

Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations
around the World

Third Edition

Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Contents

VOLUME II GLOBAL INVESTIGATIONS AROUND THE WORLD

1	Introduction to Volume II	1
	<i>Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath</i>	
2	Australia	3
	<i>Ben Luscombe, Jenni Hill, Angela Pearsall, Kirsten Scott and Lara Gotti</i>	
3	Austria	20
	<i>Bettina Knoetzl</i>	
4	Brazil	40
	<i>Isabel Costa Carvalho, Mariana Vasques Matos and Cíntia Rosa</i>	
5	Canada	57
	<i>Graeme Hamilton and Milos Barutciski</i>	
6	China	73
	<i>Kyle Wombolt and Anita Phillips</i>	
7	France	91
	<i>Stéphane de Navacelle, Sandrine dos Santos and Julie Zorrilla</i>	
8	Germany	109
	<i>Sebastian Lach, Nadine Lubojanski and Martha Zuppa</i>	
9	Greece	125
	<i>Ilias G Anagnostopoulos, Jerina Zapanti and Alexandros Tsagkalidis</i>	

Contents

10	Hong Kong	143
	<i>Wendy Wysesong, Donna Wacker, Anita Lam, William Wong, Michael Wang and Nicholas Turner</i>	
11	India	161
	<i>Srijoy Das and Disha Mohanty</i>	
12	Ireland	180
	<i>Claire McLoughlin, Karen Reynolds and Ciara Dunny</i>	
13	Mexico	205
	<i>Diego Sierra</i>	
14	New Zealand	224
	<i>Polly Pope, Kylie Dunn and Emmeline Rushbrook</i>	
15	Nigeria	243
	<i>Babajide Ogundipe, Benita David-Akoro and Olatunde Ogundipe</i>	
16	Romania	259
	<i>Gabriel Sidere</i>	
17	Russia	281
	<i>Alexei Dudko</i>	
18	Singapore	300
	<i>Danny Ong and Sheila Ng</i>	
19	Switzerland	317
	<i>Benjamin Borsodi and Louis Burrus</i>	
20	Turkey	334
	<i>Filiz Toprak Esin and Asena Aytuğ Keser</i>	
21	United Kingdom	350
	<i>Tom Stocker, Neil McInnes, Stacy Keen, Olga Toczewicz and Alistair Wood</i>	
22	United States	381
	<i>Michael P Kelly</i>	
	About the Authors	399
	Contributing Firms' Contact Details	451

1

Introduction to Volume II

**Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath¹**

Boards and senior executives have never been more concerned that they or their organisation may come under the scrutiny of enforcement authorities. And with good reason. Recent years have seen an upsurge in confidence among enforcement authorities across the globe, which has manifested and led to increased numbers of investigations, fines of unprecedented orders of magnitude and senior executives facing the much more realistic prospect of investigations concerning their own conduct and, in some cases, prosecution, conviction and imprisonment.

In many jurisdictions, the introduction of new offences and changes to the law of corporate criminal liability have provided enforcement authorities with enhanced opportunities to pursue criminal investigations and ultimately to prosecute corporate entities. Coupled to this has been the incentivisation of corporates to co-operate with investigations and provide information to assist authorities in pursuing culpable individuals through negotiated settlements. In some jurisdictions, notably the United States, these are an established feature of the enforcement landscape and are regularly used to bring investigations to a pragmatic conclusion without the commercially destructive consequences prosecution of a corporate entity can bring. In others, such as the United Kingdom and France, legislation enabling corporates to conclude investigations short of prosecution is still comparatively young.

The law relating to criminal and regulatory investigations shows no sign of standing still. Law and practice across the globe has changed, often in response to highly publicised scandals. Relationships between enforcement authorities continue to grow closer, and there is a marked trend in politicians, prosecutors and regulators carefully watching the way other jurisdictions choose to combat corporate crime, to apply the most effective mechanisms in

¹ Judith Seddon and Ama A Adams are partners at Ropes & Gray International LLP; Christopher J Morvillo and Luke Tolaini are partners and Tara McGrath is a senior associate at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

their own national contexts. Recent examples of changes to legislation in terms of either extending corporate criminal liability or legislating for its resolution through deferred prosecution agreements (or both) include significant changes being made in Singapore, Japan, Canada, Australia and Ireland at the time of writing. A similar trend may be observed in the regulatory sphere through the implementation of individual accountability regimes modelled on or drawing from the UK Senior Managers and Certification Regime in, for example, Hong Kong, Australia and Singapore.

