A Primer for In-House Counsel

Corporate and Financial Crimes

Part 1 of 6

CRIMINAL LAW 101

Blakes

Introduction

In this six-part series on corporate and financial crimes, the Blakes Business Crimes, Investigations & Compliance group outlines basic principles of criminal and quasi-criminal law that may arise in the running of a business. Armed with insights from years of multidisciplinary knowledge and experience, our lawyers provide brief answers to questions that in-house counsel routinely ask relating to these issues.

If you would like more information or to discuss a specific issue, please contact any member of our Business Crimes, Investigations & Compliance group.

SERIES ON CORPORATE AND FINANCIAL CRIMES

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What Statutes Set Out Criminal Offences in Canada?

Canada's criminal law is set out in the *Criminal Code*. The *Criminal Code* is made by Parliament and applies equally in every province and territory.

The *Criminal Code* criminalizes a wide range of acts and omissions. These include offences of fraud, insider trading, tipping, making a false prospectus, corruption, paying or receiving secret commissions, laundering the proceeds of crime, criminal breach of trust, charging a criminal interest rate, destroying documents of title, uttering a forged document, and operating a "gaming" house.

While the *Criminal Code* is the statute that sets out the majority of Canada's criminal laws, it is not the only statute that creates "white-collar" offences for which an organization can be prosecuted. There is a wide range of regulatory statutes at both the federal and provincial level that are directed at regulating how organizations carry out their business. The breach of "regulatory" statutes — while not criminal — may result in equally significant fines and, in certain cases, the imprisonment of officers and directors of the organization. Accordingly, when considering what actions may give rise to a risk of prosecution, it is important to be aware of not only the *Criminal Code*, but also numerous regulatory statutes that may apply.

It is also important for Canadian organizations to be aware of the potential application of foreign law and, specifically, both foreign criminal and regulatory statutes. This is particularly important for organizations that conduct business across national borders. For example, offering securities in the United States may be sufficient to expose an organization to the United States' criminal and regulatory statutes, such as the *Foreign Corrupt Practices Act*. Where a Canadian business operates in a foreign jurisdiction, it is important for the organization to be aware of the relevant regulatory regime in that jurisdiction and have access to knowledgeable foreign counsel when the need arises.

Does the Criminal Code Apply to Offences Committed "Outside" Canada?

Subject to limited statutory exceptions (such as, for example, financing terrorism), subsection 6(2) of the *Criminal Code* provides that no person shall be convicted of an offence committed "outside Canada." However, this does not mean that only criminal offences that are committed wholly within the territorial limits of Canada are subject to Canadian criminal law. The Supreme Court of Canada has held that Canadian courts may prosecute an offence if there is a real and substantial connection between the offence and this country.[1] Canadian courts will, for example, assume jurisdiction if a significant portion of the activities constituting the offence took place in Canada. An example of a situation where a Canadian court may assume jurisdiction, notwithstanding the fact that the offence originated in a foreign state, is a fraudulent mailing prepared and sent from the United States but directed at Canadians. It will be a question of fact in every case whether there is a real and substantial connection between the alleged offence and Canada such that Canadian courts assume the jurisdiction.[2]

Canadian courts may prosecute an offence if there is a real and substantial connection between the offence and this country.

Special note should also be taken of the jurisdiction that Canadian courts have over criminal conspiracy charges. A conspiracy is an agreement between two or more persons to commit a criminal offence. Under section 465(4) of the *Criminal Code*, Canadian courts have jurisdiction to prosecute a conspiracy where the agreement was made outside Canada to commit an offence in Canada.

1 *R. v. Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.).
2 See, e.g., *R. v. Karigar,* 2017 ONCA 576 at paras. 24-26, 29.

What Are the Elements of a Criminal Offence in Canada?

OFFENCES REQUIRING PROOF OF CRIMINAL INTENT

In most cases, liability for a criminal offence requires proof of two elements:

1. There must be proof that the accused committed an act that is prohibited by the *Criminal Code*, e.g., possessing stolen property. This is referred to as the *actus reus* or "guilty act" that is prohibited.

2. There must be proof that the accused committed the prohibited act with the requisite criminal intent.[3] This is referred to as the *mens rea* or "guilty mind" of the offence. In most cases, proof of "intent" requires proof that the accused actually intended to do the prohibited act, e.g., knowing that the property in question was stolen. In most cases, proof that the prohibited act was carried out recklessly[4] or with wilful blindness[5] may be sufficient to meet the *mens rea* element of the offence.

