regarding expectations for cooperation, self-reporting procedures and the circumstances under which the various forms of credit for cooperation will apply. In addition to forms of credit, such as reduced sanctions or no enforcement action, the OSC will now, in certain limited circumstances,<sup>24</sup> permit a potential respondent to enter into a settlement in which the respondent makes no admissions of fact or liability (commonly referred to as a no-contest settlement) or enter into no-enforcement action agreements.<sup>25</sup> Leniency under the Credit for Cooperation programme is not available in certain circumstances, including when the corporation puts its own interests (or the interests of its officers, directors or employees) ahead of its obligations to shareholders or the integrity of the

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22 RSO 1990, c. E-19, Section 92(1) (Environmental Protection Act).

23 For example, see Ontario's 'Credit for Cooperation' programme, Staff Notice 15-702 – Credit for Cooperation (13 March 2014) 37 OSCB 2583; and British Columbia's 'Credit for Assistance in Investigations' programme, BC Securities Commission Notice 2002/41 – Credit for Assistance in Investigations (17 October 2002) SECPOLY 88801723001.

24 No-contest settlements will not be available where the corporation (or individual) has: (1) engaged in abusive, fraudulent or criminal conduct, (2) misled or obstructed the regulatory investigation or (3) the misconduct has resulted in investor harm that has not been addressed in a satisfactory manner.

25 OSC Staff Notice 15-702 – Credit for Cooperation, 13 March 2014 (2014) 37 OSCB 2583, Section 2(b) and (d).

capital markets, arranges its affairs to delay reporting a matter that should be reported or to claim privilege to avoid providing details of potential breaches of Ontario securities laws.<sup>26</sup>

Since its enactment, there has been limited use of the Credit for Cooperation programme. The investigation of CP Ships Ltd remains the best example of a corporation receiving credit for cooperation from the OSC. Largely due to the credible process undertaken by the corporation, the OSC did not institute legal proceedings against CP Ships Ltd, notwithstanding that the company failed to disclose a material change in a timely manner and several of its insiders engaged in insider trading. In granting credit for cooperation, the OSC favourably considered the steps taken by CP Ships Ltd, including establishing a special committee of the board of directors to investigate the issues, providing the findings of its internal investigation and other relevant information to the OSC, publicly disclosing the investigation, and undertaking a voluntary review of its insider trading and corporate disclosure policies.<sup>27</sup>

Although the Credit for Cooperation programme has previously been viewed as ineffective,<sup>28</sup> the modernised framework of the revised programme contains credible mechanisms for more effective and timely resolutions. In 2014, the OSC approved and implemented the first no-contest settlements under the revised programme.<sup>29</sup>

Although encouraged under Canada's foreign corrupt practices regime, there are no formal programmes, protocols or guidelines for self-reporting, leniency or immunity. Two high-profile cases may provide some indication of the benefits of self-reporting. In *R v. Niko Resources Inc.*,<sup>30</sup> Niko Resources Inc was fined C\$9.5 million for providing gifts to a foreign public official worth approximately C\$200,000. Niko cooperated with the police investigation but did not self-report. In *R v. Griffiths Energy International Inc.*,<sup>31</sup> a new board and management team discovered that the company had previously made payments in excess of C\$2 million and provided certain securities to a company controlled by the wife of a foreign official while the company was negotiating with the foreign government for the grant of oil concession rights. The company commenced an independent internal investigation, self-reported and shared the results of its internal

26 Ibid, Sections 11 and 12.

27 Ontario Securities Commission, *Perspectives* (2005) Vol. 8 Issue 2, p.4. See also *Re Nortel Networks Corporation and Nortel Networks Limited (Settlement Agreement)* (2007) 30 OSCB 4747 (Ontario Securities Commission), paragraph 49 and *Re Research in Motion* (2009), 32 OSCB 1421 for instances in which no monetary penalties were ordered.

28 OSC Staff Notice 15-704 – Request for Comments on Proposed Enforcement Initiatives, 21 October 2011, (2011) 34 OSCB 10720. In this Request for Comments, the OSC noted: 'In reviewing the incidence of market participants requesting credit for cooperation under the program in recent years, staff have observed that the programme has not been widely accessed by market participants, or other parties, and the benefits listed above have not been achieved.'

29 See *Re Ernst & Young LLP* (2014), 37 OSCB 9227 (*Re Ernst & Young LLP*) and *Re TD Waterhouse Private Investment Counsel Inc.* (2014), 37 OSCB 10742 (*Re TD Waterhouse*).

30 (2012) AWLD 4565 (*Niko*).

31 (2013) AJ No. 412 (*Griffiths*).

investigation with the police and the PPSC and implemented a robust anti-corruption compliance programme. Griffiths Energy International Inc (Griffiths) paid a fine of C\$10.35 million, an amount just slightly more than the fine paid by Niko even though the value of the bribe was more than 10 times greater than the bribe made by Niko.

In contrast, under the Competition Act, two distinct programmes of self-reporting are available: the Immunity Programme and the Leniency Programme.<sup>32</sup> From 2013–2014, the Competition Bureau received 10 immunity applications and 11 leniency applications.<sup>33</sup> The Competition Bureau has described the Immunity Program as its single most powerful means of detecting criminal activity.<sup>34</sup> Under the Immunity Program, the Competition Bureau may make a recommendation to the PPSC that immunity be granted. The PPSC may then grant such treatment on the basis of its assessment of the public interest.<sup>35</sup> The Competition Bureau will only recommend immunity in situations where a party discloses an offence of which the Competition Bureau is unaware or, where the Competition Bureau is already aware of an offence, the party is first to come forward before there is sufficient evidence to warrant a referral of the matter for prosecution.<sup>36</sup> In both situations, the requirements for a party to be eligible for immunity include the following: the requesting party must terminate its participation in the activity; the requesting party must not have coerced others to be a party to the activity; the requesting party cannot be the only party involved in the activity; the requesting party must cooperate with the Competition Bureau's investigation and subsequent prosecutions; and such cooperation must be at its own expense.<sup>37</sup> If the PPSC accepts the Commissioner's recommendation for immunity, the PPSC will execute a formal immunity agreement with the requesting party.<sup>38</sup> Such an agreement typically ensures that the allegations against the party will not be made public. In cases involving multiple parties, where immunity has been granted to the first-in requesting party, second-in and later applicants may seek leniency under the Leniency Program.

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32 See 'Immunity Program' Competition Bureau Bulletin, online: Competition Bureau, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_02000.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html) (Immunity Program) and 'Leniency Program' Competition Bureau Bulletin; Competition Bureau, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html) (Leniency Program).

33 See '2014–2015 Annual Plan – Promoting Compliance for the Benefit of Canadian Consumers' (5 May 2014); Competition Bureau, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03726.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03726.html).

34 Immunity Program, see footnote 32, *supra*.

35 Assessment is guided by the factors enumerated in Part V, Chapter 35 of the Federal Prosecution Service Deskbook, available at [www.justice.gc.ca](http://www.justice.gc.ca) (Prosecution Deskbook). Consultation with the Bureau and giving due consideration to the Bureau's recommendation should be an important part of this assessment. See sections 15.3.2.1 and 54.4 of the Prosecution Deskbook.