All these macro factors, together with important changes to technical local legislation such as the implementation of the EU General Data Protection Regulation, present numerous, significant challenges to corporates and individuals around the world. Both can quickly find themselves the targets of fast-moving and far-reaching investigations, whose possible outcomes may vary significantly in different jurisdictions.

In Volume II of this Guide, which in the third edition now covers 21 jurisdictions, local experts from national jurisdictions respond to a common set of questions designed to identify the local – continually evolving – nuances of law and process that practitioners are likely to encounter in responding to the increasing number of cross-border investigations they face.

5

Canada

Graeme Hamilton and Milos Barutciski¹

General context and principles

- 1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

In February 2015, the Royal Canadian Mounted Police (RCMP) charged leading Canadian construction and engineering company SNC-Lavalin Group Inc in connection with alleged fraud relating to the construction of a Montreal hospital and alleged bribery of foreign officials in Libya. Following the initiation of the investigation, the company replaced its senior management and board and introduced robust compliance policies and procedures. SNC-Lavalin pleaded not guilty to the charges and the preliminary inquiry in the matter commenced on 29 October 2018 before a judge of the Court of Quebec in Montreal. The judge will determine whether the Crown has met the evidentiary burden to commit the company to trial. It was expected by many observers of the matter that the recent enactment of amendments to the Criminal Code introducing deferred prosecution agreements in Canada ('remediation agreements') would lead to a possible negotiated settlement of the charges. However, the company was informed by the Director of the Public Prosecution Service of Canada in early October 2018 that the prosecution was not prepared at that time to initiate negotiations for a remediation agreement. Regardless of whether the case is settled or goes to trial, it will set important benchmarks for corporate criminal liability in Canada.

¹ Graeme Hamilton and Milos Barutciski are partners at Borden Ladner Gervais LLP. The authors would like to thank their associate, Alannah Fotheringham, for her assistance with this chapter.

2 Outline the legal framework for corporate liability in your country.

Criminal law applies broadly to 'organisations', including corporations and partnerships. The liability of a corporation is assessed through an evaluation of the actions of their senior officers. 'Senior officers' are defined to include a representative who plays an important role in the establishment of an organisation's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer. A 'representative' is defined as a director, partner, employee, member, agent or contractor of the organisation.

For offences that require the prosecution to prove fault (apart from negligence), a corporation will be a party to an offence, if, with the intent at least in part to benefit the organisation, one of its senior officers (1) acting within the scope of their authority, is a party to the offence, (2) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organisation so that they carry out the act or make the omission specified in the offence, or (3) knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

For offences that require the prosecution to prove negligence, an organisation is a party to an offence if (1) one of the organisation's representatives, acting within the scope of their authority, is a party to the offence, and (2) the senior officer responsible for the aspect of the organisation's activities relevant to the offence departs markedly from the standard of care that could reasonably be expected to prevent a representative of the organisation from being a party to the offence.

In addition, there are a multitude of provincial and federal strict and absolute liability offences for which a corporation can be prosecuted but that do not require proof of intent.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

The law enforcement authorities most frequently encountered by corporations are the Canadian Competition Bureau (which enforces the Competition Act), the RCMP (which typically investigates alleged breaches of the Corruption of Foreign Public Officials Act as well as complex, multi-jurisdictional terrorist financing and money laundering offences proscribed by the Criminal Code) and the provincial securities regulators (which enforce provincial securities legislation). There are no specific policies pertaining to the prosecution of corporations.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

No particular threshold of suspicion is required. However, to take investigative steps that involve compelling the production of documents from the target of the investigation or third parties, the authorities generally need reasonable grounds to believe that an offence has been committed. The one exception is securities regulatory investigations, where no threshold of suspicion is necessary to issue a summons.

- 5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Yes.