The preceding elements must be proven by the prosecution beyond a reasonable doubt.

Criminal intent does not mean that the prohibited act was carried out for an improper purpose or motive. Proof that a prohibited act was committed with a "criminal motive" is not necessary for a criminal conviction. Conversely, proof that the act was committed with a "good" motive, such as robbing a bank in order to donate the proceeds to charity, does not provide a defence to a charge for robbery.

CRIMINAL NEGLIGENCE

The *Criminal Code* also sets out offences for acts or omissions that result from negligence. In particular, section 219(1) provides that "Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of others." Proof of criminal negligence does not require proof that the accused corporation acted with "intention" or "deliberation." Rather, what is necessary is proof that the act or omission in carrying the duty showed a "wanton or reckless disregard for the lives or safety of others."

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3 See, however, criminal negligence discussed below. In addition, in the regulatory context, both federal and provincial statutes create offences of strict or absolute liability where conviction does not require proof of "criminal intent." For strict liability offences, convictions can result from proof of commission of an act and the failure to exercise reasonable care or due diligence. For absolute liability offences, conviction can result from proof of commission of the act alone.

4 To prove that an accused acted with recklessness, it is necessary to show that he/she was aware that there is a danger that his/her conduct could bring about the result prohibited by the criminal law, but nevertheless persists in his/her conduct, despite the risk: *Sansregret v. R.*, [1985] 1 S.C.R. 570. Recklessness consists of both a subjective and objective element. The subjective element is that an accused must have knowledge that his/her conduct may involve a consequence or circumstance that constitutes or forms part of the *actus reus* of the offence. The objective element is the objective determination of whether taking the risk in question was or was not justified.

5 Wilful blindness is related to but distinct from recklessness and is an additional means through which the *mens rea* may be proven. Wilful blindness refers to a situation when an accused is aware that certain facts may exist that would make his/her actions criminal, but deliberately refrains from making any inquiries so as to remain ignorant. It involves "deliberate ignorance," and "imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries": *R. v. Briscoe*, 2010 SCC 13 at paras. 21, 24. A finding of wilful blindness can be seen as a subjective finding of suspicion with respect to the existence of a risk and a deliberate refusal to make inquiries to confirm that suspicion. However, it is not enough to find that a reasonable person would have been suspicious or would have made inquiries. It is necessary to find that the accused was in fact suspicious and refused to make inquiries.

How Is the Criminal Liability of an Organization Determined?

Determining the criminal liability of an organization such as a corporation involves unique difficulties. A corporation is a creature of statute and can only act through its directors or officers. How, then, is the liability of an organization to be determined? For offences committed after March 2004, the liability of organizations, which includes corporations and partnerships, is determined from the standpoint of the actions and intentions of their "senior officers." The term "senior officers" is broadly defined in section 2 of the *Criminal Code* as meaning "a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer." The term "representative" is broadly defined in section 2 of the *Criminal Code* as "a director, partner, employee, member, agent or contractor of the organization." The actions of any person who falls under the definition of "representative" can cause an organization to be criminally liable. Sections 22.1 and 22.2 of the *Criminal Code*, discussed below, are applicable.

For offences committed prior to March 2004, the criminal liability of corporations is determined by the "identification theory", based on the actions and intentions of those directors or officers of the corporation who are its "directing mind" with respect to the impugned conduct.

OFFENCES REQUIRING PROOF OF CRIMINAL INTENT

Section 22.2 of the *Criminal Code* makes an organization a party to an offence (other than negligence) through the acts of its senior officers in three circumstances. It provides:

> 22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers
>
> (a) acting within the scope of their authority, is a party to the offence;[6]
>
> (b) 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 organization so that they do the act or make the omission specified in the offence; or
>
> (c) knowing that a representative of the organization 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.