36 Immunity Program, paragraph 13, see footnote 32, *supra*.

37 *Ibid*, paragraphs 14–18.

38 *Ibid*, paragraph 25.

Under the Leniency Program, the Competition Bureau may make a recommendation to the PPSC that a cooperating party who has breached a criminal provision be granted leniency provided that the party has fully cooperated in a timely manner at its own expense, has terminated its participation in the criminal conduct and agrees to plead guilty.<sup>39</sup> Where the PPSC accepts the recommendation, the PPSC and the cooperating party will make a joint sentencing submission to the court.<sup>40</sup> Multiple parties may be eligible for a recommendation of leniency. The first applicant is typically eligible for up to a 50 per cent reduction of the fine that would otherwise have been recommended, the second is typically eligible for a reduction of up to 30 per cent, and the reduction available to any subsequent applicants will depend on when the application is sought in comparison to the previous applicant, as well as the timeliness of that applicant's cooperation and quality of information being provided.<sup>41</sup> Leniency will not be available once the Competition Bureau has referred the results of its investigation to the PPSC for the purposes of a prosecution.

## ii Internal investigations

At a time of greater scrutiny of corporate conduct by law enforcement agencies, regulators, stakeholders and the general public, corporations are increasingly undertaking internal investigations of suspected corporate wrongdoing. The need for an internal investigation may be triggered by internal developments, at the request of external auditors, or by external developments such as regulatory or criminal investigations, media reports and whistle-blower complaints. The decisions whether to commence an internal investigation and how to conduct such an investigation are important ones for a corporation. Depending on the circumstances, the internal investigation may be handled by senior management, the board of directors, the audit committee or a special committee of the board of directors. Current governance best practices dictate that the internal investigation should be led by the board where the alleged wrongdoing involves the conduct of senior management or where the corporation is the focus of a regulatory or criminal investigation, to ensure that the investigation and its results are, and are perceived to be, credible.

When a corporation determines that the internal investigation should be handled by the board of directors, the board typically forms a special or independent committee with a mandate to conduct the investigation. In certain cases (such as those where the quality of financial reporting is at issue) an existing committee such as the audit committee may undertake the investigation. In each case it is crucial that the members of the reviewing committee are independent and have the time and expertise to fulfil the committee's mandate. In circumstances involving serious misconduct, the failure to establish a committee independent of management or of any directors whose conduct is at issue may significantly impede the company's ability to credibly 'get to the truth' and address external threats. The findings and recommendations of an independent

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39 Leniency Program, paragraph 9, see footnote 32, *supra*.

40 *Ibid*, paragraph 31.

41 *Ibid*, paragraphs 12–15.

committee investigation are more likely to be accepted by government prosecutors, regulators, courts, private litigants and the media.<sup>42</sup>

Where an independent committee is established to conduct an internal investigation, the board should approve a mandate for the committee that authorises the committee to conduct the investigation, sets out the scope of the committee's authority and provides the committee with the resources necessary to discharge its responsibilities (including the authority to retain independent external legal and other advisers) and to report its ultimate findings to the board. The independent committee will need to develop an investigation plan to gather all necessary information and facts in a timely manner, which will typically include recovery, preservation and review of documents and witness interviews.

The preservation and gathering of electronic and hard copy documents may require external forensic experts. As an important first step, a corporation should implement a clear directive to all relevant employees, officers, directors and consultants to preserve and hold all potentially relevant records and take all necessary steps to suspend any document destruction under standard document retention and destruction policies. Any document destruction could negatively impact the credibility of the investigation.

The most common witness interviews are internal interviews of employees, directors and officers with knowledge or involvement in the matters at issue. Such individuals owe a duty to the corporation to submit to an interview and may retain their own legal counsel to represent them at the interview. The corporation may be obligated to reimburse or advance any legal fees incurred by the employee or officer depending on the terms of any contractual indemnities. The corporation is also obligated under statute to indemnify directors for such legal fees unless the director failed to act honestly, in good faith and in the best interests of the corporation.<sup>43</sup> The corporation should advise any employee, officer or director prior to the interview of the confidential or privileged nature of the investigation, that the information obtained during the interview may become public or shared with external parties such as government authorities (if that is a possibility) at the sole discretion of the corporation and may be used in the determination of any necessary disciplinary action. For those employees, officers or directors who are targets or potential targets of the investigation, it may also be necessary to advise of their right to counsel.

The investigation plan may also include interviews of external parties, such as consultants, advisers or business partners with knowledge of, or involvement with, the matters at issue, to the extent that such external parties agree to voluntarily submit to an interview. Any such witnesses should be advised that the information obtained during

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42 In *Re YBM Magnex et al* (2003) 26 OSCB 5285, the Ontario Securities Commission held that the board could not rely on the work of a special committee set up to investigate allegations of criminality and fraud because a member of the committee was not independent, stating at paragraph 250: 'If the independence of one's mandate is threatened, then the reasonableness of one's judgment becomes questionable.'

43 For example, see subsection 136(4.2) of Ontario's Business Corporations Act, RSO 1990 c. B-16, and subsection 124(5) of the Canada Business Corporations Act, RSC 1985, c. C-44.

the interview may become public or shared with government authorities (if that is a possibility).

A corporation may decide to share the existence and results of an internal investigation with government regulators, agencies or other external parties, and, in some circumstances, the independent committee may have an important role in the communications with such external parties. Depending on the nature of the investigation, a public company may be required to disclose the establishment of an independent committee and the results of its investigation pursuant to continuous disclosure obligations under Canadian securities laws.

The corporation may also be subject to production demands or orders from government authorities or through civil litigation, including class actions, and the corporation and its independent committee should consider and obtain advice on the scope of any privilege protection available over the work product and results of the investigation. Although the corporation may ultimately decide to share the results of the investigation with external parties, it is important to obtain such advice and to implement any appropriate privilege protocols for the conduct of the investigation at the outset of the investigation. If the internal investigation is conducted by external counsel for the purpose of advising the independent committee or is undertaken in anticipation of litigation, the work product and results of the investigation may be protected by solicitor–client privilege or litigation privilege. If the work product or results of the investigation are shared with external parties, such as government authorities, any privilege is likely waived and no longer available to protect from disclosure in any civil litigation.

### **iii Whistle-blowers**

Employees who report suspicions of illegal activity on their own initiative have statutory protection from reprisal in certain circumstances. Under the Criminal Code, it is an offence for an employer to take any disciplinary measures, or threaten to do so, with the intent to compel an employee to abstain from whistle-blowing to a federal or provincial law enforcement official.<sup>44</sup> Anyone found guilty of this offence is liable to imprisonment for a maximum of five years. Current governance best practices favour corporations implementing internal whistle-blower policies, which provide protections for whistle-blowers and a clear regime for effective and independent investigation of complaints.

Protection is also afforded to whistle-blowers through certain specific legislative regimes. For instance, the Competition Act prohibits employers from retaliating against employees who report offences, refuse to conduct illegal activities or declare their intention to comply with the Act.<sup>45</sup> In May 2013, the Competition Bureau launched a ‘Criminal Cartel Whistle-blowing Initiative’ to encourage members of the public to alert the Bureau to possible violations of the criminal provisions of the Competition

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44 Section 425.1 of the Criminal Code.

