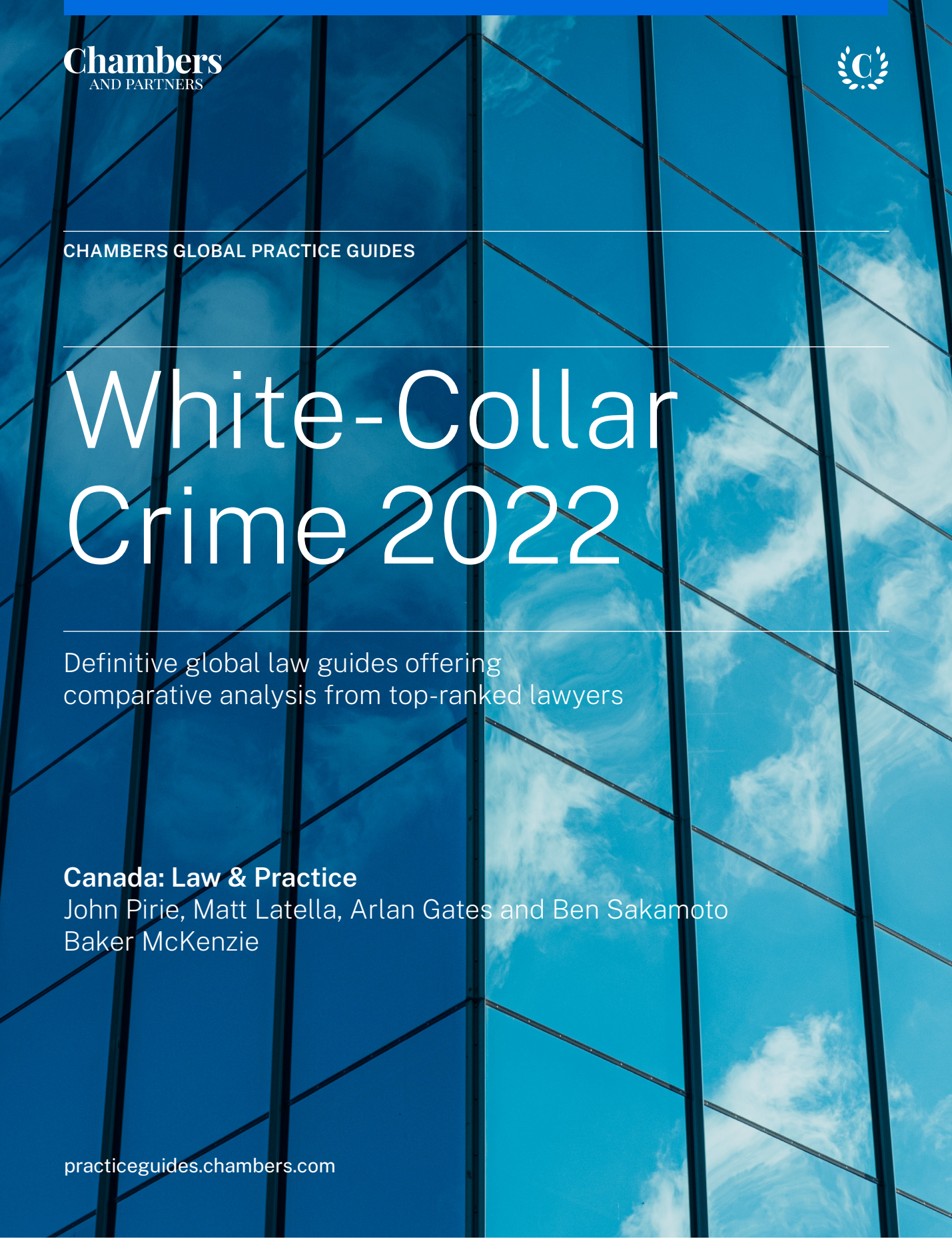

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Contents

1. Legal Framework

1.1 Classification of Criminal Offences

In Canada, criminal offences are classified into one of three categories, of varying degrees of seriousness. The most serious are indictable offences and the least serious are summary conviction offences. In between these two categories is a category of offences for which the Crown prosecutor may elect to proceed by way of either of the other two categories. This third category is known as "hybrid offences" or Crown-electable offences.

A relatively small percentage of criminal offences are simply classified as summary conviction offences. Such offences generally carry a maximum penalty of six months in jail. Trials of such offences can take place in lower level courts and an accused is not entitled to trial by jury, unless the case is being heard simultaneously with an indictable offence.

Indictable offences are the most serious types of offences and include matters such as fraud in excess of CAD5,000, terrorism, treason and robbery. Sentences for these types of offences vary greatly, up to a potential maximum penalty of life imprisonment.

Typically, those charged with these types of offences may elect:

- trial by judge alone in (a lower) Provincial Court, foregoing a preliminary hearing;
- trial by judge alone in Superior Court; or
- trial by judge and jury in Superior Court.

If opting for a Superior Court proceeding, the accused may proceed with or without a preliminary hearing. However, there are limited exceptions and not all indictable offence charges entitle the accused to a preliminary hearing or a jury trial. Some such offences do not permit the accused to elect to proceed by judge alone without the consent of the Crown prosecutor.

Most offences in the Criminal Code of Canada, including certain less serious white-collar crimes, are hybrid offences for which the Crown may exercise their sole discretion to proceed by indictment or summary conviction.

In general, to convict a person of an offence in Canada, the Crown must prove, beyond a reasonable doubt, that the accused carried out the requisite act (actus reus) with the necessary state of mind (mens rea). However, there are also "strict liability" offences, for which the Crown need not prove mens rea to secure a conviction. This category includes some white-collar crimes – for example, where a corporation has failed to prevent certain results.

An accused person may also be convicted of attempting, conspiring, assisting or encouraging a criminal offence (collectively known as "inchoate offences"). In addition, acting as an accessory to aid, abet, counsel or procure the commission of a criminal offence by a principal offender is an offence.

