OSLER

Key developments in capital markets regulatory and white-collar defence

DECEMBER 13, 2019 11 MIN READ

Related Expertise

- Capital Markets

Authors: Lawrence E. Ritchie, Stéphane Eljarrat, Shawn Irving, Lauren Tomasich, Malcolm Aboud, Stéphane Eljarrat, Frédéric Plamondon

The year was marked by regulatory, legislative and political activity that significantly impacted the white-collar and capital markets regulatory enforcement landscape. The establishment of new enforcement structures and legislative action demonstrate the political desire to enhance enforcers' ability to combat white-collar crime. In contrast, the effective use of the newly introduced "remediation agreement" has been threatened by events surrounding high profile events involving SNC-Lavalin (SNC).

Ontario establishes a Serious Frauds Office

In August 2019, the Government of Ontario announced the launch of its Serious Fraud Office (the Ontario SFO), a combined task force of both investigators and specialized Crown prosecutors with the mandate and resources to pursue complex white-collar crimes. The Ontario SFO follows in the footsteps of similar structures in the United Kingdom and the United States. It will primarily focus on serious or complex fraud, bribery and corruption, and will have the power to seek criminal penalties. It is expected that the Ontario SFO will work alongside existing law enforcement agencies in Ontario and will follow a similar integrated approach to complex investigations as is adopted by the RCMP's Integrated Market Enforcement Team and Québec's Unité Permanente Anticorruption.

At this early stage, details regarding the Ontario SFO are limited. No guidelines or other materials have yet been published.

The Ontario SFO will be limited in its mandate by jurisdictional constraints. As complicated financial fraud is rarely confined to provincial boundaries, a national enforcement strategy would provide a more coherent and comprehensive approach and would enhance the global reputation of our markets with respect to white-collar and regulatory enforcement.

OSC Burden Reduction Task Force

In January 2019, the Ontario Securities Commission (OSC) announced the formation of a Burden Reduction Task Force aimed at minimizing regulatory burdens and enhancing competitiveness. As part of this initiative, the OSC launched a public consultation process comprised of three roundtables – held in March and May 2019 – where interested stakeholders provided suggestions on ways to reduce regulatory burdens.

On November 19, 2019, the Burden Reduction Task Force delivered its final report. The report outlines over 100 different initiatives addressing 34 underlying concerns identified by

staff and stakeholders during the public consultation process. The OSC confirmed that burden reduction initiatives that fall entirely within the OSC's purview will be implemented within a year. Other changes – those that require legislative amendments, harmonization with other regulators or long-term investments in technology, systems or expertise – will be addressed over a longer time frame.

In implementing the initiative, there has been significant market support for moving away from rules-based regulation towards a principle-based approach. In line with a general trend in Canadian law and regulation, a departure from a "checklist"-based approach to regulation in favour of a more principled one is perceived to be in the interests of increased efficiency, flexibility and innovation.

Review of the Ontario *Securities Act*

In its Fall 2019 Economic Statement, the Government of Ontario announced that it would undertake a broad review and modernization of the Ontario *Securities Act*, which has not been reviewed for the past 15 years. Ontario's stated aim is to create a modernized securities regulatory framework which is responsive to innovation and rapid changes in the marketplace. A securities modernization task force will be established, which will seek input from stakeholders and provide policy recommendations on critical areas identified by the government, such as boosting competitiveness, regulatory structure, efficient regulation and investor protection.

In addition, the Government of Ontario announced that it would introduce legislation to repeal the *Toronto Stock Exchange Act* and amend the Ontario *Securities Act* to, among other things, "allow the OSC to issue blanket orders supporting greater efficiency in capital markets."

New enforcement powers for B.C. Securities Commission

In October 2019, the Government of British Columbia introduced amendments to the B.C. *Securities Act*, which will significantly enhance the powers of the British Columbia Securities Commission (BCSC) to combat white-collar crime. The reforms will also establish a modern system for regulating derivatives and financial benchmarks that is harmonized with other jurisdictions across Canada. In announcing the reforms, the B.C. Minister of Finance stated that the new legislation will ensure that the BCSC has the "strongest protections in Canada for people who are investing and tough penalties for those who are abusing the system."