45 Section 66.2 of the Competition Act.

Act.<sup>46</sup> A key feature of the Competition Bureau's whistle-blower regime is that the Competition Act provides for the protection of the identity of the whistle-blower.<sup>47</sup> In other contexts, whistle-blowers are protected by specific legislative regimes including the Canadian Environmental Protection Act,<sup>48</sup> the Ontario Occupational Health and Safety Act<sup>49</sup> and the Employment Standards Act<sup>50</sup> (Ontario), which prohibit employers from retaliating against workers who have complied with, or seek the enforcement of, the legislation.

Most Canadian regulatory and enforcement regimes do not yet provide financial rewards for whistle-blowers; however, in January 2014, the Canada Revenue Agency (CRA) launched its Offshore Tax Informant Program, which may reward individuals (regardless of nationality) who provide the CRA with specific and credible details of major international tax non-compliance, when such information leads to an additional assessment of taxes exceeding C\$100,000.<sup>51</sup> In the capital markets context, on 3 February 2015, the OSC released Staff Consultation Paper 15-401,<sup>52</sup> which proposes a new whistle-blower programme with potentially significant financial rewards to encourage the reporting of serious misconduct of Ontario securities law to the OSC. Under the OSC's programme, a whistle-blower may receive a financial reward of up to 15 per cent of the total monetary sanctions awarded (only available in cases where the sanction exceeds \$1 million). While justifying the programme on the basis of success seen under the Dodd-Frank Whistle-blower Program in the United States, the OSC programme will not provide whistle-blower awards as large as those seen in the United States and caps financial rewards at \$1.5 million. Significantly, the OSC has stated that it would use all reasonable efforts to protect the identity of the whistle-blower and would not expect that such an individual would be required to testify at the administrative proceeding.<sup>53</sup>

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46 See Competition Bureau, 'Whistleblowing Initiative' (28 May 2013), online: Canadian Competition Bureau, [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

47 Section 66.1(2) of the Competition Act.

48 Section 16 of the Canadian Environmental Protection Act, SC 1999, c. 33.

49 RSO 1990, c. 0.1, Section 50.

50 SO 2000, c. 41, Section 74.

51 'Offshore Tax Informant Program' (14 January 2014), online: Canada Revenue Agency, [www.cra-arc.gc.ca/otip/](http://www.cra-arc.gc.ca/otip/). Initial statistics from the CRA's Offshore Tax Informant Program are positive and, as of September 2014, over 1,000 calls led to nearly 100 active cases. See Barbara Shecter, 'CRA's incentive-based "whistleblower" program draws more than 1,000 calls', *Financial Post* (23 September 2014), [www.business.financialpost.com](http://www.business.financialpost.com).

52 OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program (3 February 2015).

53 Ibid.

### III ENFORCEMENT

#### i Corporate liability

In Canada, corporations may be held criminally liable for both absolute or strict liability offences and for true criminal *mens rea* offences (offences requiring guilty intent). For absolute and strict liability offences, including most regulatory offences, corporations are vicariously liable for the acts or omissions of their employees and agents regardless of intent, subject to limited defences.

For true criminal offences, corporations in Canada were traditionally held liable based on the ‘identification theory’, which identified the fault of a corporation by the actions and intent of the senior officers and directors considered to be the ‘directing minds’ of the corporation.<sup>54</sup> Under amendments to the Criminal Code enacted in 2004, corporations may now attract criminal liability for the actions or omissions of a range of individuals wider than simply those individuals who would constitute ‘directing minds’ of the corporation.<sup>55</sup> Corporations will be held criminally liable for the actions or omissions of ‘senior officers’<sup>56</sup> including directors, officers, senior managers and any individual, partner, employee, member, agent or contractor having an important role in the establishment of the organisation’s policies or responsible for managing an important aspect of the organisation’s activities. Liability for such actions or omissions is also limited to circumstances where such individuals act or fail to act with the intent at least in part to benefit the corporation. In *R v. Global Fuels Inc*<sup>57</sup> the Court of Quebec confirmed a broad approach to corporate criminal liability and interpreted the term ‘senior officer’ as extending beyond senior management to encompass lower-level employees that meet certain criteria. Relevant factors include the individual’s title, duties, the extent of his or her authority and the importance of the activities that the individual manages on behalf of the corporation. More recently, and in the context of corporate liability for criminal negligence, the Ontario Court of Appeal in *R v. Metron Construction Corp.*<sup>58</sup> confirmed that a mid-level manager, in that case a construction site supervisor, may qualify as a ‘senior officer’ under the Criminal Code, where that individual manages an important aspect of the corporation’s business. Both decisions confirm the increased risk of criminal liability for corporations.

#### ii Penalties

Under Canadian law, corporations are subject to various sanctions and penalties for criminal and regulatory misconduct, including violations of the Corruption of Foreign Public Officials Act<sup>59</sup> (CFPOA), the Competition Act and provincial securities legislation.

54 See *R v. Canadian Dredge and Dock Co* (1985) 1 SCR 662; and *The Rhone v. The Peter AB Widener* (1993) 1 SCR 497.

55 Section 22.2 of the Criminal Code.

56 See definition of ‘senior officer’, *ibid*, Section 2.

57 *R v. Global Fuels Inc*, 2012 QCCQ 5749.

58 2013 ONCA 541.

59 SC 1998, c. 34 (CFPOA).

These sanctions may include monetary penalties such as fines and disgorgement, in addition to other orders made in the public interest. Although not necessarily an automatic consequence of a breach of statute, companies may also face debarment under Canadian government purchasing guidelines.

In accordance with its international obligations under the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention), the Government of Canada has introduced strict penalties for breaches of the CFPOA. Individuals found guilty of bribing, offering or agreeing to bribe a foreign public official, either directly or indirectly, may face a term of imprisonment of up to 14 years.<sup>60</sup> The CFPOA does not specify a maximum fine for corporations; however, the Criminal Code provides that in lieu of a prison sentence, corporations convicted of an indictable offence, such as a breach of the CFPOA, are subject to a fine at the court's discretion.<sup>61</sup>

In assessing the financial penalty to impose on a corporation for breaches of the CFPOA or other criminal misconduct, including fraud, the court will consider a number of factors, such as the advantage realised as a result of the offence.<sup>62</sup> Courts will also consider mitigating factors such as whether the organisation has taken steps to reduce the likelihood of a subsequent offence. In the context of a breach of the CFPOA, this could include the implementation of a rigorous compliance and training programme. In the *Griffiths* case, mitigating factors included the fact that the company's new management took steps to implement a robust anti-corruption compliance programme and that many of the steps in furtherance of that programme were already initiated at the time the unlawful bribery was discovered and reported to authorities.<sup>63</sup>

Under the Competition Act, a corporation faces a range of sanctions depending on the offence. For more serious offences, including anti-competitive behaviour such as price fixing, the Competition Act imposes a fine of up to C\$25 million.<sup>64</sup> In the event of bid rigging, there is no upper limit on the fine that may be imposed and such a fine is at the discretion of the court. In addition to monetary penalties, the Competition Act empowers the Federal Court of Canada to impose special remedies where intellectual property rights have been improperly used in the restraint of trade.<sup>65</sup> Furthermore, individuals convicted of breaching the Competition Act may be subject to a term of imprisonment. For instance, conspiracy and bid rigging are punishable by up to 14 years in prison.<sup>66</sup>

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60 Individuals convicted of breaching the accounting (or books and records) provisions of the CFPOA also face a maximum term of imprisonment of 14 years.