1.2 Statute of Limitations

Indictable offences are not subject to a limitation period, so an accused can be charged and tried for such offences years after the events giving rise to the charges.

Summary conviction offences are subject to a six-month limitation period, which starts running on the date the offence was committed. For hybrid offences, this limitation period would only apply if the Crown prosecutor opted to proceed by way of summary conviction.

1.3 Extraterritorial Reach

In general, Canadian courts have jurisdiction over offences committed within the territory of Canada. It is sufficient for jurisdictional purposes for the offence to be initiated or fulfilled within Canada, but it is unnecessary for both to have taken place within Canada. There is a general prohibition on being convicted of an offence committed entirely outside Canada, unless a statute specifically allows for an exception. In such cases, there must be a "real and substantial connection" between Canada and the offence, meaning that a "significant portion" of the offence took place in Canada to allow for a "meaningful" connection to Canada.

In addition, where an act or omission is committed outside Canada and is nonetheless by statute made an offence when so committed, the accused can be charged and tried for the offence by Canadian courts, even if the accused is not in Canada. For example, Section 5 of the Corruption of Foreign Public Officials Act (CFPOA) deems acts or omissions that Canadian individuals or corporations, partnerships, etc, commit outside Canada to have been committed in Canada if they constitute an offence under that legislation if they would have been committed in Canada.

Since the provisions of this legislation creating these offences include the phrase "directly or indirectly", improper payments or other benefits made outside Canada by subsidiaries and agents may give rise to an offence by the Canadian parent company or principal, as the case may be.

1.4 Corporate Liability and Personal Liability

Corporations and other organisations can be held criminally liable for offences in both the Criminal Code and the CFPOA. Section 22.2 of the Criminal Code governs, with the focus on the conduct of a corporation's senior officers, particularly those with authority to design and supervise the implementation of corporate policies. Recent case law indicates that in some circumstances the actions of persons in mid-level management can give rise to corporate criminal liability.

Section 22.2 provides that a corporation may be liable for the acts of its senior officers where the person intends to benefit the company and, acting within the scope of authority, is a party to the offence, directs another director, partner, employee, member, agent or contractor to become party to the offence, or knows a representative of the organisation is about to become a party to the offence and does not take reasonable measures to stop the conduct. A due diligence defence is available to the company whereby it can put forward evidence that it took steps to prevent the commission of an offence, including steps such as the implementation of compliance programmes or risk assessments.

In Canada, criminal liability is not typically assigned to corporations for the conduct of employees. Courts consider whether the alleged criminal act is carried out as a fraud on the employer, and/or solely for the benefit of the employee. Under the corporate identity doctrine, in these circumstances the employee will not be considered a "directing mind" of the corporation and thus individual criminality, rather than corporate criminality, will most often be assigned.

Successor liability for the acts or omissions of a predecessor corporation is a fact-specific determination, with the case law to date relating mainly to civil liability. An asset purchase will generally not give rise to successor liability; however,

a share purchase or amalgamation may result in continuing exposure. To determine questions of successor liability, some Canadian courts have considered whether there has been a "de facto merger" of the entities, with a focus on whether there has been continuity of ownership, management and general business operations.

1.5 Damages and Compensation

In recent years, the Canadian Parliament passed legislation to implement more serious sanctions against those convicted of fraud. In addition to sentencing reforms, Canadian courts are obliged to inquire whether victims of the offence were given an opportunity to seek restitution. If so, and if the court does not order restitution, the judge must give reasons for its decision to so decline.

Canadian judges can issue warrants to search, seize and detain property where there are reasonable grounds for the judge to determine that the property could be subject to a criminal forfeiture order. Canadian judges may also grant a restraining order prohibiting any person from disposing or dealing with the property except as authorised by the order.

If an accused is convicted of certain designated offences and the Crown can prove (on a balance of probabilities) that specific property constitutes the proceeds of crime and that the convicted person committed the designated offence in relation to that same property, the court shall order the forfeiture of the property to the Crown. Alternatively, even if it is not demonstrated that the crime was committed in relation to the specific property, the court nonetheless retains discretion to make a forfeiture order if it is proven beyond a reasonable doubt that the property is connected to the proceeds of crime.

Canadian courts may impose fines equal to the value of the property, rather than a forfeiture order, if the property is not subject to forfeiture. Such fines are discretionary and courts are to consider the offender's ability to pay. In the event of default in payment of a fine, a term of imprisonment can be imposed.

1.6 Recent Case Law and Latest Developments

In 2017, in line with the objectives of the US Magnitsky Act, the Canadian Parliament enacted legislation of its own allowing the federal government to freeze the assets of foreign nationals responsible for, or complicit in, significant corruption or violations of internationally recognised human rights.

In September 2018, Canada enacted legislation allowing for remediation agreements in relation to certain economic crimes committed by corporations and other specified types of organisations, known as deferred prosecution agreements. After being available for nearly four years, on 10 May 2022 Canada's first official deferred prosecution agreement was approved by the Quebec Superior Court. The key terms will see SNC Lavalin, a large engineering/consulting company, pay CAD29,558,777, together with other ongoing conditions, to address multiple fraud and conspiracy charges arising from a bribery investigation into the company's role in a bridge refurbishment project. An independent monitor has been appointed to ensure ongoing compliance with the agreement. The charges will be withdrawn after three years if the conditions under the agreement have been met. It is expected that this agreement and the approval decision will form an important precedent for companies facing similar charges going forward.

In May 2020, Canada amended certain regulations under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA). The amendments bring Canada's efforts in this regard into line with standards established by the intergovernmental Financial Action Task Force. Requirements to establish due diligence vis-à-vis customers now apply to accounting firms, casinos, government agencies, dealers in precious metals and real estate agents. The regulations were also updated to cover cryptocurrency businesses.

