

LITIGATION

Key developments in white-collar defence

This year was marked by uncertainty and increased risk for businesses as a result of the COVID-19 pandemic. While white-collar enforcement activity in Canada remained limited in 2020, regulatory efforts to reform and enhance enforcement tools, as well as focus on money laundering and compliance issues arising from the COVID-19 pandemic, continued throughout the year. As regulators catch up to the effects of the pandemic, Canadian companies should expect increased enforcement in relation to white-collar offences over the next year.

Impact of COVID-19

The COVID-19 pandemic has increased risks for businesses now operating within an uncertain context. Vast sums and extensive resources have been expended to mitigate the health, economic and social impacts of COVID-19. For example, organizations like the World Bank and the International Monetary Fund have pledged billions in emergency aid, alongside the programs of national governments. This flood of money, often without the necessary oversight, is leading to a surge in white-collar crimes globally.

Examples of these offences include: corruption allegations from health insurance corporations; embezzlement of funds earmarked for the fight against COVID-19; procurement failures and grafts, including overpriced ventilators;

civil servants accepting bribes; counterfeit stimulus cheques being used to buy luxury goods; and public contracts being entered into with alleged fraudsters. [Transparency International](#) has identified over US\$1 billion lost as a result of corruption and malfeasance – a sum that would have been sufficient to purchase approximately 50,000 ventilators. The G20 held an anti-corruption ministerial meeting on October 22, 2020 to discuss a global response.

Transparency International has summarized and broken down the prominent corruption and malfeasance cases regionally in this [table](#):

Region	Cases Analyzed	Total (USD)
Africa	4	7,982,630
Europe	7	555,302,400
Latin America	5	273,198,110
North America	1	1,300,000
Asia	2	288,171,000
Total all regions:	19	1,125,954,140

Canadian businesses must prepare accordingly. As is being seen in other countries, bad actors may seek to exploit the pandemic. Although regulators in Canada have eased certain requirements such as filing deadlines, law enforcement agencies and regulators continue to hold wrongdoers accountable for transgressions. In this environment, businesses will likely face increasing regulatory scrutiny.

Some of the pandemic-related risks currently facing businesses include:

- Businesses are subject to increased compliance risks as a result of emergency measures and other legal obligations in connection with the COVID-19 pandemic, including closure of and restrictions on non-essential businesses, prohibitions on practices such as price-gouging, and the imposition of various changing health and safety measures, including physical distancing.
- Businesses facing material supply chain challenges will be under increasing pressure to maintain or expand supply chains. Supply chain interruptions increase the risk that businesses may be victims of fraud and demand additional regulatory compliance.
- Businesses adjusting to operating in the context of the pandemic may find themselves engaged in government interactions outside their normal course, including with respect to novel regulatory requirements and requirements to operate in unfamiliar markets as a result of supply chain disruptions. This may, in some jurisdictions, increase the risk of interactions that expose businesses to corruption and demands for bribes.

- Businesses engaged in M&A activity resulting from the economic fallout of the pandemic may face increased risk through corporate successor liability. Ensuring appropriate due diligence is undertaken regarding the target's operations will be important in assessing and mitigating risk.

It is therefore crucial for businesses operating in the context of the pandemic to remain prudent and ensure that they are taking appropriate measures to address the pandemic-related risks, in addition to those facing their own businesses in the normal course, which may be exacerbated as a result of COVID-19.

Enforcement activity

Snapshot of enforcement activity involving corruption

The most recent significant enforcement activity in Canada came in late 2019, with the much-awaited outcome in the high-profile case involving SNC-Lavalin Group Inc. The allegations against SNC-Lavalin pertained to activities in Libya from 2001 to 2011. Charges from the RCMP included one count of bribing a foreign public official under section 3(1)(b) of the *Corruption of Foreign Public Officials Act* (the CFPOA) and one count of fraud under s. 380(1) of the *Criminal Code*. On December 18, 2019, a division of SNC-Lavalin Group Inc. pleaded guilty to fraud with a negotiated penalty of \$280 million in fines and three years' probation, resolving the criminal case against the Montréal-based engineering firm.

In addition, on December 15, 2019, former SNC-Lavalin executive Sami Bebawi was convicted by a jury on five separate counts relating to fraud, corruption of foreign officials and laundering the proceeds of crime in relation to these events. Mr. Bebawi was sentenced on January 10, 2020 to eight and a half years in prison in connection with the scheme. This ended the last of the criminal charges brought against the company and its former employees.

Both penalties represented significant increases relative to those previously imposed for similar offences in Canada. The negotiated monetary penalty for SNC-Lavalin of \$280 million was the largest financial penalty levied against a corporation for fraud under the *Criminal Code* and is significantly larger than any corporate fine levied for similar offences under the CFPOA. The eight-and-a-half-year sentence for Bebawi, and the Crown's request for a sentence of four and a half years for the corruption offence, represent an increase as compared to the three-year sentences generally imposed for similar offences by individuals.

On November 12, 2020, the Royal Canadian Mounted Police charged Damodar Arapakota, a former executive of IMEX Systems Inc., under section 3(1) of the CFPOA for allegedly bribing a public official from Botswana, following self-reporting of the allegations by the company.