- 6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Generally speaking, Canadian criminal law does not apply extraterritorially. Section 6(2) of the Criminal Code provides that ‘no person shall be convicted . . . of an offence committed outside Canada’ unless a specific provision provides otherwise. That said, ‘outside Canada’ has been judicially interpreted in the leading Supreme Court of Canada case, *R. v. Libman*, as lacking a ‘real and substantial’ connection to Canada. In other words, an offence committed outside the territory of Canada could be prosecuted in Canada if there remains some ‘real and substantial’ link to Canada. Also, many proscriptions of particular concern to corporations contain language that gives them extraterritorial effect. For instance, both the anti-money laundering (AML) provision in the Criminal Code and the terrorism financing provision contain specific language to give them extraterritorial effect. The AML provision prohibits dealing in property acquired as a result of the commission abroad of an act that would be a criminal offence in Canada. A terrorism financing offence is deemed to be committed in Canada where there is a nexus between the underlying terrorist act and Canada, either through the perpetrator or the victim, or if the person who commits the terrorism financing offence is linked to Canada. In addition, bribery of foreign officials in contravention of the Corruption of Foreign Public Officials Act is prosecutable in Canada if the offence is committed by a corporation, firm or partnership that is ‘incorporated, formed or otherwise organised under the laws of Canada or a province’.

- 7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Cross-border criminal investigations are often hampered by difficulty in obtaining information from foreign sources. Canada has mutual legal assistance treaties (MLATs) with some 20 countries and Canadian legislation allows non-treaty assistance. MLAT requests can be time-consuming and administratively burdensome. Canadian authorities also have enforcement co-operation agreements and memoranda of understanding with counterpart agencies in other countries in matters such as competition law and securities. Informal co-operation also takes place between Canadian enforcement agencies and their foreign counterparts; however, the extent of co-operation is often limited as a result of statutory and policy restrictions on disclosure of confidential information.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Canadian enforcement authorities do not, as a general matter, defer to the findings of foreign agencies (absent a double jeopardy issue where the same matter has been definitively determined by a foreign court). That said, Canadian authorities will consider both the fact of and the outcome of foreign investigations when determining case and resource-allocation priorities.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture, including the existence of and effectiveness of compliance policies, is taken into consideration by Canadian enforcement agencies and courts. Several agencies including the Competition Bureau and the Financial Transactions and Reports Analysis Centre of Canada have issued guidelines on compliance policies, while officials of other agencies (such as the RCMP and securities commissions) have made public statements about the importance of compliance policies and procedures and 'tone at the top'. Similarly, corporate decisions to self-report potential violations and the existence of robust compliance policies have been considerations in certain instances where enforcement authorities have chosen not to prosecute.

10 What are the top priorities for your country's law enforcement authorities?

Enforcement authority is divided by subject matter, level of government (federal, provincial or municipal) and geographical jurisdiction. As a result, enforcement priorities vary considerably across the country and by subject matter. In recent years, the RCMP has indicated that it is giving priority to organised crime, terrorism and national security and economic crimes. At the provincial level, priorities have varied, with money laundering attracting greater priority in British Columbia and corruption being a key focus in Quebec.

11 How are internal investigations viewed by local enforcement bodies in your country?

As a general rule, Canadian enforcement agencies welcome the efforts of corporations to address wrongdoing by officers, directors and employees, including conducting internal investigations. However, the posture towards internal investigations varies immensely from agency to agency and is affected by the safeguards adopted to preserve the integrity of the internal investigation and the evidence collected.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct come to the attention of enforcement authorities and corporate management through a wide range of sources. Whistleblowers, internal or compliance audits

and media reports are frequent sources of both internal and government investigations. In 2015, the Ontario Securities Commission adopted a whistleblower policy to award up to C\$5 million to persons who report securities law violations.

13 Does your country have a data protection regime?

Canada has privacy laws at both federal and provincial levels. The Personal Information Protection and Electronic Documents Act applies to federal government organisations and to businesses in provinces that do not have ‘substantially similar’ privacy protections. Canada does not have a broad data protection law equivalent to the European Union’s General Data Protection Regulation.

14 How is the data protection regime enforced?

Contraventions of privacy laws are generally enforced through complaints to and investigations by commissioners appointed federally or provincially.

15 Are there any data protection issues that cause particular concern in internal investigations in your country?

Canadian privacy and data protection laws have not been impediments to internal investigations to date.