In June 2021, additional amendments were made to the PCMLTFA to strengthen Canada's regime. These amendments include rules for specific sectors, including: accounting firms, dealers in precious metals and stones, money service businesses, and securities dealers. The amendments also provide for rules of general application to all persons and entities in business sectors that are subject to the PCMLTFA (reporting entities). For businesses that operate in these sectors, new anti-money laundering rules may apply to their operations. This may include enhanced counterparty due diligence requirements or government reporting obligations. Updates to rules of general application to all reporting entities include:

- requirements to update information on beneficial ownership, on an ongoing basis (which previously only applied to high-risk clients);
- special record-keeping requirements for entities that are widely held or publicly traded trusts;
- screening requirements for politically exposed persons and heads of international organisations;
- screening requirements to file large virtual currency transaction reports in prescribed circumstances; and
- new third-party determination rules requiring that reasonable measures are taken to determine whether a third party is involved in certain transactions.

Further changes came into force on 5 April 2022 that require businesses in certain industries to meet new compliance obligations, including registering with FINTRAC and maintaining compliance obligations. These new amendments apply to crowdfunding platforms and certain payment services providers.

In September 2020, the Competition Bureau strengthened its relationships with its antitrust counterpart agencies in Australia, New Zealand, the UK and the USA by entering into the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, aimed at enhancing and reinforcing existing assistance arrangements to allow for greater co-ordination in investigations, collaboration on cross-border matters, and intelligence-sharing.

In 2022, the Canadian government further strengthened cartel laws, adopting significant amendments to the criminal conspiracy provisions of the Competition Act that will take effect in June 2023. These establish a new criminal offence under the criminal conspiracy provisions for employers who agree to fix, maintain, decrease or control wages or other terms of employment (wage-fixing agreements) or refrain from hiring or trying to hire one another's employees (no-poach agreements). The amendments also remove the maximum limit (currently CAD25 million) on criminal fines for supply-side agreements between competitors to fix prices, allocate markets or restrict output, and will allow fines to be set at the discretion of the court. As part of the same amendments, maximum civil administrative monetary penalties for mislead-

ing and deceptive advertising have also been significantly increased.

Canada has shown some degree of increasing CFPOA enforcement. For instance, in December 2019 Mr Sami Bebawi was found guilty on a number of bribery and corruption charges, and on 10 January 2020, he was sentenced to imprisonment for eight years and six months. Around the same time, SNC-Lavalin Construction Inc pleaded guilty to fraud contrary to the Criminal Code. The PPSC and counsel for SNC-Lavalin Construction Inc made joint submissions for a fine of CAD280 million. The court also ordered a three-year probation order that the company cause the SNC-Lavalin Group to maintain and, as required, further strengthen its compliance program, record keeping, and internal control standards and procedures.

And in R v Barra, 2021 ONCA 568 the Court of Appeal for Ontario ordered a new trial in a CFPOA case. The appeal court clarified the mental element of bribery offences under the CFPOA. Going forward, to secure a conviction for bribery under the CFPOA prosecutors will need to establish, beyond a reasonable doubt, that an accused had knowledge of the "official" character of the person to whom the bribe was offered. If the person offered the bribe is employed by a corporation, then to have the required mens rea the accused must know not only that the person was employed by the corporation, but that the corporation was established to perform a function on behalf of a foreign state. This case also clarified when mistrial can be invoked as a remedy for late disclosure in CFPOA prosecutions. In this respect the court held that an accused must establish, on a balance of probabilities, that the right to make full answer and defence was violated. The accused must also show a "reasonable possibility" that the late disclosure affected the outcome or the overall fairness of the trial.

The COVID-19 pandemic has without a doubt impacted efforts to combat bribery and corruption in Canada. Corruption and emergencies fuel each other. During the pandemic, governments have had urgent need for large sums of money and essential goods. This urgency and need can increase opportunities for corruption and bribery to occur, while weakening the mechanisms to prevent it.

2. Enforcement

2.1 Enforcement Authorities

In Canada, both federal and provincial authorities investigate and prosecute white-collar offences.

The Royal Canadian Mounted Police (RCMP), Canada's federal police service, is responsible for investigating many white-collar criminal offences. The RCMP has specific programmes in place to address anti-corruption and financial crimes. However, in recent years, the RCMP has outsourced some white-collar investigations work. Various provincial and local police departments may also investigate white-collar offences.

The federal Public Prosecution Service of Canada (PPSC) is an independent prosecuting authority that prosecutes federal offences. The PPSC publishes guidelines for the application of the provisions of the Criminal Code that deal with remediation agreements, Canada's version of deferred prosecution agreements.

Provincially, Crown attorneys are responsible for prosecuting Criminal Code offences and in Ontario are part of the provincial Ministry of the

Attorney General. Crown counsel also form part of the Ministry of the Attorney General and prosecute regulatory offences, and may also act as civil counsel to other ministries.

Federal and provincial regulators have their own investigations staff. For example, many of the provincial securities regulators, such as the Ontario Securities Commission, have robust teams dedicated to the investigation of regulatory offences.

The province of Ontario has established a Serious Fraud Office (Ontario SFO), under the same model as the UK anti-fraud agency of the same name. The Ontario SFO brings together fraud investigators and specialised Crown prosecutors.

The Competition Bureau (Bureau) investigates both criminal and civil matters under the Competition Act, but refers criminal matters to the Attorney General of Canada who determines whether to prosecute them. In some matters, the Competition Act provides a choice between either a criminal or a civil/administrative track.

2.2 Initiating an Investigation

Police, regulators and prosecutors may initiate an investigation. The RCMP and other police services may initiate investigations independently or working alongside Crown counsel. Crown counsel play a larger role in the early stages of an investigation where judicial authorisations are required for the purposes of evidence gathering. Federally, the PPSC has drafted guidelines governing investigations and the relationship between Crown counsel and investigative agencies.

Large regulators, such as the Bureau and provincial securities commissions, have teams of investigators. Similarly, provincial ministries that act as regulators have teams of investigators that work with provincial Crown counsel. As discussed in greater detail in **2.3 Powers of Investigation**, Charter rights, which constrain investigators in criminal investigations, are not always engaged during a regulatory investigation.