The proposed legislation will add a number of new tools to the BCSC's investigative and collection toolbelt, including new powers to obtain information and compel witnesses to testify; increased maximum fines and jail terms for securities offences (five years in prison and $5 million in fines); minimum sentences for repeat offenders (at least one year in prison for repeat violators and for fraud over $1 million); an ability to order administrative monetary penalties without a hearing for contraventions of regulations or decisions; strengthened obligations and sanctions regarding the preservation of records (including computer data); protection for whistleblowers; and enhanced powers for the BCSC to freeze and seize property, including RRSPs.

Enforcement activity

(a) Snapshot of recent white-collar enforcement proceedings

A number of developments in white-collar and regulatory enforcement activity occurred over the past year.

Canadian prosecutors secured two convictions under the *Corruption of Foreign Public Officials Act* (CFPOA) in *R. v. Barra and Govindia*. The case arose out of the same facts as a 2013 case in which Nazir Karigar was convicted for conspiring to pay bribes to Air India officials and the Indian Minister of Civil Aviation to secure a major contract. It represents Canada's first convictions under the CFPOA since that time. Both Barra and Govindia were convicted of violating section 3(1) of the CFPOA, which prohibits paying or agreeing to pay bribes to foreign public officials. In its decision, the Court provided helpful guidance on what constitutes a "continuing conspiracy" to pay bribes under the CFPOA. Each defendant was sentenced to 30 months in prison.

Prosecutors also secured a notable conviction in connection with the bribery scheme through which SNC secured a $1.3 billion contract to build the McGill University Health Centre (MUHC). On February 1, 2019, former SNC CEO Pierre Duhaime pleaded guilty to breach of trust for his role in the scheme. Duhaime was sentenced to 20 months of house arrest and 240 hours of community service, and is required to make a $200,000 charitable donation to victims of crime. Duhaime's conviction follows that of Yenai Elbaz, a former senior manager of the MUHC who was sentenced to a three-year prison term for his involvement in the scheme.

(b) Developments in whistleblowing

In February 2019, the OSC announced that it had paid out its first-ever whistleblower awards under its Whistleblower Program launched in 2016. Three whistleblowers in separate matters received a total of $7.5 million for, according to the OSC, providing "high quality, timely, specific and credible information, which helped advance enforcement actions resulting in monetary payments to the OSC." However, one of the major deficiencies with the program is the lack of transparency about who the payments were made to and in respect of what matters, as well as the nature of the information.

(c) Developments in capital markets regulatory enforcement

The Canadian Securities Administration (CSA) released its annual Enforcement Report for the 2018/2019 fiscal year, which reflected enforcement statistics as well as a discussion of CSA priorities. The spotlight this year was on enforcement action in the digital world, with a focus on deterring misconduct particularly in relation to cryptocurrency.

The report highlights that CSA members are developing and leveraging new technologies that enhance the ability to examine, with greater detail, the way markets function. This includes the Market Analysis Platform which is intended to help CSA members better identify and analyze market misconduct through a central data repository and analysis system.

The Enforcement Report also sets out enforcement statistics for the fiscal year: CSA members concluded a total of 94 matters, involving 177 respondents. This is slightly lower than what the CSA reported in 2018. The vast majority of these matters related to illegal distributions (72 matters) and fraud (32 matters), which is consistent with the respective proportions set out in the 2018 report.

Fines and administrative penalties imposed in the fiscal year were up slightly from the

previous year (rising from $65 to $77.5 million), with a notable increase in orders for restitution and disgorgement.

Various matters in 2019 reflect the ongoing pursuit by regulators of enforcement actions, and the court's willingness to uphold significant penalties:

