

White-collar crime enforcement in Canada: Making headway?

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Authors: Stéphane Eljarrat, Lawrence E. Ritchie, Malcolm Aboud, Sarah Firestone, Emilie Dillon, Stéphane Eljarrat, Frédéric Lamondon

In 2022, there were a number of significant developments in the regulation and enforcement of white-collar crime. Canada's deferred prosecution agreement (DPA) regime produced its first court-approved remediation agreement, and a second one is currently pending before the courts. The longstanding efforts of the Cullen Commission of Inquiry into Money Laundering in British Columbia (the Cullen Commission) culminated in a final report released this year to which the federal government is actively responding. Canada's modern slavery legislation, Bill S-211, is on the verge of becoming law. Finally, 2022 saw some long-awaited RCMP-led enforcement activities against complex financial crimes, as well as several new initiatives – notably, the creation of the Integrated Market Enforcement Team's Special Advisory Group and the Canadian Financial Crime Agency.

Deferred Prosecution Agreements Successfully Reached

Nearly four years after its inception, Canada's DPA regime – referred to as “remediation agreements” under Canadian legislation – produced its first two agreements, one of which has received court approval, and the second of which is still pending before the courts.

As we have previously written in 2018, 2020, and 2021, a remediation agreement is a voluntary agreement suspending outstanding criminal charges while specified undertakings are established that the organization must fulfill to avoid facing a potential criminal conviction.

As we wrote last year, SNC-Lavalin was invited by the Québec Directeur des poursuites criminelles et pénales (DPCP) to enter into negotiations for a potential remediation agreement simultaneously with the announcement of charges by the RCMP on September 23, 2021. On May 6, 2022, SNC-Lavalin announced it had reached a remediation agreement with respect to charges of fraud against two divisions and two executives in connection with the Jacques Cartier Bridge project in Montréal.

The agreement was approved by the Superior Court of Québec following a hearing that commenced on May 10, 2022. Pursuant to the agreement, SNC-Lavalin will pay nearly \$30 million over three years, which covers penalties, forfeitures and reparations. The agreement includes a payment of \$3.4 million to The Jacques Cartier and Champlain Bridges Inc. by way

of reparation for the harm caused to this Crown corporation. It also includes a \$5.4 million payment as a compensatory victim surcharge to the provincial government. SNC-Lavalin will also be subject to additional compliance obligations and independent monitoring.

Osler acted for The Jacques Cartier and Champlain Bridges Inc.

A second remediation agreement was announced by the RCMP on September 21, 2022. This DPA was reached in connection with charges of bribery of a foreign public official and fraud brought against Montréal-based Ultra Electronics Forensic Technology Inc. and four of its former executives in relation to a ballistics equipment contract for the Philippine National Police. The fully negotiated remediation agreement was reached with the Public Prosecution Service of Canada in July of 2022, two months before the charges were made public. A hearing in the Superior Court of Québec to approve the settlement began on September 28, 2022. A decision is likely to come out later this year.

Consequently, we also expect an equally important increase in the number of charges laid for corporate crimes against individuals as individuals are not eligible for DPAs. Moreover, assuming some resistance to approval of DPAs by the prosecution or the courts, the next few years could also see an increase in the number of corporate criminal charges proceeding before the courts. Of note, DPAs are not available for all types of corporate criminal charges. For example, DPAs are not an option in connection with offences under the *Competition Act*.

Canada Responds to the Cullen Commission's Final Report

On June 15, 2022, the Cullen Commission released its much-awaited final report (the Commission Report). As we wrote last year and in 2020, the Cullen Commission was established in May 2019 and led by the Honorable Austin F. Cullen of the British Columbia Supreme Court to inquire into and determine where and how money laundering is taking place in the province. The Cullen Commission is also considering why money laundering has been allowed to happen, as well as whether and how it can be prevented.

Based on its investigation, the Commission Report estimates that billions of dollars each year are being laundered into the province, requiring strong and decisive action by government, law enforcement, and regulators. The Commission Report highlights that money has been laundered through real estate, casinos and the purchase of luxury goods in the province. The Cullen Commission has made numerous recommendations regarding anti-money laundering regulation and enforcement going forward. Additional information about the Commission Report and its recommendations is found in our blog post.