Bureau investigations, whether civil or criminal, are often commenced after the Bureau receives consumer or competitor complaints, or information from whistle-blowers or immunity or leniency applicants.

2.3 Powers of Investigation

In criminal investigations and regulatory investigations supporting criminal charges, investigative authorities are constrained by the subject's Charter rights, such as the right to be protected against unreasonable search and seizure. Accordingly, in these situations, the subject of an investigation may not be compelled to provide evidence.

Where a subject's Charter rights are engaged, investigative authorities still have criminal investigative tools, including search warrants. Warrants may allow investigative authorities to search and seize evidence, implement wire taps, compel testimony under oath or require production of documents or responses to written information requests.

By contrast, in a regulatory investigation where the predominant purpose of the inquiry is not penal liability, the subject of an investigation may be compelled to provide evidence.

In the competition context, the Bureau has broad investigative powers to obtain information from companies under investigation, their employ-

ees, officers and directors, as well as third-party suppliers, customers, competitors and other industry sources, through formal and informal methods. These include voluntary requests for information, court orders for document production, written responses to questions, or oral examinations, search warrants or wiretaps.

2.4 Internal Investigations

Internal investigations are not strictly required under Canadian law. However, directors and officers should be mindful of their fiduciary duties in considering whether an internal investigation is appropriate. Management should also be mindful of the degree of independence required to properly conduct the investigation and take care to avoid internal conflicts.

Internal investigations may assist organisations in assessing liabilities and are particularly helpful for organisations that are considering self-reporting. For example, disclosure of the results of an internal investigation may assist an organisation that is seeking a remediation agreement.

While internal investigations are not mandatory under the Competition Act, the Bureau's immunity programme generally requires that applicants undertake an internal investigation, and reveal all non-compliant conduct of which they become aware, as well as provide progress and/or status updates on the internal investigation. As a result, organisations will typically conduct an internal investigation and engage in fact-finding prior to seeking to rely on the immunity and leniency programmes.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Canada is party to a number of bilateral and multilateral mutual legal assistance treaties. The Mutual Legal Assistance in Criminal Matters Act allows Canadian authorities to obtain court orders on behalf of countries that are parties to mutual legal assistance agreements with Canada. Treaty counties may be able to obtain the following court ordered assistance:

- search and seizure;
- gathering physical or documentary materials;
- compelling witnesses to give statements or testimony, including by video or audio link;
- transferring sentenced persons to the requesting country, with their consent, to give evidence or to assist in an investigation;
- lending court exhibits;
- examining a place or site in Canada;
- enforcing foreign restraint, seizure and forfeiture orders; and
- enforcing criminal fines.

A Canadian judge may make an order for the gathering of evidence, where satisfied that there are reasonable grounds to believe that:

- an offence has been committed; and
- evidence of the commission of the offence or information that may reveal the whereabouts of a person who is suspected of having committed the offence will be found in Canada.

Limited forms of assistance are available to countries that are not parties to mutual legal assistance treaties with Canada. Non-treaty countries must use the letters rogatory process, whereby a judge, court or tribunal in the requesting country issues a request, to obtain evidence in Canada.

Extradition requests are governed by the Extradition Act, international treaties and the Charter. An extradition request must be approved by the Department of Justice, a judge of the Superior Court, and the Minister of Justice. A similar pro-

cess is used when Canadian authorities request the extradition of a person from another state to Canada.

In the competition context, the Bureau's International Affairs Directorate supports its enforcement efforts by negotiating co-operation instruments with foreign authorities. The Bureau has mutual legal assistance treaties with 16 jurisdictions, and also co-operates with foreign authorities through other instruments. Recently, the Bureau strengthened its relationships with its "Five Eyes" counterparts by entering into the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (see **1.6 Recent Case Law and Latest Developments**).

2.6 Prosecution

For most proceedings under the Criminal Code, including standard criminal fraud related offences, the Provincial Crown oversees prosecutions, primarily through Crown prosecutors.

Each province has rules that relate to the process for pressing charges, with an overarching requirement of co-operation between the police and the Crown. In deciding whether to prosecute, in most provinces the Crown must consider (i) whether there is a reasonable likelihood of conviction based on the evidence available at trial, and (ii) if so, would a prosecution best serve the public interest?

If criminal fraud-related offences are committed under federal statutes such as the Competition Act, the matter will be prosecuted by the federal Crown. The Public Prosecution Service of Canada commences and carries out prosecutions on behalf of the federal Crown. The Director of Public Prosecutions has the authority to make decisions to prosecute offences under federal statutes.

With respect to regulatory fraud-related offences, or quasi-criminal infractions, the administrative body established under the statute at issue will typically have the power to investigate and adjudicate potential offences. Where an administrative body forms a view that a matter amounts to criminal fraud, the body can refer the matter to the Crown for criminal prosecution.

2.7 Deferred Prosecution

In September 2018, Canada enacted legislation allowing for remediation agreements (similar to deferred prosecution agreements used in the UK) in relation to certain economic crimes committed by corporations and other specified types of organisation.

If such an agreement is determined to be in the public interest and the relevant Attorney General consents, the Crown may enter into such negotiations, considering several factors. These factors include: the "nature and gravity" of the alleged offence; whether the organisation has taken steps internally to prevent further misconduct; and whether it has co-operated with the authorities and made reparations for the harm it has caused.

Applicable offences include fraud, bribery, secret commissions, money laundering and certain offences under the CFPOA. Such agreements are also subject to approval of the Court, which will consider, inter alia, reparations for victims, community impact and whether the terms are determined to be "fair, reasonable and proportionate to the gravity of the offence".

2.8 Plea Agreements

Plea agreements are common in Canada, and their utility has been repeatedly endorsed by the courts.

Plea bargaining often involves agreement on more than a joint sentence submission. Negotiations regularly focus on whether the Crown will accept a plea to a lesser offence or withdraw some of the offences in exchange for the accused pleading guilty to others. In coming to an agreement, both sides will want reasonable certainty that the court will accept a joint submission.