Section 22.2(c) is noteworthy because it imposes an affirmative obligation on a senior officer who knows that a representative of the organization (e.g., a director, partner, employee, member, agent or contractor) is, or is about to be, a party to an offence to take "all reasonable measures to stop them from being a party to the offence." The scope of this obligation is, as of yet, uncertain, but potentially onerous. What exactly are "all reasonable measures"? Arguably, a report to the police would be the most effective means to prevent a representative from becoming a party to the offence. Is this required? If an employee is, or is about to become,

6 See the discussion of who constitutes a "party to the offence" below.

a party to an offence, is a severe warning to that employee enough to satisfy the affirmative obligation? Is a suspension required? Is termination required? Does the senior officer have to begin monitoring the emails, phone calls or activities of the representative who is, or is about to become, a party to an offence?

Although there is limited case law interpreting section 22.2(c) of the *Criminal Code*, it is clear that senior officers who do nothing or who turn a blind eye to a criminal offence may expose the organization to criminal liability. A recent decision of the Quebec Superior Court illustrates this. There, the court found a corporation criminally liable for price-fixing on account of the conduct of a general manager (considered a "senior officer") who participated in a price-fixing scheme and was aware that territory managers under his supervision were engaging in price-fixing and took no steps to stop them.[7]

CRIMINAL NEGLIGENCE

Section 22.1 of the *Criminal Code* sets out circumstances in which an organization can be held criminally liable for negligence:

> 22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if
>
> (a) acting within the scope of their authority
>
> (i) one of its representatives is a party to the offence, or
>
> (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
>
> (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

As with criminal offences requiring proof of "intent," the criminal negligence of organizations is assessed in relation to the acts or omissions of its representatives and its senior officers. Liability is established if:

1. one of the organization's representatives acting within the scope of his/her authority is a party to a negligence offence, and
2. the senior officer responsible for the aspect of the organization's activities relevant to the offence markedly departs from the standard of care that could reasonably be expected to prevent a representative from being a party to the offence.

7 *R. v. Pétroles Global Inc.*, 2013 QCCS 4262, leave to appeal granted (2013 QCCA 1604), but no reported decision of an appeal. A penalty decision was released by the Quebec Superior Court in 2015: 2015 QCCS 1618.

Section 22.1(b) of the *Criminal Code* was recently considered by the Ontario Court of Appeal in *R. v. Metron Construction Corporation*. The court adopted an expansive view of "senior officer" and concluded that a company's agent — a construction site supervisor in this case — fell within the definition of that term. The court also affirmed that the actions of a senior officer may result in conviction of a corporation for criminal negligence causing death where that individual demonstrates a "marked and substantial departure from the conduct of a reasonably prudent person in the circumstances."[8]

An interesting feature of section 22.1 is that it permits the court to amalgamate the conduct of multiple representatives and senior officers of the organization in order to assess criminal liability. That is, the acts or omissions of two or more representatives can form the basis for a negligence offence where the acts of a single representative alone would be insufficient to constitute negligence. This means that even if the single representative's omissions do not show a wanton or reckless disregard for the lives or safety of others, the organization can still be held criminally liable if the omissions of the representatives involved in the conduct in issue — viewed collectively — show such a disregard.[9]

The acts or omissions of two or more representatives can form the basis for a negligence offence.

PROHIBITING SENIOR OFFICERS FROM COMMITTING CRIMINAL ACTS

Both sections 22.1 and 22.2 of the *Criminal Code* refer to a senior officer or representative acting "within the scope of their authority." This raises a question as to whether an organization can avoid criminal liability by stipulating in contracts with their senior officers or representatives that they are not to engage in criminal acts. **The answer to this question is no**. An organization cannot avoid criminal liability merely by asserting that it did not authorize the commission of the criminal acts. As Estey J. stated in *Canadian Dredge v. The Queen*:

> It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition.[10]

Only in limited cases where the "directing mind" is acting in fraud of the corporation or where the acts are directed at the destruction of the corporation or for the sole benefit of the "directing mind" can a corporation avoid criminal liability based on the culpability and intent of its "directing mind."

8 *R. v. Metron Construction Corporation*, 2013 ONCA 541 at paras. 79, 88. The company acknowledged that the actions of one of its representatives demonstrated a marked and substantial departure from the standard that could be expected of a reasonably prudent person, resulting in the deaths of four workers and the permanent injury of a fifth.

9 See, for example, *R. v. Stave Lake Quarries Inc.*, 2016 BCPC 377, where a construction company pleaded guilty to criminal negligence causing the death of a worker, and acknowledged that through one or more of its senior officers the company showed wanton or reckless disregard for the deceased worker's life.