61 Section 735(1) of the Criminal Code.

62 Section 718.21 of the Criminal Code.

63 See *Griffiths* (see footnote 31, *supra*), paragraph 19.

64 Section 45 of the Competition Act.

65 *Ibid*, Section 32.

66 *Ibid*, Sections 45(2) and 47(2).

Breaches of provincial securities legislation also attract a range of sanctions, both financial and non-financial, depending on the severity and nature of the breach. The OSC has the power to order an administrative penalty of up to C\$1 million for each breach of Ontario securities law, disgorgement of any amounts obtained as a result of non-compliance with securities law and various non-monetary sanctions including, among others, suspending the trading of a company's shares (either temporarily or permanently), restraining a person or company from trading in securities, and preventing an individual from acting as a director or officer of a company.<sup>67</sup>

As discussed, securities regulators can elect to prosecute certain violations of securities law either administratively or quasi-criminally. In Ontario, where the OSC proceeds quasi-criminally, the Securities Act provides that individuals may be imprisoned for up to five years, less one day.<sup>68</sup> Where the breach of securities legislation is pursued as a quasi-criminal offence, the maximum fine is C\$5 million or, in cases of insider trading or tipping, the greater of C\$5 million or an amount equal to three times the profit made or loss avoided.<sup>69</sup> The federal government has also criminalised certain financial misconduct under the Criminal Code, such as insider trading and tipping, which is punishable by a prison term of up to 10 years. To date, there has only been one conviction for criminal insider trading,<sup>70</sup> although there are indications that, in conjunction with provincial prosecutors and law-enforcement agencies, securities regulators may seek to bring more insider trading charges under the Criminal Code. For example, the OSC formed JSOT to work collaboratively with police agencies and has recently announced an initiative to seek to amend the Criminal Code to permit the use of wire taps in the investigation of illegal insider trading and tipping.<sup>71</sup>

While debarment is not a proscribed penalty under statutes such as the Criminal Code or the CFPOA, the procurement policy of Public Works and Government Services Canada (PWGSC), the federal department primarily responsible for the purchase of goods and services, effects an automatic debarment by restricting PWGSC from accepting bids from a company convicted of certain offences, including various fraud, bribery and corruption offences.<sup>72</sup> There is, however, an ongoing public debate concerning whether

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67 Section 127 of the Securities Act.

68 In 2013, the OSC secured prison sentences against four individuals totalling 63 months. See Howard Wetston, 'OSC Priorities for Today's Capital Markets' (Speech delivered at the Toronto Region Board of Trade, 27 March 2014), online: Ontario Securities Commission, [www.osc.gov.on.ca/en/NewsEvents\\_sp\\_20140327\\_hw-osc-priorities-todays-capital-markets.htm](http://www.osc.gov.on.ca/en/NewsEvents_sp_20140327_hw-osc-priorities-todays-capital-markets.htm) [Wetston speech].

69 Section 122(4) of the Securities Act.

70 On 6 November 2009, Stan Grmovsek pleaded guilty to illegal insider trading contrary to Section 382.1 of the Criminal Code and was sentenced to 39 months in prison (in addition to monetary penalties in Canada and the United States). See *Grmovsek, Re* (2009), 32 OSCB 9038.

71 Wetston speech (see footnote 68, *supra*).

72 'PWGSC's Integrity Framework'; Public Works and Government Services Canada, [www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html](http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html).

such a 'one size fits all' automatic debarment regime is fair or appropriate, particularly where a corporation has self-reported and taken remedial steps following the detection of the wrongdoing. As explained above, Canada's criminal regime leaves little flexibility for resolving instances of corrupt practices short of conviction. The federal government has recently announced a plan to implement a new integrity framework for its procurement transactions that will ensure that all suppliers are given due process.<sup>73</sup> While the particulars of such a new integrity framework are not yet known, it is anticipated that such changes will have significant positive implications for companies that act responsibly following detection of corrupt practices.

### iii Compliance programmes

Corporate compliance programmes are a critical component of responsible corporate governance practices in Canada, and necessary to assist corporations in mitigating legal, economic and reputational risks. When a corporation is the subject of a criminal or regulatory investigation, a robust compliance regime helps to establish credibility with investigators and may ultimately assist in avoiding prosecution.

Even where charges are levied against a corporation, a compliance programme implemented prior or subsequent to the investigation may help mitigate a corporation's exposure.<sup>74</sup> A court imposing a criminal sentence on an organisation must consider a number of factors, including whether the organisation has taken any measures (such as implementation of a compliance programme) that would reduce the likelihood of it committing a subsequent offence.<sup>75</sup> Similarly, the willingness of a corporation to proactively implement, or improve, a compliance programme following an investigation would likely be looked upon favourably by regulators and prosecutors. In respect of strict liability offences, a compliance programme may even serve as a complete defence.<sup>76</sup>

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A high-profile corruption investigation is ongoing in Canada against SNC-Lavalin, and the RCMP charged SNC-Lavalin with corruption and bribery on 19 February 2015. See 'RCMP Charges SNC-Lavalin' (19 February 2015), [www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm](http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm). In April 2013, the World Bank announced that SNC-Lavalin Inc (and over 100 affiliates) has been debarred from World Bank funded projects for 10 years. See 'World Bank Debars SNC-Lavalin Inc and its Affiliates for 10 years' (17 April 2013); The World Bank, [www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years](http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years).

As a result of the World Bank's debarment of SNC-Lavalin Inc. and its affiliates in 2013, Canada now has the largest number of companies on the World Bank's Listing of Ineligible Firms & Individuals. See 'World Bank Listing of Ineligible Firms & Individuals'; The World Bank, [www.worldbank.org](http://www.worldbank.org).

73 2015 Budget, [www.budget.gc.ca/2015/docs/plan/ch5-1-eng.html](http://www.budget.gc.ca/2015/docs/plan/ch5-1-eng.html).

74 See, for example, *Griffiths*, paragraph 19, footnote 31, *supra*.

75 Section 718.21 of the Criminal Code.

76 A robust compliance programme may serve as evidence establishing a due diligence defence to a strict liability offence. A strict liability offence is one in which there is no necessity for the prosecution to prove the *mens rea* (or intent) element of the offence; the doing of the

#### iv Prosecution of individuals

Individuals may also face criminal, regulatory or civil liability for corporate misconduct. Individuals may be criminally liable for their own misconduct, for facilitating the corporate misconduct or as parties to the corporate misconduct. In the securities regulatory context, for instance, a director or officer of a corporation who authorised, permitted or acquiesced in a securities violation shall also be deemed not to have complied with securities law.<sup>77</sup>

Given the inherent potential for conflict, corporations and their individual directors, officers and employees are typically represented by separate legal counsel from the outset of any criminal and regulatory investigations and proceedings. Notwithstanding the potential for conflict, there will often still be a shared interest between the corporation and the individual director, officer or employee in the outcome of the investigation or proceedings and, in appropriate circumstances, a joint defence arrangement may be established to permit the corporation and the individual to continue to confer, coordinate, strategise and share privileged information.