16 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants are a feature of law enforcement in Canada.

Generally, a warrant to search a particular location may only be issued where there are reasonable grounds to believe that the search will yield evidence of the commission of an offence. The search warrant will outline the parameters of the search, including the date, time and the specific location (or locations) to be searched. An application for a search warrant must be supported by affidavit evidence establishing the requisite grounds.

Where the requisite grounds for the search are lacking, or the parameters of the search authorised by the warrant are exceeded, the search will be unreasonable in violation of section 8 of the Canadian Charter of Rights and Freedoms (the Charter), which protects both individuals and corporations from unreasonable searches and seizures. At the investigative stage, an application to quash the search warrant can be brought after the search has been executed (there is usually not an opportunity to bring the application beforehand because the target of the search will typically only become aware of the search at the time the warrant is executed). If the application is successful, the fruits of the search may be returned to the party from which they were seized. If a prosecution is initiated, it is also possible to exclude evidence obtained from an unlawful search pursuant to a pretrial application brought pursuant to section 24(2) of the Charter.

17 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

When a search warrant is being executed, the target being searched (or their legal counsel) may make a claim of privilege over privileged documents. In such circumstances, the documents will be sealed in an envelope and provided to the clerk of the local superior court. The investigating authorities and defence counsel may then negotiate a review process for the privileged records.

If the search warrant authorises the seizure or imaging of a computer, the target being searched (or their legal counsel) can still make a claim for privilege. A variety of methods may be used to review the computer data to protect the privilege. For instance, an officer not involved in the investigation may review the imaged data to segregate the privileged records.

18 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Section 11(c) of the Charter provides for a right against self-incrimination. It stipulates that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person.

Section 13 of the Charter also provides for a right against self-incrimination. It protects a testifying witness from compelled incriminating evidence that he or she provided being used against him or her in any other proceeding (except in a prosecution for perjury or for giving contradictory evidence). This protection is different from the Fifth Amendment in the United States, under which witnesses can refuse to testify.

A subpoena must be obtained to compel the attendance of a witness. For a judge to issue a subpoena, the party seeking the subpoena must be able to establish that the witness would probably or is likely to have material evidence to give.

19 What legal protections are in place for whistleblowers in your country?

Under the Criminal Code, it is an offence for an employer to discipline, demote or dismiss an employee in retaliation for that employee providing information to the authorities about a violation of federal or provincial law, or threaten to do so. It is also an offence to do any of these things in an attempt to dissuade the employee from providing information to the authorities.

20 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employees do not have any particular rights under employment law that govern how the company must interact with them during an internal investigation. However, if the employee is treated unfairly and subsequently demoted or dismissed, that treatment may be a factor in wrongful termination proceedings instituted by the employee. Also, employees may be

found to have a reasonable expectation of privacy in relation to their personal use of company computers, tablets and mobile phones. This may preclude the company from voluntarily turning over the contents of these devices to law enforcement authorities for their use in a criminal investigation of the employee.

- 21 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?**

There are no particular steps that need to be taken by the employer. It may be possible to dismiss an employee for refusing to participate in an investigation, particularly where the contract of employment imposes a duty on the employee to participate in the investigation.

Commencing an internal investigation

- 22 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?**

There is no mandatory process for conducting internal investigations in Canada. Independent investigations often begin with a document or work plan that sets out the subject matter and scope of the investigation. The work plan will generally evolve as the investigation progresses and its evolution is typically the subject of discussion between the investigators and the corporate authorities instructing the investigation.

- 23 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?**

Internal reports of potential illegal conduct should be passed on to management and, depending on the nature or severity of the conduct, to the board of directors. The relevant corporate authority should consider whether immediate remedial action is required and consult counsel prior to deciding on the appropriate course of action, which can involve an internal investigation conducted by company personnel or an independent investigation by outside investigators. It is generally prudent to conduct the review and investigation of potential illegal conduct under the guidance and direction of counsel to preserve privilege on behalf of the corporation and to avoid inadvertent waivers of privilege before the scope and severity of the potential misconduct can be determined.