10 [1985] S.C.J. No. 28 at para. 21.

Can Directors, Officers or Employees of an Organization Be Held Personally Liable for Criminal Offences of the Organization?

Section 21 of the *Criminal Code* provides that when an organization commits a criminal offence, its directors, officers or employees can — depending on their role in the commission of the alleged offence and their knowledge of same — be potentially charged as a party to the offence. However, given the criminal nature of this liability, a high standard applies. In general, an individual is only in potential jeopardy if they know of wrongdoing and either participated in it or encouraged it. Section 21 sets out a broad definition of who could be a "party":

21(1) Everyone is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

When an organization commits an offence under the *Criminal Code*, criminal charges can be laid against the organization and/or against its directors, officers or employees who knowingly carry out the allegedly criminal acts, who do or omit to do anything for the purpose of aiding a person to commit the offence, or who abet[11] a person in committing an offence. Such liability may come as a surprise to those more familiar with the civil law. In the civil context, it is well accepted that a wrong committed by the corporation — be it a breach of contract by the corporation or the commission of a tort — cannot be visited upon an officer, director or employee of the corporation merely because the officer, director or employee was the person who authorized or committed the breach or the tort. In contrast, with the criminal law, officers and directors of an organization can be held personally liable for the criminal acts of the organization, either as a principal or as a party to the offence, if they participate in or encourage wrongdoing. The Ontario Court of Appeal described the rationale for imposing personal criminal liability in *R. v. Fell*, as follows:

> The device of incorporation does not protect people who commit offences. A company can act only through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence itself just as any employee committing an offence for a human employer is liable.
>
> Where a company is liable under the identification doctrine the director or other controlling officer will almost always be a co-perpetrator of or accessory in the offence, or commit a statutory offence[12].

Therefore, while officers, directors or lower level managers or employees who participate in a crime can be held personally liable, potential criminal liability will not arise simply by virtue of their sitting on a board or acting as a director or officer.

Officers and directors of an organization can be held personally liable for the criminal acts of the organization if they participate in or encourage wrongdoing.

11 "Abetting" means intentionally encouraging another to commit an offence.
12 (1981), 64 C.C.C. (2d) 456 at 461-462 (Ont. C.A.).

Can the Criminal Liability of a Subsidiary Be Visited Upon Its Parent — or Vice Versa?

A question that frequently arises is whether the parent of a Canadian-based subsidiary can be held liable for the criminal acts of the subsidiary. The answer is that, in most cases, a parent corporation cannot be held liable for the criminal acts of its subsidiary merely based on the existence of a parent-subsidiary relationship.[13] This is because the criminal law recognizes the existence of the "corporate veil" that separates a company and its shareholders, as enunciated by the House of Lords in *Salomon v. A. Salomon & Co. Ltd.*[14]

While the parent corporation cannot generally be held criminally liable for the acts of the subsidiary, such liability may arise where a court chooses to "pierce the corporate veil" in respect of a particular transaction that is alleged to be criminal.[15] When this occurs, the alleged criminal acts of the subsidiary become the acts of the parent, and the parent is at risk of criminal prosecution. However, it is very rare for the corporate veil to be pierced in criminal cases. Furthermore, where a subsidiary runs a legitimate and separate business from its parent, the courts are loath to pierce the corporate veil, as is demonstrated by *Transamerica Life Insurance of Canada v. Canada Life Assurance Co.*[16] In that case, the court declined to pierce the corporate veil, despite the fact that the subsidiary was wholly owned by the parent and the board of directors of the subsidiary was comprised of executives of the parent. This is because the subsidiary was found to have independent management and to conduct a business separate and distinct from that of its parent. Similarly, in *Bank of Montreal v. Canadian Westgrowth Ltd.*,[17] the Alberta Court of Queen's Bench refused to hold a parent corporation liable on a rental agreement entered into by its wholly owned subsidiary, despite the following findings: (1) the subsidiary was wholly owned by the parent; (2) the subsidiary was entirely funded by the parent; (3) the officers and directors of the companies were identical, and the meetings of both boards were held simultaneously; and (4) most of the dealings with respect to the rental agreement were with the parent's staff on the parent's letterhead. The court refused to pierce the corporate veil because the situation was nothing more than what one would expect to find in the operation of two related companies.