### IV INTERNATIONAL

#### i Extraterritorial jurisdiction

Canadian authorities may assume jurisdiction over conduct that occurs outside of Canada if authorised by statute or if such conduct has a ‘real and substantial connection’<sup>78</sup> to Canada. Canadian authorities will also consider the requirements of international comity before assuming extraterritorial jurisdiction.

A company may be subject to Canadian jurisdiction for the actions of its employees, officers and directors while they are working in Canada. Moreover, where Canadian law explicitly covers the conduct of its citizens or residents while abroad, a company may be liable for the actions of those employees even though they are acting outside of Canada.

In the context of foreign corruption, under the CFPOA Canadian authorities currently assert jurisdiction where a significant portion of the actions or omissions constituting a corruption offence are committed in or connected to Canada.<sup>79</sup> Moreover,

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prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that it took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. The defence will be available if all reasonable steps were taken to avoid the particular event. See *R v. Sault Ste. Marie (City)* (1978), 2 SCR 1299, paragraph 60.

77 See, for example, Section 129.2 of Ontario’s Securities Act.

78 *R v. Libman*, [1985] 2 SCR 178, paragraph 74.

79 In *R v. Karigar*, 2013 ONSC 5199, paragraphs 34–41, the first trial, conviction and sentencing of an individual under the CFPOA, the Ontario Court of Justice rejected Karigar’s submission that, in the context of bribing a foreign public official, the financial element of the offence (i.e. the approving and funding of the bribe) must have occurred in Canada to satisfy the ‘real and substantial connection’ test. The court found that it had jurisdiction over Mr

and in response to pressure from the OECD, Canada amended the CFPOA in 2013 to extend jurisdiction to cover the actions of Canadian companies, citizens and residents, regardless of where they occur. This is consistent with the law of many parties to the OECD Bribery Convention, such as the United States and the United Kingdom.

Under Canadian competition law, there are no specific statutory provisions establishing extraterritorial jurisdiction. There are several provisions in the Competition Act that appear to authorise remedies for conduct outside of Canada that has affected or threatens to adversely affect competition in Canada, such as the price maintenance provisions. However, in practice, the Competition Bureau generally takes an effects-based approach to jurisdiction and considers the effect of alleged unlawful conduct on Canada or Canadian companies.<sup>80</sup> For instance, the Competition Bureau takes the position that the conspiracy provisions of the Competition Act authorise remedies against foreign or domestic participants in a conspiracy when the conduct has local effects in Canada even though the agreement to conspire was made outside of Canada.<sup>81</sup> The extraterritorial application of the conspiracy provisions was considered in *Vitapharm Canada Ltd v. F Hoffmann-La Roche Ltd*<sup>82</sup> in the context of an application for certification of a class action under of the Competition Act. The court rejected the notion that a conspiracy to fix prices is an offence only when the agreement to conspire was made within Canada.<sup>83</sup> More recently, in *Option consommateurs v. Infineon Technologies AG*,<sup>84</sup> the Supreme Court of Canada affirmed the jurisdiction of the Quebec courts in a proposed indirect purchaser price fixing class action on the basis that Quebec consumers suffered harm in Quebec and notwithstanding that the conspiracy occurred outside of Quebec.

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Karigar since, among other reasons, he was acting for the benefit of a Canadian company and, had the scheme been successful, an unfair advantage would have flowed to that company. Mr Karigar was charged prior to the 2013 amendments to the CFPOA, which eliminated the territorial connection to Canada for Canadian companies, citizens and residents. Accordingly, the jurisdictional findings in the *Karigar* decision will be of most relevance to foreign nationals.

80 On 18 April 2013, the Competition Bureau announced that a C\$30 million fine was levied against a Japanese supplier of motor vehicle components. The Japanese supplier pleaded guilty to violating the bid-rigging provisions of the Competition Act for its involvement in a cartel involving other Japanese suppliers, who conspired to enter bids for the supply of vehicle components to vehicle manufacturers for use in vehicles sold in Canada. The fine was the largest to date for a bid-rigging offence. See 'Record \$30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier' (18 April 2013); Competition Bureau, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html).

81 Section 45 and 46 of the Competition Act.

82 (2002) OJ No. 298 at paragraph 95 (Ont. Sup. Ct.), affirmed (2002) OJ No. 1400 (Div. Ct.) (*Vitapharm*).

83 *Ibid*, paragraphs 59 and 60.

84 2013 SCC 59. This case was decided by the Supreme Court of Canada as part of a trilogy cases confirming that Canadian courts may certify class actions commenced by indirect purchasers against manufacturers for unlawfully inflated prices.

**ii International cooperation**

Canadian government agencies, both federal and provincial, actively cooperate with law enforcement agencies of other countries through formal and informal means, including multilateral agreements. Canadian law enforcement and regulatory agencies may also engage in the informal sharing of information with their foreign counterparts, without the need to trigger formal processes.

In the criminal law context, Canadian law provides for both extradition and inter-state cooperation and collaboration in criminal law matters. In the case of extradition, Canada's Extradition Act provides that a person may be extradited from Canada on request from an extradition partner under circumstances such as where the underlying offence is punishable by a term of imprisonment of two or more years (or by more severe punishment) in both the requesting country and Canada (if the offence had occurred in Canada).<sup>85</sup>

With respect to non-extradition cooperation, the Mutual Legal Assistance in Criminal Matters Act<sup>86</sup> provides that Canada may request assistance or provide assistance to other countries through various means, including conducting search and seizures, facilitating the examination of witnesses under oath and transferring detained persons abroad to assist foreign criminal investigations. A request for assistance under this legislation must generally be made pursuant to an existing agreement, such as a treaty, convention or other international agreement.<sup>87</sup> To that end, Canada has entered into mutual legal assistance treaties (MLATs) with a number of countries. MLAT requests can be used to obtain assistance at all stages of an investigation, including before and after charges have been laid.<sup>88</sup> Additionally, many MLATs permit the requesting state to obtain commission evidence.<sup>89</sup> It is important to note that Canada may also request assistance from a foreign state or entity in the absence of a formal treaty.<sup>90</sup>

Canada also cooperates with its international counterparts in respect of foreign corruption, and is a member of the United Nations Convention against Corruption (the UN Corruption Convention),<sup>91</sup> the OECD Bribery Convention, and the Inter-American Convention against Corruption. Cooperation is formalised under these conventions. For instance, the UN Corruption Convention sets out a comprehensive framework for international cooperation with respect to extradition, the transfer of sentenced persons, mutual legal assistance, the transfer of criminal proceedings, law enforcement cooperation, joint investigations, and special investigative techniques (such as electronic or other forms of surveillance and undercover operations).<sup>92</sup> Similarly, under the OECD

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85 Section 3(1) of the Extradition Act, RSC 1999, c. 18.