In R v Anthony-Cook, 2016 SCC 43, the Supreme Court of Canada has indicated that plea bargains should only be rejected by the court in exceptional circumstances. Rejection of a joint submission should only occur when it is "so unhinged from the circumstances of the offense and the offender that its acceptance would lead reasonable and informed persons, aware of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down".

3. White-Collar Offences

3.1 Criminal Company Law and Corporate Fraud

Most of the provinces and territories within Canada operate under the common law, except for Quebec, which uses a mix of civil law and common law. However, Canadian criminal law is governed largely by the federal Criminal Code. There are numerous municipal, provincial and federal regulatory regimes that sanction corporate misconduct and that have criminal or quasi-criminal powers, but for present purposes, the focus of this section is on corporate criminal liability as set out in the Criminal Code and the CFPOA.

Under the Criminal Code and the CFPOA, some of the key provisions pertaining to corporate criminal liability include the following.

- Negligence – offences of negligence – organisations (Criminal Code, Section 22.1); duties tending to the preservation of life; duty of persons directing work (Criminal Code, Section 217.1) if done with criminal negligence (Criminal Code, Sections 219 and 220, 221 or 222).
- Offence that requires fault (other than negligence); other offences – organisations (Criminal Code, Section 22.2).
- Theft – theft by or from person having special property or interest (Criminal Code, Section 328(e)).
- False pretences – false pretence or false statement (Criminal Code, Sections 362(1)(c), Section 362(1)(d)).
- Forfeiture – person deemed absconded (Criminal Code, Section 462.38(3)(b)); money laundering (Criminal Code, Section 462.31).
- Public stores – selling defective stores to Her Majesty; offences by representatives (Criminal Code, Section 418(2)).
- Bribery, corruption and inappropriately influencing public and municipal officials – bribery of officers (including judicial officers) (Criminal Code, Sections 119, 120); frauds on the government (Criminal Code, Section 121); breach of trust by public officer (Criminal Code, Section 122); municipal corruption (Criminal Code, Section 123); selling or purchasing office (Criminal Code, Section 124); influencing or negotiating appointments or dealing in offices (Criminal Code, Section 125); bribing a foreign public official (CFPOA, Section 3); accounting (CFPOA, Section 4); offence committed outside Canada (CFPOA, Section 5); secret Commissions (Criminal Code, Section 426).

- Threats and retaliation against employees (Criminal Code, Section 425.1).
- Fraud (Criminal Code, Section 380); fraudulent manipulation of stock exchange (Criminal Code, Section 380(2)); insider trading (Criminal Code, Section 382.1(1)); tipping (Criminal Code, Section 382.1(2)) and making a false prospectus (Criminal Code, Section 400).

See also **1.4 Corporate Liability and Personal Liability**.

3.2 Bribery, Influence Peddling and Related Offences

Domestic Offences

Under the Criminal Code it is an offence to:

- give or offer any loan, reward, advantage or benefit of any kind to public officials (or their family members) for co-operation, assistance, exercise of influence or an act or omission in connection with any government business;
- bribe any municipal official, officer or judicial officer; or
- provide a "secret commission" to the agent of a principal, including giving or offering a reward, advantage or benefit as consideration for doing or not doing anything related to the affairs or business of an agent's principal, or demanding, accepting, or offering to accept such a reward, advantage or benefit, or otherwise knowingly being privy to a secret commission.

Offences with respect to public officials and secret commissions are subject to fines and/or imprisonment for up to five years, while offences with respect to officers and judicial officers may be liable to fines and/or imprisonment for up to 14 years. Corporate liability can arise where an offence is committed with the knowledge or direction of a "senior officer", which has been held to include individuals responsible for managing an important aspect of the activities of a business, and is not limited to senior management.

Quebec, the only province that broadly addresses bribery at a provincial level through its Anti-Corruption Act, establishes various offences pertaining to corruption, breach of trust, malfeasance, collusion, fraud and influence peddling in the public sector and in the administration of justice; the misuse of public funds; and the gross mismanagement of public contracts (Section 2). The statute provides a number of penalties associated with hindering investigations and reprisals against whistle-blowers.

Under the federal Lobbying Act and similar provincial legislation, lobbyists are required to register and report on their activities. Registration is required for both in-house lobbyists (ie, employees) and consultant lobbyists who, for payment, act on behalf of clients. Lobbying is defined broadly to include communicating with public office holders in an attempt to influence their decisions. For consultant lobbyists, "lobbying" includes arranging a meeting between a public office holder and any other person. Under the federal law, penalties include a fine of up to CAD200,000 and/or imprisonment for up to two years.

Pursuant to the federal Conflict of Interest Act, it is an offence for a public official to receive any gift or other advantage that might reasonably be seen to have been given to influence the exercise of an official power, duty or function, or to benefit from public contracts, including through an interest held in a partnership or corporation, or to use a position to seek to influence a decision to further the official's private interests. A public official found to have committed such

offences may be subject to a penalty based on the gravity of the offence.

The Canada Elections Act also prohibits federal political candidates from accepting any gift or advantage (excluding political contributions within regulated limits) that might reasonably be seen to have been given to influence them in their duties and functions if elected.

Foreign Offences: the CFPOA

Foreign bribery is governed by the CFPOA, which applies to all Canadian citizens, permanent residents of Canada, persons anywhere whose acts or omissions have been committed in Canada, as well as organisations incorporated or formed in Canada. Under the CFPOA, it is an offence to:

- give or offer a loan, reward, advantage or benefit of any kind to a foreign (non-Canadian) public official or to any person for the benefit of a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties/functions; or
- induce the official to use their position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions.

Penalties under the CFPOA include imprisonment for up to 14 years, and unlimited fines for corporate offenders.

3.3 Anti-bribery Regulation

Canadian anti-bribery legislation does not impose a specific obligation to prevent bribery or influence peddling, or to maintain a compliance programme. However, given the potential consequences arising from violations, adopting an effective compliance programme is increasingly standard industry practice.