13 A parent corporation could be held to be a party to a criminal offence committed by the subsidiary under the circumstances set out in section 21 of the *Criminal Code*.

14 [1897] A.C. 22 (H.L.).

15 Alternatively, if the subsidiary acts as the "agent" of the parent in carrying out the alleged criminal acts, the parent can be held criminally liable. However, liability on agency grounds is generally difficult to establish. The evidence of agency must be "pretty clear – possibly overwhelming" in order to pierce the corporate veil on agency grounds. This is because there is a presumption that a transaction is what it purports to be: *Snook v. London & West Riding Investments Ltd.*, [1967] 2 Q.B. 786 (Eng. C.A.).

16 [1996] O.J. No. 1568 (Gen Div.) at pp. 11-12, affirmed [1997] O.J. No. 3754 (C.A.). The principles in this decision were recently affirmed by the Ontario Superior Court of Justice in the high-profile decision of *Yaiguaje v. Chevron Corporation,* 2017 ONSC 135 (Commercial List) at paras. 63-64, leave to appeal refused, 2017 ONSC 2251 (Div. Ct.). Although not a criminal matter, the case is of interest because the court upheld the separate legal personality of a U.S. parent and a Canadian subsidiary, declining to pierce the corporate veil to allow the plaintiffs to seize the assets of the Canadian subsidiary in order to satisfy an Ecuadorian judgment in their favour against the parent company.

17 [1990] A.J. No. 127, affirmed (1992), 2 Alta. L.R. (3d) 221 (C.A.).

If an Organization Is Convicted of a Criminal Offence, What Are the Potential Sentences that Can Be Imposed?

Upon conviction, the *Criminal Code* provides for a number of sentencing options for organizations and their directors, officers or employees. The precise sentence to be imposed — be it imprisonment, fine, probation or other punishment — depends on a consideration of all relevant circumstances, including statutory minimum or maximum sentences and the range of sentences that have been imposed in the past for similar offences.

FACTORS RELEVANT TO SENTENCING

In determining the appropriate sentence to impose on an organization convicted of a criminal offence, the *Criminal Code* sets out specific factors that are required to be considered by the sentencing judge. Section 718.21 states:

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Moreover, the *Criminal Code* contains a number of sentencing provisions directed at offences affecting the capital markets, such as fraud, fraudulent manipulation of stock exchange transactions, insider trading, tipping and making a false prospectus. Section 380.1, for example, sets out a number of factors that the sentencing judge is required to consider as "aggravating factors" (i.e., factors justifying a harsher sentence) in imposing a sentence upon conviction for one or more of these offences:

AGGRAVATING FACTORS FOR CAPITAL MARKETS OFFENCES

380.1(1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in sections 380, 382, 382.1 and 400, it shall consider the following as aggravating circumstances:

(a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;

(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;

(c) the offence involved a large number of victims;

(c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;

(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;

(e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and

(f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

(1.1) Without limiting the generality of section 718.2, when a court imposes a sentence for an offence referred to in section 382, 382.1 or 400, it shall also consider as an aggravating circumstance the fact that the value of the fraud committed exceeded one million dollars.

Section 380.1(2) prohibits the sentencing judge from considering a number of factors as "mitigating factors" (i.e., factors justifying a more lenient sentence) in imposing a sentence upon conviction for one or more of these offences affecting capital markets:

> 380.1(2) When a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

Accordingly, those mitigating factors that have, in the past, helped those convicted of white-collar offences to secure more lenient sentences, are no longer to be considered in sentencing for these offences.

A series of changes were made in 2011 and 2015 to the *Criminal Code* provisions relating to the sentencing of those convicted of fraud. These changes will make the consequences of a fraud conviction harsher for the company and its senior officers. Among other things:

SENTENCING FOR FRAUD

1. Section 380(1.1) imposes a minimum mandatory sentence of two years imprisonment if the total value of the subject-matter of the fraud or frauds exceeds C$1-million. While C$1-million appears on its face to be a large amount, one can readily see the frauds affecting the capital markets or the so-called Ponzi/pyramid schemes that have gained such high profile in recent years easily exceeding this amount.

2. As noted above, section 380.1(1) now mandates that a judge consider a number of aggravating circumstances when handing down a sentence for fraud.