- The OSC accepted a $30-million settlement payment in the Katanga Mining Limited matter, which is one of the most significant monetary penalties in the OSC's history. In December 2018, an OSC Panel approved the settlement, which related to misstatements in Katanga's financial statements, as well as disclosure violations and internal controls failures in relation to its operations in the Democratic Republic of the Congo.
- The BCSC Criminal Investigations Branch launched an investigation against Ayaz Dhanani, and subsequently charged Dhanani with offences under the *Criminal Code* and the B.C. *Securities Act*. Dhanani was found to have fraudulently solicited nearly $200,000 in investments from B.C. residents and directed the funds to himself. This was in contravention of a BCSC Order, resulting from Dhanani's earlier fraudulent conduct, which prohibited him from engaging in investment-related activity. Dhanani received a lengthy prison sentence of 36 months plus an order requiring restitution to the five victims.
- The Ontario Court of Appeal upheld the decision of an OSC panel in relation to Sino-Forest Corporation. The OSC panel found that executives of Sino-Forest orchestrated an elaborate fraud to overstate the assets and revenue of the corporation. The Court of Appeal upheld some of the most severe penalties ever ordered by the OSC, including administrative penalties, the disgorgement of profits and lifetime bans on market participation.
- The OSC approved settlement agreements with two Canadian banks regarding supervision and controls in the banks' foreign exchange trading businesses from 2011 to 2013. Both banks were recognized to have cooperated with the OSC and voluntarily agreed to payments to advance the OSC's mandate of protecting investors, and payment for the cost of OSC staff's investigation. Both banks were also recognized to have subsequently enhanced the systems of supervision and controls over their FX trading businesses.

Adventures in cryptocurrency

Canadian securities regulators continue to investigate and take enforcement action against alleged wrongdoers in the cryptoasset space:

- In February 2019, the OSC obtained a permanent order prohibiting trading in securities by a Dubai-based company offering cryptocurrency-related financial products within Ontario.
- In July 2019, the OSC reached a settlement with CoinLaunch Corp., which carried on business as a "crypto consultant," offering marketing and promotional services to prospective cryptoasset token issuers. CoinLaunch was found to have violated the dealer registration requirements of Ontario securities laws, and agreed to pay approximately $50,000 in penalties, disgorgement and costs. Although the monetary penalty was, in the OSC's words, "relatively modest," the OSC emphasized that firms in the cryptoasset sector that ignore registration obligations were "on notice" and "can reasonably expect to face more stringent consequences" in the future.

- In British Columbia, the BCSC initiated investigations into two cryptoasset trading platforms. It obtained a court order appointing an interim receiver over one of them after it failed to comply with the BCSC's demands for information.

Similar enforcement actions have also been taken in the United States by the *Securities and Exchange Commission* against participants in the cryptoasset space. Read our Emerging clarity on cryptoasset regulation article for more information on cryptoassets.

Status of remediation agreements

Canada's remediation agreement regime is off to a rough start. In September 2018, deferred prosecution agreements (DPAs) were introduced under Canadian law. A remediation agreement – a voluntary agreement between the Crown and an organization accused of certain economic crimes such as fraud and bribery – is an alternative to the prosecution of criminal offences against an organization. The effect of a remediation agreement is to suspend the outstanding investigation or prosecution while simultaneously establishing specific undertakings that the organization must fulfill in order to avoid facing the potential criminal charges. Once the accused corporation has fulfilled the terms of the remediation agreement, the charges are dropped. Remediation agreements must be approved by a judge, who must be satisfied that the agreement is in the public interest and the terms of the agreement are fair, reasonable and proportionate.

The purposes underlying the DPA regime include incentivizing companies to proactively self-report wrongdoing and reducing the negative consequences of such wrongdoing on innocent third parties, including innocent employees of the accused organization. Notwithstanding this, with respect to offences under the *Corruption of Foreign Public Officials Act*, the Crown cannot consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved in its decision whether to offer a DPA.

No remediation agreements have been announced in Canada since the DPA regime came into force. One of the first applications seeking to benefit from the new DPA regime led to a political firestorm. The Director of Public Prosecutions (DPP) declined to invite SNC to negotiate a remediation agreement in connection with ongoing foreign bribery and fraud charges. Subsequently, the then Minister of Justice and Attorney General accused the Prime Minister's Office of attempting to politically interfere in the exercise of her prosecutorial discretion by pressuring her to reconsider the DPP's decision. SNC applied for judicial review of the DPP's decision to the Federal Court, which confirmed that the decision whether to enter into settlement discussions falls within the ambit of the DPP's prosecutorial discretion and, consequently, is not reviewable by the courts except where there is an abuse of process.

Conclusion

The year's enforcement activity reflects ongoing efforts to reform and enhance enforcement tools and approaches, sharpen the focus of enforcement agencies and to sidestep some fall out from controversies that may have unintended consequences.