- 24 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?**

The obligation of a corporation to report an internal or government investigation of illegal conduct varies according to a wide range of factors, including whether the corporation is private or publicly traded, the business activities of the corporation and the type of conduct in question. Public companies have disclosure obligations under Canadian securities laws

with respect to ‘material information’. Whether specific information regarding potential misconduct rises to the requisite level of materiality depends on several factors, both qualitative and quantitative. In certain sectors (e.g., financial services, consumer health and safety and government procurement), companies are subject to legal or contractual obligations to disclose certain types of misconduct. In other instances, particularly those that have the potential to affect consumers, early public disclosure may be prudent for reputational reasons.

25 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

The decision to report the existence of an internal or government investigation will depend on the subject of the investigation and the potential effect on the corporation. Minor legal or regulatory matters would typically not be specifically reported to the board and might be included or referenced in regular reports from general counsel or internal audit. Other matters should be reported to the risk or audit committee of the board as soon as it is determined that the issue could have a significant operational, financial or reputational effect on the corporation.

26 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Note that such orders are only used against third parties and not the target of an investigation. If served with a preservation demand, a preservation order or production order, a company should immediately take steps to preserve and produce (as applicable) the data subject to the order.

If a company is unable to comply with the terms of the order in the time prescribed, the company may apply to the court to vary or revoke the order. Such an application may assist the company in obtaining more time to comply with an order (which can be broadly drafted), or if there are concerns about privileged documents. Notice of this application must be made to the officer named in the order within 30 days of the day on which the order is made.

27 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Subpoenas are generally not a tool that is available to law enforcement authorities at the investigative stage. There is no way to compel individuals to provide statements, and documents can only be obtained from the target of an investigation through a search warrant. The one exception is in securities regulatory investigations, where provincial securities regulators do have the authority to compel individuals to be interviewed by way of a summons, and compel the production of documents.

A summons from a provincial securities regulator can be challenged through an application to a court to quash the summons. Such an application would generally need to be premised on a challenge to the regulator’s jurisdiction to issue the summons.

Attorney–client privilege

- 28 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?**

Yes. Both attorney–client privilege and litigation privilege may attach to work-product produced in an internal investigation. Attorney–client privilege will protect communications made in furtherance of the provision of legal advice. Litigation privilege will attach to documents where the ‘dominant purpose’ in creating the document was anticipated or ongoing litigation. Neither litigation privilege nor attorney–client privilege will attach to documents that predated the investigation or transcripts or factual summaries of interviews of employees or third parties not directly involved in instructing the lawyers conducting the investigation.

It is prudent to clearly define who the client is at the outset of the mandate (e.g., the corporation alone, the corporation and certain senior officers, a special committee of the board of directors) and, if the client is a corporation, who will be instructing the lawyers on behalf of the corporation. Documents should also be marked as ‘solicitor–client privileged’ or ‘litigation privileged’ and their dissemination should be restricted to the individuals directly involved in instructing the lawyers. Also, the client may choose not to have interviews recorded or verbatim transcripts prepared, but instead have their lawyers prepare impressionistic memoranda over which a tenable claim of litigation privilege may be made.

- 29 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?**

Attorney–client privilege applies where there is a communication between the attorney and the client (1) that is expected to be confidential and (2) that is in furtherance of obtaining legal advice. The attorney–client privilege is held by the client and can only be waived by the client. This is the case irrespective of whether the client is a corporation or an individual. Privileged communications are shielded from disclosure indefinitely.

- 30 Does the attorney–client privilege apply equally to in-house and external counsel in your country?**

The fact that the lawyer giving legal advice is in-house (as opposed to external) counsel is irrelevant. A communication will be privileged if it is in furtherance of obtaining legal advice. Privilege will not attach to communications when in-house counsel is providing business advice. Also, over-circulation of a document by in-house counsel can result in a finding that the communication is not privileged because it was not intended to be kept confidential.

- 31 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?**

With the exception of securities regulators, Canadian enforcement authorities do not generally request waiver of privileged information, and waiver of privilege is not generally required to obtain credit for co-operation. However, some agencies (particularly the RCMP) can be

sceptical of extensive privilege claims even where they are well-founded. It is prudent in RCMP investigations of such matters as foreign corrupt practices, procurement fraud, sanctions and export control violations, to consider whether appropriate waivers of specific privileged information may be beneficial to the corporation.