3. Section 380.2 allows courts to impose a prohibition order in addition to any other punishment for the general offence of fraud. Such an order would prohibit offenders from seeking employment that involves having authority over the real property, money or valuable security of another person. The length of any such prohibition order is left to the discretion of the sentencing judge.

4. Section 737.1 requires the court to consider making a restitution order under section 738 or 739 if a person is sentenced or discharged under section 380 for fraud. The court is also obliged to ask the prosecutor whether victims of the offence were given an opportunity to indicate whether they were seeking restitution, and if a victim seeks restitution and the court declines to make an order to that effect, the court must give reasons for its decision in the record.

5. Section 722.2 requires that the sentencing judge consider a written community impact statement, if one is provided. Such a statement is made by a person on a community's behalf that describes the harm done to, or losses suffered by, the community as a result of the commission of the fraud. While previously discretionary, changes to this provision in 2015 have made the consideration of community impact statements mandatory for the court.

IMPRISONMENT

The sentence that is most closely associated with conviction for a criminal offence is imprisonment. While an organization obviously cannot be imprisoned, its directors, officers or employees certainly can be. The potential for imprisonment can provide a prosecutor with powerful leverage in plea negotiations with an organization.

The length of imprisonment that can be imposed depends on the offence in issue. In most cases, the *Criminal Code* prescribes maximum, rather than minimum, sentences. In the realm of the so-called white-collar crimes, Parliament has clearly moved in the direction of increasing the maximum length of imprisonment that can be imposed upon conviction. For example, the 2004 amendments to the *Criminal Code* increased the maximum sentence for fraud from 10 years to 14 years. They also increased the maximum sentence for the fraudulent manipulation of stock-exchange transactions from five years to 10 years. All of the factors in section 718.21 as described above will be relevant to the court's determination of the appropriate sentence.

As noted above, with the 2011 amendments to the *Criminal Code*, there is now a mandatory minimum jail sentence of two years for a conviction or convictions for fraud pursuant to section 380(1.1) of the *Criminal Code*, where "the total value of the subject-matter of the offences exceeds one million dollars."

The potential for imprisonment can provide a prosecutor with powerful leverage in plea negotiations with an organization.

FINES

When a corporation is convicted of a criminal offence, it cannot be imprisoned. A fine, however, will be imposed in lieu of imprisonment.[18] In the case of conviction for indictable offences (such as more serious criminal offences includes fraud), the amount of the fine is in the discretion of the sentencing judge and is subject to no limit. The judge will, however, likely consider the nature of the offence and the circumstances surrounding its commission, the injury to the public caused by the offence, and the "profit" obtained by the wrongdoer. If the wrongdoer fails to pay a fine in accordance with the order of the sentencing judge, the Attorney General of the province or of Canada may file the order with the court and enforce it as if it were a civil judgment, (for example, it may obtain writs of execution and sale with respect to the corporation's assets and property).

18 Section 735.

PROBATION

Where a person is convicted of an offence, it is open to the court to direct that the offender comply with the conditions prescribed in a probation order. The 2004 amendments to the *Criminal Code* gave sentencing judges broader powers to impose a wide range of conditions on convicted organizations. In particular, section 732.1(3.1) provides that:

> 732.1(3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:
>
> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
>
> (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;[19]
>
> (c) communicate those policies, standards and procedures to its representatives;
>
> (d) report to the court on the implementation of those policies, standards and procedures;
>
> (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
>
> (f) provide, in the manner specified by the court, the following information to the public, namely,
>
> (i) the offence of which the organization was convicted,
>
> (ii) the sentence imposed by the court, and
>
> (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
>
> (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

The conditions that can be imposed on an organization are numerous and potentially unlimited, given the extremely broad basket clause in section 732.1(3.1)(g). They can be imposed for a term of up to three years.[20]

Further, under section 750(3), certain offences may result in a party's inability to "contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person", or to "hold office under Her Majesty."

19 Before making an order under (3.1)(b), the court must consider whether it would be more appropriate for a regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph (section 732.1(3.2)).