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

Provincial and territorial securities laws generally prohibit persons in a "special relationship" with an issuer from trading the issuer's securities, if that person is in possession of material non-public information, or from informing any other person of the material non-public information except in the necessary course of business. Provincial securities legislation also addresses market abuses, including matters related to misleading representations, misleading statements, and market manipulation.

While penalties vary from province to province, individuals and corporations found guilty of insider dealing and market abuses are liable to fines of up to CAD5 million (and in certain cases, triple the amount of profit made or loss avoided) and/or up to five years' less a day imprisonment, and may also be liable for administrative monetary penalties, trading bans and disgorgement orders. Certain provinces also provide for an individual right of action for damages for certain offences.

The federal Criminal Code also prohibits insider trading, including directly or indirectly buying or selling a security while knowingly using inside information obtained in a defined manner that has not been generally disclosed and that could reasonably be expected to significantly affect the market price or value of a security; or conveying such inside information ("tipping"). A person found guilty of insider trading is liable to imprisonment for up to ten years, while conveying inside information is subject to imprisonment for up to five years.

3.5 Tax Fraud

The federal Income Tax Act prohibits tax evasion, including failing to report foreign property, reporting less income than actually earned, deducting amounts that are higher than allowed, making false or deceptive statements/entries in a tax return/records, destroying or altering records to evade tax, and selling/promoting unregistered "tax shelters".

If prosecuted as a criminal offence (which generally requires an intent to evade tax), tax evasion is subject to a fine of not less than 50% (100%, for certain offences related to tax shelters), and not more than 200% (eg, of the tax sought to be evaded), or this same fine and imprisonment for up to five years.

Tax evasion constituting fraud under the Criminal Code may be subject to imprisonment for up to 14 years. Directors/officers may be held criminally liable for participating/acquiescing in a company's tax evasion. Canada has a voluntary disclosure programme, under which a taxpayer may be relieved of criminal prosecution if the taxpayer voluntarily discloses tax evasion.

3.6 Financial Record-Keeping

The Criminal Code broadly governs offences related to record-keeping, and prohibits:

- the use, trafficking or possession of forged documents (Section 368);
- the falsification of books and documents, including through alteration, falsification, destruction and/or omissions with the intent to defraud (Section 397); and
- the circulation or publishing of a false prospectus, a statement or an account with the intent to induce, deceive or defraud (Section 400).

Persons found guilty of falsifying books and documents, including financial records, are subject to imprisonment for up to five years, while those found guilty of publishing falsified financial documents and using, trafficking or possessing forged documents are subject to up to ten years' imprisonment.

The CFPOA also prohibits the falsification and/or destruction of books and records, the omission of records, and the use of knowingly false documents for the purpose of bribing a foreign public official in order to obtain or retain an advantage or for the purpose of hiding that bribery. Persons found guilty are liable to imprisonment for up to 14 years.

Additionally, federal and provincial corporate laws provide for record-keeping requirements. Numerous provincial corporate laws prohibit the misrepresentation of information on financial statements and impose a duty on corporations to guard against falsification of records. Fines vary on a province-by-province basis. For example, in Ontario, individuals found guilty of such offences may be subject to a fine of up to CAD2,000 and/or imprisonment for up to one year, while corporations are subject to a fine of up to CAD25,000.

Similarly, the federal Canada Business Corporations Act prohibits directors and officers from knowingly recording, authorising or permitting the recording of false or misleading information, subject to a fine of up to CAD200,000 and/or imprisonment for up to six months.

3.7 Cartels and Criminal Competition Law

The main cartel offences are agreements or arrangements to fix prices, allocate sales, territories, customers or markets, or restrict output

(Section 45), and to rig bids. Effective 23 June 2023, wage-fixing agreements and no-poach agreements between employers will also be criminalised. These are per se illegal – ie, there is no requirement to prove effect on the market. All other competitor agreements or arrangements may be subject to civil review and administrative enforcement where they are found likely to prevent or lessen competition substantially.

Corporations and individuals found guilty of cartel conduct may be subject to a fine of up to CAD25 million per count; individuals may also be subject to imprisonment for up to 14 years. Parties may be charged with multiple counts, thereby resulting in fines that significantly exceed the statutory maximum. Legislative amendments adopted in 2022 will remove the maximum per-count fine and allow fines to be set at the discretion of the court, with no maximum fine, effective 23 June 2023.

Bid-rigging is already subject to a discretionary fine, for both individuals and corporations. Individuals may also face up to 14 years in prison and a fine, but there is no maximum statutory fine for either individuals or corporations.

The Competition Act also permits private parties to bring civil claims for single damages resulting from breaches (or alleged breaches), which are typically brought by way of class actions.

Civil matters that are resolved by consent agreement or order of the Competition Tribunal can attract criminal penalties, if a civil order is subsequently contravened, including a fine in the discretion of the court (and/or imprisonment for up to five years for individuals).

3.8 Consumer Criminal Law

The Competition Act prohibits misleading representations and a wide range of deceptive marketing practices, which may generally result in either criminal or civil penalties. These include false or misleading representations to the public, deceptive telemarketing, deceptive prize notices, deceptive pricing practices, and pyramid selling schemes, and various more specific practices specifically subject to civil sanction. Legislative amendments adopted in 2022 now explicitly recognise drip pricing as a form of both civil and criminal false or misleading advertising.