86 Mutual Legal Assistance in Criminal Matters Act, RSC 1985, c. 30.

87 Ibid, Section 8.

88 Section 43.3.1 of the Prosecution Deskbook.

89 Ibid.

90 Ibid, Section 43.3.2.

91 United Nations Convention against Corruption (31 October 2003), online: United Nations, [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

92 Ibid, Articles 44–50.

Bribery Convention, parties, including Canada, are to provide mutual legal assistance (to the extent possible) to assist with both criminal and non-criminal corruption proceedings brought against individuals and companies.<sup>93</sup>

In antitrust cases, Canada has entered into cooperation agreements with a number of countries including the United States, Brazil, Australia, Japan and the European Union. These cooperation agreements provide for, among other things, positive comity, meaning that a requesting party may request the competition authorities of a requested party to investigate and, if warranted, remedy anti-competitive activities in accordance with the requested party's competition laws. Such a request may be made regardless of whether the activities also violate the requesting party's competition laws and regardless of whether the competition authorities of the requesting party have commenced or contemplated taking enforcement activities under their own competition laws. The Competition Bureau continues to build its relationship with its Chinese counterparts, and on 19 May 2015 the Competition Bureau announced that it has signed memoranda of understanding (MOUs) with China's State Administration for Industry and Commerce and the Ministry of Commerce of the People's Republic of China, which are intended to further develop communication with Chinese agencies and facilitate technical and enforcement cooperation.<sup>94</sup> Currently, the Competition Bureau is coordinating an investigation into an international bid-rigging scheme involving the supply of motor vehicle components with several of its international counterparts.<sup>95</sup>

As the global financial crisis demonstrated, international collaboration and cooperation among securities regulators, especially in the areas of financial stability and enforcement, is necessary for the effective protection of investors and the integrity of capital markets. Canadian securities regulators have a history of collaboration and cooperation domestically and with their international counterparts,<sup>96</sup> and a stated intention to further increase the level of intelligence sharing and assistance with

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93 Article 9 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997), online: OECD, [www.oecd.org/corruption/oecdantibriberyconvention.htm](http://www.oecd.org/corruption/oecdantibriberyconvention.htm).

94 'Competition Bureau enhances cooperation in cross-border enforcement' (19 May 2015), online: Competition Bureau, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03931.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03931.html).

95 As a result of the ongoing international investigation, on 11 December 2014, Yamashita Rubber Co., Ltd., the latest in a series of motor vehicle competent suppliers, plead guilty to two counts of bid-rigging under the Competition Act and was fined C\$4.5 million by the Ontario Court of Justice. This represents the seventh guilty plea (which has generated over \$56 million in fines) since April 2013. See 'Seventh guilty plea in Competition Bureau's investigation involving motor vehicle components' (11 December 2014); Competition Bureau, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03860.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03860.html). See also Competition Bureau Press Release dated 18 April 2013 (footnote 80, *supra*).

96 Recent examples of such cooperation include the following:  
*a* In *Re Richard Bruce Moore*, 36 OSCB 4440, Canadian and US securities regulators collaborated in the successful investigation and prosecution of an investment banker.

enforcement investigations.<sup>97</sup> For example, the OSC is a party to a number of MOUs with securities regulators from around the world, including the United States, Australia, Hong Kong, Italy and France. The OSC is also a member of multilateral organisations, including the International Organization of Securities Commissions (IOSCO),<sup>98</sup> the North American Securities Administrators Association (NASAA), and the Council of Securities Regulators of the Americas (COSRA).

The specific level of cooperation under these MOUs may vary; however, the arrangement typically facilitates the sharing of information on organisations and individuals under the supervision of the different regulators, inter-jurisdictional collaboration on investigations and enforcement activities, and assistance to provide the regulators with a more fulsome understanding of particular market activity.<sup>99</sup>

IOSCO members are committed to providing each other with a significant level of assistance. This includes (among other things) sharing records and information that enables the reconstruction of securities transactions, providing information that identifies persons who beneficially own or control companies, and taking or compelling statements or testimony regarding a potential offence. Canadian provincial securities regulators, such as the OSC and the Autorité des marchés financiers (Quebec), are members of IOSCO.

### iii Local law considerations

Canada's laws do not typically impede foreign or multi-jurisdictional investigations and as discussed above, Canadian law enforcement and regulatory agencies are very receptive to international cooperation.

Under Canada's Personal Information Protection and Electronic Documents Act, personal information (as defined under that act) may be disclosed without consent if such disclosure is made to a Canadian government institution having received a request

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*b* In *Re Smith*, Canadian and German securities regulators collaborated in the investigation and quasi-criminal prosecution of an individual for various breaches of the Ontario Securities Act. See OSC News Release, 'Vernon Smith charged Quasi-Criminally with Unregistered Trading and Breaching OSC Cease Trade Orders' (29 April 2014); Ontario Securities Commission, [www.osc.gov.on.ca/en/NewsEvents\\_nr\\_20140429\\_osc-vernon-smith-charged.htm](http://www.osc.gov.on.ca/en/NewsEvents_nr_20140429_osc-vernon-smith-charged.htm).

*c* In *Re Arbour Energy Inc*, 2012 ABASC 131, the investigation and prosecution of Arbour Energy Inc in relation to a C\$46 million Ponzi scheme relied in part on the assistance of five domestic securities regulators and the US Securities and Exchange Commission.

97 See CSA, 'Regulatory Cooperation', online: Canadian Securities Administrators, [www.securities-administrators.ca/aboutcsa.aspx?id=101](http://www.securities-administrators.ca/aboutcsa.aspx?id=101).

98 IOSCO's members regulate more than 95 per cent of the world's securities markets. See 'International Organization of Securities Commissions: Fact Sheet' (April 2015), [www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf](http://www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf).

99 International Organization of Securities Commissions, 'Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information' (May 2012), [www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf).

from a foreign government carrying out an investigation relating to the enforcement of its laws or gathering intelligence for the purpose of enforcing its laws.<sup>100</sup>

Under the Foreign Extraterritorial Measures Act<sup>101</sup> (FEMA), the Attorney General of Canada may take certain steps to hinder the actions of a foreign tribunal where there is an adverse effect or there is likely to be an adverse effect on significant Canadian interests in relation to international trade or commerce. In particular, the Attorney General may, by order, prohibit or restrict the production or disclosure of records to a foreign tribunal and prohibit any person in Canada from complying with measures (including, laws, judgments and rulings) taken by a foreign state or tribunal.

To date FEMA has only been used to prevent Canadian companies and citizens from complying with extraterritorial measures taken by the United States concerning Cuba.

Despite the strong and demonstrated commitment to cooperation of Canada's securities regulators, such cooperation is not without limitation. A notable limit is in the sharing of information gathered by way of compelled testimony. For instance, under the Ontario Securities Act, investigators have the power to summon and enforce the attendance of any person and to compel that person to testify under oath.<sup>102</sup> Given the potential infringement of a person's right against self-incrimination associated with compelled testimony, information gathered in this manner cannot be shared with a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction, without the consent of the person from whom the testimony was obtained.<sup>103</sup> Although information will not be directly disclosed by the OSC to foreign police forces or law enforcement agencies without consent, the Ontario Securities Act was amended in 2013 to enable the OSC to disclose information gathered during an investigation, including compelled testimony and documents, to another securities regulatory authority or other government or regulatory authority (for example, the SEC), without giving notice or an opportunity to be heard to the provider of that information where it is in the 'public interest to do so'.<sup>104</sup> To date, there is no guidance on the circumstances that would give rise to 'no notice' disclosure of compelled information. Given the often significant differences between different countries' regimes for the protection of self-incrimination, this amendment raises concerns that a witness who provides compelled information to the OSC may face liability in another jurisdiction as a result of that information, without notice or an opportunity to respond. Moreover, in the absence of a special agreement with the OSC, there is a risk that the foreign securities regulator may share compelled information provided by the OSC with a criminal law enforcement authority for use in a criminal proceeding against the individual who gave the compelled evidence.