Although the findings of the Commission Report focus on British Columbia, money-laundering activities are predominantly regulated federally. For its part, the federal government issued a statement following the release of the Commission Report welcoming the Cullen Commission's findings and committing to closely examining them as part of its efforts to review and improve Canada's Anti-Money Laundering and Anti-Terrorist Financing (AML/ATF) regime. The federal government has indicated that it is taking steps to address issues identified by the Cullen Commission.

Developments in Supply Chain Due Diligence

Canada's proposed forced labour and modern slavery legislation continued to advance through Parliament during 2022. As discussed last year, Canada has been steadily increasing prospective liability for businesses that fail to address supply chain compliance. Refer to our discussion of Canada's 2021 model Foreign Investment Promotion and Protection Agreement

and the Supreme Court of Canada's 2020 [decision](#) that Canadian companies may face civil liability in Canada for human rights abuses overseas. A variety of legislation has been proposed at the federal level to address forced or child labour in businesses and their supply chains. Additional detail can be found in our [Trade article](#).

With the anticipated passage of this legislation, companies should carefully assess the risks at all stages of their supply chains and implement appropriate oversight mechanisms within their supplier relationships to ensure compliance throughout their supply chain.

Recent Enforcement Efforts

This year, Canada continued to face criticism over perceived lack of enforcement of white-collar crime, including corruption. Transparency International's (TI) latest report, [Exporting Corruption 2022](#), found "limited enforcement" of the *Corrupt Foreign Public Officials Act* (CFPOA), which was unchanged from the findings in the previous 2020 report. In a [press release](#) following the release of the report, TI Canada praised the recently announced remediation agreements as an "encouraging sign" but noted that it was "still too early to tell if this is the beginning of a serious enforcement trend." TI remarked that increased resources for law enforcement to pursue CFPOA cases is "critical", and they have suggested lawmakers consider the merit of other anticorruption tools such as a 'failure to prevent' offence for companies and the creation of separate regulatory body to oversee anticorruption measures. Read more about TI Canada's report in our [blog post](#).

Despite TI Canada's findings, there were multiple significant enforcement actions in Canada in 2022. In addition to the SNC-Lavalin and Ultra Electronics cases already discussed, the RCMP's Integrated Market Enforcement Team (IMET) laid charges of fraud in [June 2022](#) in connection with a years-long investigation into Fortress Real Developments relating to a syndicated mortgage investment scheme. In [August 2022](#), IMET, in collaboration with the Ontario Securities Commission, charged four individuals with fraudulent acts in connection with the real estate development activities of Noble Developments and related companies. As well, as part of its efforts to be more proactive, the RCMP's IMET Toronto unit established a [Special Advisory Group](#) as a year-long pilot project to assist the RCMP in addressing real time issues that arise in specific investigations that have tended to undermine its ability to respond most effectively to white-collar matters.

The federal government has also committed to making significant investments in enforcement authorities such as the RCMP and Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). The federal government's [2022 Budget](#) announced \$89.9 million of funding for FINTRAC over the next five years to bolster its capacity to fight financial crime and \$200 million over four years for the creation of a new "Canadian Financial Crime Agency". The new Agency will bring the RCMP, FINTRAC and the Canada Revenue Agency together to investigate highly complex financial crimes and may result in further enforcement authority.

Recent Developments on Privilege

On October 17, 2022, the Court of Appeal of Québec rendered a landmark [decision](#) in which it held that the act of sharing with police authorities an internal investigation report prepared by an accounting firm hired by attorneys does not constitute a waiver of privilege for the benefit of third parties. In making this decision, the Court relied on a British case to similar effect.

This decision is extremely important for corporate criminal practitioners, particularly when self-disclosure is being considered. However, it does not address the practical issue of the

restrictions, if any, that would be placed on the use by police authorities of privileged information voluntarily submitted in a self-disclosure context. It remains to be seen whether this decision will be challenged in the Supreme Court of Canada.

Conclusion

While the last two years of the global pandemic have kept governments and businesses preoccupied with novel challenges, 2022 saw the focus shift back to Canada's long-held goal of reforming and strengthening its enforcement efforts against white-collar crime. In 2023, we can expect continued enforcement efforts and further tangible results, particularly in light of the increases in financial criminal activity over the past few years. As always, it is crucial for businesses to have robust compliance programs in place to mitigate risks and better navigate the increasingly regulated environment.