20 Section 732.2(2)(b).

DEFERRED PROSECUTION AGREEMENTS

Outside of the *Competition Act*, Canadian law does not currently provide for civil resolution or alternative non-criminal resolution vehicles, such as deferred prosecution agreements ("**DPAs**") or non-prosecution agreements, as options to resolve criminal or quasi-criminal charges for corporations. DPAs are agreements between an accused and the responsible enforcement authority, whereby the enforcement authority agrees to suspend or defer prosecution in exchange for cooperation and compliance with certain conditions. Such conditions may include the payment of financial penalties, disclosure of an alleged offence and/or the implementation of more fulsome compliance policies. If the accused complies with the conditions set out by the DPA, the enforcement authority will withdraw the charges. Pioneered by the United States Department of Justice in the context of the *Foreign Corrupt Practices Act*, DPAs are now used by enforcement authorities in a number of jurisdictions, including the United Kingdom and France.

On September 25, 2017, the Federal Government of Canada requested comments from the public with respect to the development of a DPA regime in Canada.

DPAs provide an alternative, non-criminal resolution vehicle that can be used by corporations to self-report wrongdoing without exposure to uncertain criminal liability. In other jurisdictions, this had led to increased cooperation between enforcement authorities and corporations, as well as increased compliance with corporate criminal laws. By allowing accused corporations to avoid contested criminal proceedings, DPAs can also result in numerous benefits in respect of time, cost and reputation.

Is an Organization or Individual Required to Cooperate with a Police Investigation of a Criminal Offence?

WHISTLEBLOWER PROTECTIONS

There is no obligation for an organization or individual, either before or after a charge, to cooperate with or assist the police in the investigation of a criminal offence. The organization or individual can decline to participate in an interview, refuse to voluntarily turn over corporate documents or records and deny the police access to private property without a search warrant, without risk of criminal liability. Where an organization has been charged, the circumstances will be rare where it will want to assist in the criminal investigation.

It is also open to the organization to advise its employees of a request by the police for assistance in the investigation of a criminal offence and the organization's decision to not cooperate. The organization may also remind employees of the importance of maintaining the confidentiality of corporate information. **What the organization cannot do, however, is to direct an employee not to cooperate with the police or to punish or threaten to punish an employee who chooses to cooperate.** The *Criminal Code* contains provisions to protect "whistleblowers." In particular, it is a criminal offence, punishable by up to five years of imprisonment, for an employer or person acting on behalf of an employer to take action to retaliate against whistleblowers or to prevent them from providing information to the police relating to an offence that the employee believes has been or is being committed by the employer, an officer or employee of the employer or, in the case of a corporation, its directors. Section 425.1 of the *Criminal Code* provides that:

> 425.1(1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
>
> (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
>
> (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.
>
> 425.1(2) Any one who contravenes subsection (1) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) an offence punishable on summary conviction.

This offence puts into sharp focus the care that must be taken by an organization when communicating to its employees about a criminal investigation. While it is legitimate for the organization to tell its employees that it has chosen to not cooperate with the investigation and that they also have no obligation to cooperate, it is vital that the organization not inappropriately attempt to dissuade, sanction or punish those employees who wish or choose to do so.

Further, while there is no obligation to cooperate with or assist the police in an investigation, the corporation must be careful not to obstruct an investigation. For example, hiding or destroying records knowing that they are relevant to a criminal investigation may be found to be obstruction. Deliberately providing the police with false or misleading information relating to the alleged offence may similarly be found to be obstruction.

The corporation must be careful not to obstruct an investigation.

It is important to recognize that while there is no legal obligation to cooperate with a police investigation, there may be negative consequences for failing to do so. First, the police may view a refusal to cooperate as an indication that the organization has done something wrong or has something to hide. This, in turn, may lead the police to focus more attention on the organization than they would have otherwise and may increase the risks of a charge being laid. Second, if the organization does not cooperate, the police may seek a search warrant or production order to obtain the information sought. The execution of a search warrant may result in significant disruption to the operations of the business, not to mention unwanted media attention. Further, to obtain a search warrant, the police are required to file an affidavit or "information" with the court that details the police's basis for believing that a criminal offence has been committed. Once a search warrant is executed, this affidavit is generally available to the public and the media, unless ordered sealed by the court. These negative consequences should be carefully considered in deciding whether it is in the best interests of the company to "cooperate" in a police investigation notwithstanding the fact that there is no obligation to do so.

What Is a Search Warrant? What Is a Production Order? How Should the Organization Respond when Served with These Court Orders?