32 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

Yes, but the circumstances in which a corporation can successfully assert that it intended a limited waiver are uncertain. However, it can be safely said that when the production of privileged information is required by statute, and the privileged information is produced for that purpose, the doctrine of limited waiver will apply.

33 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

If the preconditions for the assertion of privilege exist, and it is clear that only a limited waiver for a specified purpose was intended, privilege could possibly be maintained in Canada.

34 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privilege does exist in Canada. Common interest privilege may be invoked if a party voluntarily discloses a privileged document to another party who has a common interest in the subject matter of the communication or in the litigation in connection with which the document was created. For common interest to exist, the parties must share a common goal, seek a common outcome or have an identical, shared interest. The common interest does not need to exist at the time the privileged document is created, so long as the common interest exists at the time the document is disclosed.

35 Can privilege be claimed over the assistance given by third parties to lawyers?

Yes, as a general rule, third-party and expert assistance engaged by counsel for the purposes of conducting an investigation, such as forensic accountants and investigators, data recovery services, translation services and document review, is covered by privilege.

Witness interviews

36 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes. Witness interviews are generally a key part of internal investigations.

37 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Internal witness interviews may be covered by litigation privilege, provided that the interviews are for the dominant purpose of existing or contemplated litigation. Because litigation privilege does not protect underlying facts from disclosure, a successful assertion of

privilege can only be made regarding impressionistic summaries prepared by the lawyer. Attorney–client privilege will also attach to interviews of key individuals involved in instructing the lawyers.

Reports prepared by lawyers as part of an internal investigation may also be solicitor–client privileged, provided that (1) the report is delivered in the context of a solicitor–client relationship, (2) the report is prepared for the purpose of providing legal advice, and (3) the report is prepared and delivered with the expectation of confidentiality.

38 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

It is generally considered prudent to give an employee an *Upjohn*-type warning, although the issue of whether such a warning is required has not been considered by a Canadian court. In addition, if the employee is to be interviewed by a lawyer on behalf of the employer, local Bar rules require the lawyer to clarify that the lawyer is acting on behalf of the employer and not for the employee, and if the employee subsequently seeks legal representation, the lawyer cannot interview the employee except with the consent of the employee’s lawyer.

39 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Documents may be put to the witness. The interview may be recorded, but the recording will not be privileged. Employees should be advised that the interviewing lawyer acts for the employer, in which case the employee may seek their own legal representation. If the employee retains a lawyer, they cannot be interviewed except with the express consent of the employee’s lawyer. Such an interview would generally take place in the presence of the employee’s lawyer.

Reporting to the authorities

40 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

There is no general obligation to report misconduct to law enforcement. However, companies in certain sectors (e.g., financial services, consumer health and safety, and government procurement) are subject to legal or contractual obligations to disclose certain types of misconduct to the appropriate authorities.

41 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

A company might be advised to self-report if it is likely to receive credit for doing so and the underlying misconduct is likely to come to the attention of law enforcement. Formal credit for co-operation programmes has been established by the Ontario Securities Commission for

securities regulatory offences and by the Canadian Competition Bureau for offences under the Competition Act. With recent legislation that provides for deferred prosecution agreements, it is possible that the circumstances under which voluntary self-reporting would be advisable will expand.

42 What are the practical steps you need to take to self-report to law enforcement in your country?

Both the Ontario Securities Commission and the Canadian Competition Bureau provide guidance in respect of how to self-report under their credit for co-operation programmes.

Responding to the authorities

43 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

The company is likely to approach the authority conducting the investigation to understand the allegations. Discussions may be entered into to assess whether there is information the company can provide that will enable it to avoid a prosecution, either because the information refutes the allegations or establishes that a prosecution is not in the public interest (i.e., because the company has undertaken an internal investigation and subsequent remedial action).

44 Are ongoing authority investigations subject to challenge before the courts?

In theory, investigations can be challenged through an application for judicial review of administrative action. Such an application is likely to be successful only if the law enforcement agency undertaking the investigation clearly lacks the lawful authority for doing so.