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100 Section 7(3)(c.1)(ii) of the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

101 R.S.C. 1985, c. F-29.

102 Section 13 of the Securities Act. Failure to cooperate with a compelled examination can result in contempt proceedings before the Ontario Superior Court of Justice.

103 *Ibid*, Section 17(7).

104 *Ibid*, Section 17(2.1).

## V YEAR IN REVIEW

Developments over the past year have demonstrated the continued focus of Canadian law enforcement agencies and regulators on prosecuting both individuals and companies for corporate criminal misconduct.

From a policy perspective, the RCMP and more recently, the OSC, have expressed an intention to vigorously pursue both corporations and individuals for corporate criminal misconduct through the use of traditional police investigative techniques and methods, including wiretaps and undercover operations.<sup>105</sup> While it remains to be seen whether this will translate into more convictions in Canada, such techniques have been utilised with significant success in a number of high-profile white-collar criminal investigations in the United States.<sup>106</sup>

Canadian securities regulators and local policies agencies have continued to cooperate and collaborate to more effectively investigate difficult and complex cases for criminal and quasi-criminal prosecution using the provisions of the provincial securities statutes and the Criminal Code. As of 2 March 2015, JSOT has investigated 22 matters, executed over 80 search warrants and laid criminal and quasi-criminal charges in 14 matters.<sup>107</sup> The effectiveness of the JSOT initiative remains to be seen; however, it appears to be gaining momentum.

The OSC recently successfully prosecuted two lengthy and high-profile insider-trading and tipping trials, one involving an insider-trading ring with an executive assistant from a prominent Canadian investment bank at its centre<sup>108</sup> and another involving individuals from a leading Canadian law firm and prominent Canadian investment bank.<sup>109</sup> These recent successes<sup>110</sup> stand in stark contrast to prior high-profile prosecution failures and may indicate a trend towards more effective enforcement. These cases follow the earlier recent dismissal by an OSC hearing panel of allegations of insider trading and tipping in connection with the prosecution of individuals arising from a hostile takeover bid of Baffinland Iron Mines Corporation and several other high profile dismissals.<sup>111</sup>

105 Douglas Quan 'RCMP to use more undercover agents, wiretaps to go after white-collar criminals', *Post Media* (25 November 2012), <http://news.nationalpost.com>. See also OSC Notice 11-769, 'Statement of Priorities - Request for Comments Regarding the Statement of Priorities for Financial Year to End March 31, 2015' (2014), 37 OSCB 3339.

106 See, for example, *United States v. Rajaratnam*, 802 F. Supp. 2d 491 (SD NY Dist. Ct. 2011), *aff'd* 11-4416-cr (2d Cir.).

107 'OSC Announces Results of Enforcement Activity in 2014' (2 March 2014); Ontario Securities Commission, [www.osc.gov.on.ca/en/NewsEvents\\_nr\\_20150302\\_enforcement-activity-2014.htm](http://www.osc.gov.on.ca/en/NewsEvents_nr_20150302_enforcement-activity-2014.htm).

108 *Re Eda Marie Agueci et al.*, Amended Statement of Allegations (26 September 2013); Ontario Securities Commission, [www.osc.gov.on.ca](http://www.osc.gov.on.ca).

109 *Re Azeff* (2015), 38 OSCB 2983 (Ont Sec Comm).

110 See also *Re Weicker*, 2015 BCSECCOM 19.

111 See *Re Waheed* (2014), 37 OSCB 8007 (Ont Sec Comm) and *Re Donald* (2012), 35 OSCB 7383 (Ont Sec Comm). See also the criminal insider trading case of *R v. Rankin* (2005) OJ

A trial in the high-profile fraud proceedings against Sino-Forest Corp. (Sino-Forest) and certain of its former officers and directors commenced on 2 September 2014, and is ongoing before the OSC.<sup>112</sup> Allegations of fraud involving Sino-Forest were first raised in June 2011 by a market analyst and, following a costly and complex investigation, the OSC commenced enforcement proceedings in May 2012. Sino-Forest, which once had a market capitalisation of approximately C\$6 billion and raised approximately US\$3 billion in equity and debt financing in the Canadian capital markets, has since filed for bankruptcy. While the outcome of these proceedings is highly anticipated, this matter highlights the inherent difficulty in prosecuting emerging market issuers for securities violations, since management, records, assets and witnesses are mostly located abroad.

In an effort to achieve more timely and efficient resolution of matters, the OSC implemented and approved the first no-contest settlements under its revised credit for cooperation programme. First, in *Re Ernst & Young LLP*,<sup>113</sup> the global accounting firm paid C\$8 million without any admission of wrongdoing to resolve allegations related to its role and responsibility as external auditor for the financial disclosure of two Canadian companies with Chinese operations, Sino-Forest and Zungui Haixi Corp. Second, in *Re TD Waterhouse Private Investment Inc. et al*,<sup>114</sup> the TD respondents paid compensation of C\$13.5 million to clients and costs and other payments of C\$650,000 without any admission of wrongdoing to resolve allegations relating to inadequacies in TD Waterhouse's internal systems of controls and supervision which resulted in excess fees being charged to clients. According to the Chair of the OSC, no-contest settlements have become an important component of the OSC's enforcement strategy, and allow for timely and appropriate resolutions in the public interest, while freeing OSC resources to pursue other activity.<sup>115</sup>

The federal government continues to demonstrate its commitment and priority to combat foreign corrupt practices, and to improve transparency by Canadian companies, through the dedication of increased resources, increased enforcement activity by specialised police units and legislative action.

In 2013–2014, Canada saw its first prosecution, conviction and sentencing of an individual under the CFPOA.<sup>116</sup> In August 2013, following a lengthy trial, Nazim

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No. 4871 (Ont Ct J).

112 *Re Sino-Forest et al*, Statement of Allegations (22 May 2012); Ontario Securities Commission, [www.osc.gov.on.ca](http://www.osc.gov.on.ca).

113 *Re Ernst & Young LLP*, footnote 29, *supra*.

114 *Re TD Waterhouse*, footnote 29, *supra*.

115 'OSC Approves Settlement Agreement with Ernst and Young' (30 September 2014); Ontario Securities Commission, [www.osc.gov.on.ca/en/NewsEvents\\_nr\\_20140930\\_osc-approve-s-settlement-agreement-ernst-young.htm](http://www.osc.gov.on.ca/en/NewsEvents_nr_20140930_osc-approve-s-settlement-agreement-ernst-young.htm).