Criminal offences are punishable by a fine at the discretion of the court and/or imprisonment for up to 14 years. Civil provisions carry significant administrative monetary penalties for corporations of the greater of CAD10 million (CAD15 million for repeat conduct) and three times the value of the benefit obtained from the deceptive conduct, or, if this amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues. As noted above, violation of a civil order can result in criminal sanctions.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

The Criminal Code criminalises various cybercrime offences, including the following:

- (i) obstruction, interruption or interference with the lawful use of computer data, or denying access to computer data to a person who is entitled to access it, (ii) destruction or alteration of computer data, and (iii) rendering computer data meaningless, useless or ineffective, punishable by imprisonment for up to ten years;
- importation, possession, sale, distribution or making available a device that is designed

or adapted primarily to commit an offence through unauthorised access or the infection of computer systems, punishable by imprisonment for up to two years; and
- knowingly obtaining or possessing another person's identity information in circumstances giving rise to a reasonable inference that the information is intended to commit an offence involving fraud, deceit or falsehood, punishable by imprisonment for up to five years.

In addition to the Criminal Code, Canada's Anti-Spam Legislation (CASL) prohibits the unauthorised installation of a computer program on another person's computer system. CASL violations may be subject to substantial administrative monetary penalties of up to CAD10 million per violation for corporations and up to CAD1 million per violation for individuals.

The federal government recently introduced Bill C-26, An Act Respecting Cyber Security (ARCS). The proposed legislation is intended to bolster cyber security in the financial, telecommunications, energy, and transportation sectors. The proposed legislation is still under consideration, but would introduce amendments to the Telecommunications Act and Canada Evidence Act. The ARCS would also introduce the new Critical Cyber Systems Protection Act (CCSPA). The CCSPA is aimed at securing Canada's critical infrastructure from cyberthreats.

3.10 Financial/Trade/Customs Sanctions

The United Nations Act allows the Canadian government to give effect to any measure adopted by the United Nations Security Council, including through the imposition of economic and trade sanctions. Persons contravening any order or regulation made under the statute may be subject to a fine of up to CAD100,000 and/or imprisonment for up to one year.

Non-multilateral trade and economic sanctions may be given effect under the Special Economic Measures Act or the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law). Persons wilfully contravening any sanctions enacted by these statutes may be subject to a fine of up to CAD25,000 and/or imprisonment for up to one year.

The Criminal Code prescribes measures intended to prohibit and punish certain activities involving organisations or persons associated with terrorism and related activities.

The Freezing Assets of Corrupt Foreign Officials Act allows the assets and property of foreign politically exposed persons to be frozen or restrained. Persons who contravene the measures enacted under the Freezing Assets of Corrupt Foreign Officials Act may be subject to fines of up to CAD25,000 and/or imprisonment for up to five years.

Contraventions of the Customs Act and related customs statutes and regulations may be subject to civil and/or criminal penalties. The Administrative Monetary Penalties System (AMPS) is a graduated civil monetary penalty system that applies to certain contraventions of the Customs Act and related customs/trade statutes. Penalty amounts under AMPS vary depending on the contravention. Civil penalties may also take the form of seizures and ascertained forfeitures. Criminal offences pursuant to the Customs Act are punishable by fines of up to CAD500,000 and/or imprisonment of up to five years.

Persons exporting goods or technologies from Canada in contravention of the federal Export and Import Permits Act may be subject to a fine that is determined at the court's discretion and/

or to imprisonment for a term not exceeding ten years.

3.11 Concealment

Under the Criminal Code, fraudulent concealment – ie, fraudulently taking, obtaining, removing or concealing anything – is punishable by up to two years' imprisonment (Section 341). There is no required predicate offence.

3.12 Aiding and Abetting

Pursuant to the Criminal Code, a person found to have aided or abetted any crime will be considered a party to the offence, and will be subject to the same consequences and potential penalties as a person who actually committed the offence.

3.13 Money Laundering

It is an offence under the Criminal Code to engage in money laundering. To establish the offence, a person must have (i) laundered property or any proceeds of any property, in any manner and by any means, (ii) with the intent to conceal or convert that property or those proceeds, (iii) knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of an offence in Canada (or one occurring outside Canada, that, if it occurred in Canada, would constitute an offence).

Money laundering is punishable by imprisonment for up to ten years. Additionally, courts may also order the forfeiture of certain property.

In addition, the federal Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) imposes obligations on financial institutions and certain other businesses to prevent money laundering through record-keeping, identity verification, and ongoing monitory and reporting, as well as through anti-money laundering compliance programmes. The PCMLTFA is enforced by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), the federal financial intelligence agency.

Persons found in contravention of the PCMLTFA may be subject to a fine of up to CAD500,000 and/or imprisonment for up to five years, or an administrative monetary penalty of up to CAD100,000 for individuals or up to CAD500,000 for organisations, for most offences. Parties may be offered the opportunity to enter into a formal compliance agreement with FINTRAC in exchange for a reduced penalty.

As discussed in **1.6 Recent Case Law and Latest Developments**, the PCMLTFA and its regulations have seen significant amendments in recent years.

4. Defences/Exceptions

4.1 Defences

General defences available under Canadian criminal law, including duress and necessity, are applicable to white-collar offences. While not strictly a defence, criminal liability may also be avoided where the defence shows that the Crown has not proven an element of the offence.

Similarly, defences based on the Canadian Charter of Rights and Freedoms may be available – for example, where evidence was obtained through unreasonable search and seizure such evidence can be excluded. Criminal proceedings may also be stayed as an abuse of process in instances of entrapment. In addition to these more general defences, a wide range of specific statutory defences exist under Canadian law.

The Competition Act establishes a number of limited defences to a charge of conspiracy. These are:

- the ancillary restraint defence, whereby parties that have been charged with conspiracy will not be convicted if the agreement or arrangement in question is directly related to, and reasonably necessary for, giving effect to a broader or separate agreement;
- the regulated conduct defence, whereby actions that are authorised or carried out pursuant to federal or provincial legislation may be exempt from prosecution in certain circumstances; and
- the export cartels defence, whereby agreements or arrangements that relate only to the export of products from Canada are exempt from prosecution provided they meet certain conditions.

Parties subject to a bid-rigging offence may invoke the disclosure defence – that is, that all communications and arrangements with other bidders have been disclosed to the person calling for or requesting the bid, while parties alleged to have engaged in misleading advertising or violated certain other consumer criminal laws may rely on a due diligence defence.