45 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

As a first step, local counsel should be retained in both jurisdictions and counsel in each jurisdiction should serve as the contact point for the local authorities. Counsel may then wish to make enquiries directed at determining whether the action is coordinated, taking care not to reveal that they are the subject of the investigation in the other jurisdiction if prohibited from doing so under local law. If it is confirmed that the action is coordinated, it would be prudent to consider whether a consistent disclosure package can be negotiated. If prohibited from revealing the existence of the investigation, it is likely that this can only be done through the agency in the locality that prohibits revealing the existence of the investigation. Generally, in Canada, there is some scope for negotiation around what is to be produced, even if there is a court order compelling production.

- 46 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?**

Yes. A production order would apply to information in the company's control anywhere in the world.

- 47 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?**

Canadian law enforcement agencies can share information with foreign agencies pursuant to various arrangements, both formal and informal. For example, information can be provided to a foreign agency through a formal mutual legal assistance request managed by the International Assistance Group of the federal Department of Justice. Certain agencies also have formal arrangements with their foreign counterparts that provide for information-sharing and assistance (e.g., the Competition Bureau has co-operation agreements with the US Department of Justice and Federal Trade Commission, the European Commission and other foreign competition authorities). The provincial securities commissions have memoranda of understanding with the US Securities and Exchange Commission that authorise information sharing in specific circumstances. Other agencies (including the RCMP) have close relations with foreign enforcement agencies and can contact their counterparts for assistance and information that is not confidential or otherwise restricted by the relevant foreign government.

- 48 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?**

Yes. Disclosure will be restricted to parties facing a criminal or regulatory prosecution arising out of the investigation. Disclosure to third parties, such as in a class action, will generally only be made pursuant to a court order.

- 49 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?**

Canadian enforcement agencies are familiar with foreign data protection laws that restrict disclosure of information. While referencing those laws is important in the discussion of production expectations and timing, it is often useful to obtain a foreign legal opinion to determine whether the foreign law prohibits the disclosure of the precise information that is being requested by Canadian authorities.

- 50 Does your country have blocking statutes? What related issues are implicated by complying with a notice or subpoena?**

Canada does not presently have a traditional blocking statute that prohibits disclosure to foreign authorities or persons except as permitted by treaty.

- 51 **What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?**

Confidentiality will attach to information that is compelled and information that is produced voluntarily. When information is produced voluntarily, a company is generally precluded from challenging the admissibility of that information as evidence in a subsequent prosecution against it at the instance of the regulator.

Global settlements

- 52 **Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?**

Settlements attract deference from courts and regulatory authorities, but they are generally not bound by them. Also, when making admissions as part of a settlement, they should be qualified as being for that purpose and not for any other purpose. Once a settlement is entered into, it is likely that litigation privilege will no longer apply to documents prepared for the purpose of the regulatory proceeding.

- 53 **What types of penalties may companies or their directors, officers or employees face for misconduct in your country?**

Companies face fines, probation, disgorgement and debarment. Directors, officers and employees face fines, probation, disgorgement and jail.

- 54 **What do the authorities in your country take into account when fixing penalties?**

The fundamental principle of sentencing is that the sentence or penalty should be proportionate to the gravity of the offence and the degree of responsibility of the offender. There is a whole host of other aggravating and mitigating factors prescribed by statute and that have been recognised at common law. Among the most commonly considered are whether the company or individual entered into an early resolution, whether they co-operated with the authorities in the investigation, and whether they voluntarily repaid ill-gotten gains or otherwise voluntarily undertook remedial action.

- 55 **Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?**

Canada recently introduced deferred prosecution agreements (referred to as 'remediation agreements') as a result of amendments to the Criminal Code that came into force on 19 September 2018. A remediation agreement is defined as 'an agreement between an organisation accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organisation complies with the terms of the agreement'. Remediation agreements are subject to judicial approval and are available for specified offences, including foreign and domestic corruption, fraud, stock manipulation and insider trading.

- 56 **Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?**

The federal government maintains an integrity regime that provides for suspension and debarment of suppliers of goods and services to the government of Canada if they have been charged with or convicted of designated offences in Canada or in a foreign jurisdiction. Designated offences include fraud, corruption, price fixing and bid rigging and other economic crimes. The integrity regime provides for mandatory debarment for 10 years if a company has been convicted of a designated offence. The debarment can be reduced by up to five years if the company enters into an administrative agreement with Public Services and Procurement Canada (PSPC). Suspension and debarment are discretionary if an affiliate of the company is charged or convicted in a foreign jurisdiction, and depend on a determination by the PSPC as to whether the Canadian company had any role in or participated in the foreign offence. Companies can, in certain circumstances, avoid suspension pending trial by entering into an administrative agreement with the PSPC to implement or maintain agreed compliance measures.