116 *Karigar* represents the latest conviction for a breach of the CFPOA and the first since the conviction of Griffiths. In 2012, an investigation was conducted into allegations that the previous management of Griffiths violated the foreign corrupt practices regime in the process of obtaining oil and gas contracts in the Republic of Chad. The investigation was triggered

Karigar was convicted on a single-count indictment of offering to bribe a foreign public official contrary to the CFPOA. Karigar was found to have played a leading role in a conspiracy to bribe officials of Air India, a corporation owned and controlled by the government of India, and the Indian Minister of Civil Aviation, for the purpose of securing a multi-million Air India contract for a biometric security system of behalf of Cryptometrics Canada Limited (Cryptometrics). On 23 May 2014, Karigar was sentenced to three years' imprisonment in a federal penitentiary; however, this sentence would likely have been more severe had Karigar been charged after the 2013 amendments to the CFPOA, which, *inter alia*, increased the maximum length of imprisonment to 14 years.<sup>117</sup> Immediately following Karigar's sentencing, the RCMP charged three foreign nationals, one British agent and two American former executives of Cryptometrics, with bribery and fraud. This recent development may demonstrate an increased willingness by Canadian authorities to assert jurisdiction over individuals, irrespective of their nationality or location, who conspire to bribe foreign public officials where such conduct has a connection with Canada.<sup>118</sup>

On 19 February 2015, the RCMP announced that it charged SNC-Lavalin, a prominent Canadian engineering and construction company, and two related entities with one count of foreign corruption contrary to the CFPOA and one count of fraud under the Criminal Code. The charges follow a lengthy investigation of SNC-Lavalin in Canada (and several other countries) over allegations that it bribed foreign public officials to secure government contracts in a number of foreign countries, including Libya (the subject of the current charges), Bangladesh and Cambodia. Previously, at least five individuals from SNC-Lavalin and two others connected with an impugned bridge project in Bangladesh have been charged under the CFPOA. The prosecution of certain of the individuals charged is now well underway. As a result of the alleged misconduct, an SNC-Lavalin company and its affiliates have been debarred by the World Bank for up to 10 years.<sup>119</sup> Domestically, SNC-Lavalin also remains embroiled in a corruption scandal related to the construction of a C\$1.3 billion hospital in Montreal, with several former senior executives facing charges, including fraud, conspiracy and breach of trust.<sup>120</sup>

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by Griffiths' self-reporting of the unlawful conduct and ultimately culminated in a conviction and a fine of C\$10.35 million. See *Griffiths* (footnote 31, *supra*), paragraph 28.

117 2014 ONSC 3093.

118 See 'RCMP Charge Individuals with Foreign Corruption' (4 June 2014), online: RCMP, [www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm](http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm). Prosecution of foreign nationals under the CFPOA may be difficult where the foreign national resides in a country with which Canada does not have an extradition treaty. See *Chowdhury v. HMQ*, 2014 ONSC 2635, where the court stayed the prosecution of an individual, a Bangladeshi citizen and resident, charged in connection with the SNC-Lavalin corruption investigation, due to a lack of jurisdiction.

119 World Bank press release dated 17 April 2013 (see footnote 72, *supra*).

120 See Graeme Hamilton, 'Arthur Porter – who is fighting extradition to Canada – complains he can't defend against fraud charges' (26 May 2014), <http://news.nationalpost.com>.

In an effort to improve transparency in the extractive sector and deter and detect corrupt practices, the Canadian government enacted the Extractive Sector Transparency Measures Act,<sup>121</sup> which establishes a mandatory reporting framework for mining and oil and gas companies, under which such companies are required to report and publicly disclose certain types of payments, whether monetary or in kind that exceed C\$100,000 in any year, made to governments in Canada or abroad (including aboriginal governments) or any corporation or other body that exercises or performs such government function. Any failure to comply with these reporting standards, to knowingly provide false or misleading information or to structure a payment so as to avoid the reporting obligations is an offence subject to a fine of up to \$250,000. It is expected that this new regime will not only increase compliance requirements for Canadian extractive companies and those foreign companies listed on Canadian exchanges, but may also influence and inform enforcement activities under the CFPOA.

## VI CONCLUSIONS AND OUTLOOK

Corporations and their officers and directors are subject to increasing scrutiny and prosecution by Canadian regulators and law enforcement agencies empowered to investigate and prosecute corporate wrongdoing. There is no indication that this trend is likely to abate in the near future, creating significant implications for foreign and domestic corporations operating in Canada or subject to Canadian jurisdiction.

A criminal or regulatory investigation against a corporation or an individual within a corporation can be devastating, causing disruption to the corporation's business and damage to its reputation. These investigations frequently trigger external scrutiny and criticism of the corporation's policies, ethics and compliance systems by government agencies, the media, investors, customers and business partners. By commencing its own internal investigation, a corporation may avoid or proactively respond to potential regulatory or criminal charges, civil lawsuits and negative publicity. Depending on the circumstances, a corporation may seek to cooperate as fully as possible with the external government investigation.

A number of recent developments suggest an increased criminal focus on investigations and prosecutions of corporate misconduct, and a drive to seek prison sentences for those individuals involved. Canadian police agencies and securities regulators have announced their intention to use a broader range of enforcement tools, including search warrants, wiretaps and informants, to investigate corporate misconduct, and corporations may soon face more aggressive investigations. In addition, Canadian securities regulators have announced an increased focus on criminal enforcement through quasi-criminal prosecutions rather than administrative prosecutions for certain misconduct, including fraud.<sup>122</sup>

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121 SC 2014, c. 39, s. 376. This Act came into force on 1 June 2015.

122 OSC Notice 11-770, 'Notice of Statement of Priorities for Financial Year End to March 31, 2015' (26 June 2014), online: Ontario Securities Commission, <http://www.osc.gov.on.ca>; 2012 ASC Annual Report (2013), online: Alberta Securities Commission, [www.ascc.ca](http://www.ascc.ca).

The Canadian government has continued to demonstrate its commitment to combat foreign corruption and other corporate misconduct, through strengthened statutory regimes and increased investigations and prosecutions, including the recent prosecutions of SNC-Lavalin, Sino-Forest and Nestlé Canada Inc.<sup>123</sup> Canadian companies and other companies employing Canadian citizens or residents, with operations in high-risk jurisdictions, should be alert to the potential risks, assess the effectiveness of their current compliance regimes and protocols for monitoring, detecting and preventing corporate misconduct.

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albertasecurities.com, at pp. 9 and 17; and British Columbia Securities Commission, BCSC Annual Report 2011–2012 (2012), online: British Columbia Securities Commission, www.bsc.bc.ca, at pp. 5, 62–68.

- 123 Nestlé Canada Inc. (Nestlé), along with Mars Canada Inc., and several other parties have been charged with price fixing related offences contrary to the Competition Act following a Competition Bureau investigation into the pricing of chocolate confectionary products in Canada. In a recent decision in the case, several of the defendants, including Nestlé were granted access to certain factual information provided to the Crown by applicants under the Competition Bureau's Immunity and Leniency Programs. The Ontario Superior Court of Justice found that neither solicitor-client nor settlement privilege applied to such information. See *R. v. Nestlé Canada Inc.*, 2015 ONSC 810.

# THE INTERNATIONAL INVESTIGATIONS REVIEW

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# EDITOR'S PREFACE

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In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in past years many corporate criminal investigations were resolved through deferred or non-prosecution agreements, 2014 saw a significant increase in the number of guilty pleas sought and obtained by the US Department of Justice.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted

to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its fifth edition, this volume covers 24 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

**Nicolas Bourtin**

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New York

July 2015

## Appendix 1

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