Canada continued to receive criticism in 2020 for its limited enforcement activity, in particular in relation to corruption. Canada dropped four places, from 8th to 12th, in Transparency International's Corruption Perceptions Index (CPI), the annual ranking of countries in relation to perceived public sector corruption. The CPI, in which Canada fell from its position in the top 10 for the first time since 2005, cited Canada's growing reputation as an easy place to launder money.

The negotiated monetary penalty for SNC-Lavalin of \$280 million was the largest financial penalty levied against a corporation for fraud under the *Criminal Code*.

In particular, the Transparency International report cited two different government-commissioned reports in British Columbia (the 2019 [Maloney Report](#) and the 2018 [German Report](#)) detailing the extent of money laundering in real estate, casinos and luxury goods. The report also cited controversy surrounding the federal government's decision not to invite SNC-Lavalin to negotiate a deferred prosecution agreement. Similarly, Transparency International's most recent [Exporting Corruption report](#) maintained that Canada has retained its reputation of having "limited enforcement" with regard to penalizing bribery of foreign public officials while operating abroad.

Ontario's Serious Fraud Office

The Government of Ontario's Serious Fraud Office (SFO), established in mid-2019, has commenced enforcement activity. Most notably, following a fraud investigation by the SFO, Charles Debono was deported from the Dominican Republic and arrested on arrival in Canada by the Ontario Provincial Police (OPP). Debono has been charged with several criminal offences, including fraud, money laundering, bribery and forgery in connection with an alleged \$56 million Ponzi scheme originating in 2012.

The investigation was commenced by the OPP and then transferred to the newly established SFO. The SFO has identified approximately 515 victims with losses totaling more than \$24 million. How this matter unfolds will be instructive about what can be expected from the SFO going forward.

The SFO's establishment represented a heightened focus on white-collar enforcement in the province. It was a step forward in provincial enforcement, given the criminal (and thus federal) nature of anti-corruption legislation in Canada, which is generally enforced by the RCMP. The Unité permanente anticorruption in Québec has enjoyed relative success in a similar vein.

We continue to expect that the SFO's establishment will lead to increased enforcement in Ontario in the future. The Debono investigation may well be a sign of things to come.

Status of remediation agreements

As of this year, Canada has yet to make effective use of its remediation agreements, which were introduced in 2018. Under the Canadian regime, a remediation agreement can only be entered into for economic offences. Notably, the guilty plea entered by SNC-Lavalin followed unsuccessful attempts by the company to enter into a remediation agreement with the Public Prosecution Service of Canada.

To date, no remediation agreements have been announced in Canada. Nonetheless, remediation agreements remain an important tool in enforcement authorities' toolkits and should serve to facilitate greater enforcement in the future.

We continue to expect that the SFO's establishment will lead to increased enforcement in Ontario in the future. The Debono investigation may well be a sign of things to come.

Money laundering

Public focus on white-collar issues in Canada has been significantly directed towards money laundering in recent years. In response to the aforementioned [Maloney Report](#) in 2019 and [German Report](#) in 2018 detailing the extent of the money laundering problem in British Columbia, the establishment of the Commission of Inquiry into Money Laundering in British Columbia (the Cullen Commission) was announced in May 2019 and its work continued into 2020. The Commission is led by B.C. Supreme Court Justice Allen Cullen and its mandate is to inquire into and report on money laundering in B.C. Specifically, the Cullen Commission is tasked with determining where and how money laundering is taking place and why it has been allowed to happen, as well as whether and how it can be prevented.

The Cullen Commission's hearings are ongoing and are proceeding by videoconference as a result of the pandemic. Companies should anticipate regulatory changes or new enforcement mechanisms with respect to money laundering once the recommendations of the Commission are released.

Canada may also see renewed attention to anti-money laundering issues as a result of the recent leak of suspicious activity reports collected by the U.S. Financial Crimes Enforcement Network (FinCEN). Previous leaks of information, including the Panama Papers, have shed light and renewed attention on money laundering in Canada in the past.

Expectations for enforcement

Given the added risks to businesses arising from the COVID-19 pandemic, effective compliance for businesses should be paramount. Canada will likely take its lead from other jurisdictions. Such jurisdictions include the United States, which in 2020 released a second edition of its Resource Guide to the U.S. Foreign Corrupt Practices Act. In the U.K., updated guidance regarding its deferred prosecution regime was also recently released.

We anticipate increased enforcement in 2021 with respect to corruption, money laundering and other white-collar crimes.

Given the added risks to businesses arising from the COVID-19 pandemic, effective compliance for businesses should be paramount.

AUTHORS**Stéphane Eljarrat**

Partner, Litigation
Lead, White-Collar
Defence

seljarrat@osler.com

514.904.8118 (Montréal)
416.862.6623 (Toronto)

**Lawrence E. Ritchie**

Partner, Litigation
Chair, Risk Management
and Crisis Response

lritchie@osler.com

416.862.6608

**Sonja Pavic**

Associate, Litigation

spavic@osler.com

416.862.5661

**Frédéric Plamondon**

Associate, Litigation

fplamondon@osler.com

514.904.8109

**Malcolm Aboud**

Associate, Litigation

maboud@osler.com

416.862.4207