Quebec is the only province to maintain a similar suspension and debarment regime, which is administered by the provincial securities regulator and applies to private as well as publicly traded companies.

- 57 **Are ‘global’ settlements common in your country? What are the practical considerations?**

No.

- 58 **Are parallel private actions allowed? May private plaintiffs gain access to the authorities’ files?**

Yes. In some instances, such as for certain violations of securities regulations or the Competition Act, the applicable statutes provide for a private right of action. Access to the authorities’ files is possible through a court order.

Publicity and reputational issues

- 59 **Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.**

Publicity at the pre-charge stage is generally very limited. Law enforcement agencies will generally not voluntarily release information unless there is a particular investigative objective to be achieved by releasing the information. However, it is possible that the media will be able to gain access to information through court records of applications for search warrants. Although these records are often sealed, an application to unseal them can be brought in high-profile cases (which is often done).

Once a charge has been laid, court proceedings are open to the public and, with few exceptions, the proceedings can be reported on by the media.

- 60 What steps do you take to manage corporate communications in your country?
Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Yes. However, corporate communications should be vetted by the company's lawyers as they are admissible against the company in court proceedings.

- 61 How is publicity managed when there are ongoing, related proceedings?

A corporate communications firm may be engaged, but if the company is a party to the proceedings, or could be a party to future proceedings, its communications should be vetted by the company's lawyer to ensure that they do not compromise the company's position in those proceedings.

Duty to the market

- 62 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

A public company will be required to disclose an investigation or a settlement where it constitutes a 'material fact' or a 'material change' under applicable securities laws.

Appendix 1

About the Authors

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Graeme Hamilton is an experienced trial and appellate counsel whose practice focuses on white-collar criminal defence, government and internal investigations, and securities regulation. Graeme is the co-chair of BLG's investigations and white-collar defence group. In particular, Graeme's practice encompasses defending corporations and individuals facing investigation or prosecution for white-collar offences, including fraud, illegal insider trading, price fixing, deceptive marketing, bribery and public corruption; advice in relation to compliance with anti-money laundering, anti-bribery, antitrust and securities legislation; corporate internal investigations; securities regulation, including investigations and enforcement proceedings before the Ontario Securities Commission and self-regulatory organisations; professional discipline proceedings; related civil litigation, including proceedings for contempt of court and applications for *Mareva* injunctions and *Anton Piller* orders; and appeals and applications for judicial review.

Graeme has been lead counsel in dozens of trials and contested hearings. He also has substantial appellate experience in both criminal and civil matters. Graeme has testified as an expert witness before the Senate Legal and Constitutional Affairs Committee and previously taught evidence at Osgoode Hall Law School as an adjunct professor.

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Milos Barutciski has represented *Fortune 500* clients and companies listed on the Toronto Stock Exchange, the New York Stock Exchange, NASDAQ, European and Asian stock exchanges in anti-corruption, sanctions, export control, cartel, government procurement, money-laundering and other regulatory investigations and compliance matters. He has represented clients in investigations by the Royal Canadian Mounted Police, the Canada Border Security Agency, the Competition Bureau, the Ontario Securities Commission and

other agencies, including investigations by the US Department of Justice, the US Securities and Exchange Commission and the European Commission. Milos has represented clients in several World Bank corruption investigations and has appeared as counsel before the Bank's Sanctions Committee. Milos is a founding member of the Task Force on Bribery and Corruption of the Business and Industry Advisory Committee to the OECD in respect of the 1997 Anti-Bribery Convention. He also advised the government of Canada with respect to the drafting of the Corruption of Foreign Public Officials Act. From 1996 to 1999, Milos was engaged by the World Bank to advise on regulatory reform in the Middle East and Africa. He is a member of the executive board of the International Chamber of Commerce. He is called to the Bars of Ontario and Quebec.

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