Under provincial securities legislation, an accused may establish a defence to insider trading or tipping if the individual reasonably believed that the material information had been generally disclosed. An accused may also establish a defence to tipping when the information was provided in the necessary course of business.

The CFPOA sets out certain defences for bribery of foreign public officials. An accused may establish a defence where: (i) the benefit given is permitted or required under the laws of the foreign state or public international organisation for which the foreign public official performs duties or functions; or (ii) the benefit was given to pay reasonable expenses incurred in good faith by or on behalf of the foreign public official that are related to promotion of the accused's products and services or the performance of a contract between the person and the foreign state.

Canadian money laundering offences require proof of intent and knowledge. However, in certain circumstances an accused's recklessness may also satisfy the knowledge requirement. For reporting offences under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, a due diligence defence is available.

4.2 Exceptions

No industries or sectors are exempt from Canadian white-collar criminal liability. However, the Competition Act exempts affiliated companies from prosecution under the conspiracy provisions.

No de minimis exceptions exist under statutes relating to white-collar offences. However, Crown prosecutors and regulators have discretion to refrain from bringing charges and may do so where the amount at issue is negligible. Similarly, mitigating factors to the offence may play a role in sentencing.

4.3 Co-operation, Self-Disclosure and Leniency

While co-operation and self-disclosure may be mitigating factors on sentencing (or in the determination of penalty), these steps will not typically relieve a party of criminal or regulatory liability.

As discussed above, Canada has recently enacted a deferred prosecution regime that allows a corporate accused to enter into a remediation

agreement with the Crown. Self-disclosure and co-operation are factors that may be considered by the Attorney General in deciding whether to offer an accused a remediation agreement. In the context of bribery charges under the CFPOA, self-disclosure and co-operation have been considered in negotiating a plea agreement, and would also be considered on sentencing.

Self-disclosure and co-operation with specific investigators may be a mitigating factor. Parties implicated in conduct that violates the criminal provisions of the Competition Act may co-operate with the Bureau in exchange for immunity from prosecution. However, in order to qualify for immunity, a party must either be the first to disclose an offence not yet detected, or be the first party to come forward before there is sufficient evidence to commence a prosecution.

Parties that are implicated in conduct that violates the Competition Act and that do not qualify for immunity may apply for leniency in prosecution, but must plead guilty to an offence under the Act and provide full co-operation.

4.4 Whistle-Blower Protection

No comprehensive whistle-blower legislation exists in Canada. However, there are some specific protections in place.

The Criminal Code prohibits employers or their agents from:

- threatening an employee to prevent that employee from providing information to law enforcement; or
- retaliating against an employee who has provided information to law enforcement.

Provincial whistle-blower protections in securities legislation is in place, but inconsistent – some provinces (ie, Alberta, Manitoba, Saskatchewan, New Brunswick and Ontario) have enacted protections, while others have yet to legislate formal protections. Provincial securities regulators, including the Ontario Securities Commission, have also implemented incentive programmes for whistle-blowers.

The Canada Revenue Agency offers financial incentives for whistle-blowers who provide information regarding international non-compliance of Canadian taxpayers.

Federal public sector employers are required to create a code of conduct protecting whistle-blowers under Canada's Public Servants Disclosure Protection Act. Similar provincial legislation exists in certain provinces.

Under the Competition Act, any person may notify the Bureau of an offence and request that their identity be kept confidential. Employers are prohibited from retaliating against whistle-blower employees who act in good faith and on the basis of a reasonable belief, through dismissing, suspending, demoting, disciplining, harassing or otherwise disadvantaging an employee, or denying an employee a benefit of employment.

5. Burden of Proof and Assessment of Penalties

5.1 Burden of Proof

Generally, Canadian criminal law requires that the prosecution prove each element of an offence beyond a reasonable doubt. The accused benefits from a presumption of innocence.

In civil cases, the plaintiff must prove their claim on a balance of probabilities. Similarly, defend-

ants must prove any affirmative defences on a balance of probabilities.

5.2 Assessment of Penalties

The Criminal Code sets out the purpose of sentencing and establishes principles used to guide judges in imposing sentences. The Criminal Code also sets out the following factors to be considered when sentencing an organisation:

- any advantage realised by the organisation as a result of the offence;
- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- whether the organisation has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;
- whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- any penalty imposed by the organisation on a representative for their role in the commission of the offence;
- any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and
- any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.

Distinct sentencing principles exist for regulatory offences. Generally, in assessing sentences for regulatory offences, the goal is to impose an appropriate sentence to achieve general and specific deterrence, bearing in mind the principles of sentencing including proportionality and parity. Given that regulatory offences are created under a range of disparate statutes, many of which are provincial legislation, the principles of sentencing vary depending on the relevant offence and jurisdiction.

Courts and regulators have discretion to impose sentences after an accused is convicted of an offence. An accused may also enter into a plea agreement with prosecutors – however, plea agreements are still subject to approval from the relevant court or regulator.

When a remediation agreement is entered into, any conditions of that agreement are not considered to be part of a sentence. However, conditions of a remediation agreement may include financial penalties, disgorgement, mandatory implementation of compliance measures and reparations to victims. The terms of a remediation agreement are negotiated between the accused and prosecutors. Negotiation of a remediation agreement must be approved by the Attorney General and the final terms require judicial approval.

The federal government has also implemented an “integrity regime” designed to ensure that the government only does business with ethical suppliers. The integrity regime includes an “ineligibility and suspension policy” under which businesses may be declared ineligible or suspended from doing business with the government.

Baker McKenzie has a white-collar and investigations practice which is one of the largest in the world, drawing on resources and expertise in 78 offices across 46 countries. The firm's Canadian team boasts an array of top practitioners with the seamless ability to pursue and defend multi-jurisdictional proceedings. The team is well known for handling high-stakes corporate and civil fraud litigation, global asset recoveries, cartel defence and competition matters, bribery and corruption issues, and a range of internal and government investigations.

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