The *Criminal Code* provides the police with a number of tools to assist them in criminal investigations. This section provides a brief overview of two tools — search warrants and production orders — and how a corporation should respond when it is presented with either of them.

SEARCH WARRANT

A search warrant is a court order authorizing certain named law enforcement agents to search a building, receptacle or place at designated times of the day for certain items set out in the search warrant and to seize those items. A search warrant may also authorize the law enforcement agent to search a computer system in a building or place for specified electronic data. Such an authorization may permit the law enforcement agent to use any computer system at the building or place to search for this data, make hardcopies of data in the computer system once located and download it to a disk or CD.

In order to obtain a search warrant, a law enforcement agent must make an application to a justice of the peace with a sworn affidavit setting out his/her basis for believing that a criminal offence has been committed. The affidavit must set out reasonable grounds for believing that the building, receptacle or place to be searched contains anything that will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence. The target of the search warrant does not receive prior notice of the application to the court for a search warrant and, therefore, does not have the opportunity to make submissions against the issuance of a search warrant at that time.

There are a number of steps that an organization can take when served with a search warrant to protect its interests. **The first and most important step is to contact a lawyer who has knowledge and experience in dealing with search warrants.** While the organization is unlikely to be able to prevent the execution of the search warrant, there are certainly steps that a knowledgeable lawyer can take to protect the interests of the organization that is served with a search warrant.

The following is a non-exhaustive list of matters to consider when a search warrant is served on the premises:

The Warrant

Ask to see a copy of the search warrant, if one has not already been provided. Inspect the search warrant to confirm that it does, in fact, authorize the search that is to be conducted. Check that the correct address is set out on the search warrant, that the search is being conducted at the time specified by the search warrant, that only those authorized to conduct the search are participating in the search, and that the warrant states what articles, items and/or documents are being sought.

Affidavit

Ask for a copy of the affidavit (or "information to obtain"). While it may not be provided until the search has been completed, this will provide the organization with more details as to the police investigation and the basis for believing that evidence will be found at the location to be searched. Outside counsel can also review the affidavit/information to determine if there is a basis to quash the search warrant. The organization may also consider making an application to "seal" the

affidavit/information if there is a basis to do so. A sealing order would preclude the public and the media from accessing the affidavit/information or disseminating its contents.

Outside Counsel

Ask that the commencement of the search be delayed briefly so that counsel may attend. Provided that the search warrant is not defective on its face, the law enforcement agents are not obligated to delay the search. However, depending on the length of delay requested, they may oblige. At a minimum, have outside counsel contact the law enforcement agent overseeing the search.

Individual to Oversee

Designate one person from the organization to oversee the execution of the search warrant. Ask that all questions that the law enforcement agents may have in the course of their search be directed to that person. In this way, the organization limits the number of people who speak to the law enforcement agents and limits the risk of inadvertent disclosure of confidential information.

Inquiries

Instruct all employees to direct any inquiries that may be made to them by the law enforcement agents to the designated person.

Monitor

Monitor the search. So long as you are not obstructing the search, you are fully entitled to monitor the manner in which it is being conducted. To the extent that the law enforcement agents conduct the search in an "unreasonable" manner or exceed the scope of the search warrant in conducting the search (for instance, the warrant may authorize a search of the building but not the accompanying storage huts), this may provide a basis to quash the search warrant at a later date or exclude the evidence obtained.

Minimize Disruption

Consider what steps can be taken to minimize the disruption that will be caused by the search. The organization may want to make a room available to the law enforcement agents that is outside of public view or heavy traffic. The organization may also volunteer to provide documents to be seized so as to avoid the disruption that may follow from a search for the documents, but such a decision should be considered carefully because it may prevent the organization from later arguing that the volunteered documents fell outside the scope of the search warrant.

Privilege

Claim privilege over solicitor-client privileged materials. A search warrant does not permit law enforcement agents to access materials that are protected by solicitor-client privilege. For this reason, it is important at the outset of the search to segregate those materials and ask that they be protected as privileged. The law enforcement agents may seize them but are required to place them in a sealed envelope that is not to be accessed without court order.

Seized Materials

Consider asking for copies of materials that have been seized. To the extent that the law enforcement agents seize materials that are required in the day-to-day operations of the organization, it is important that copies remain available even after the search is conducted.

Media Statement

Consider whether it is necessary to prepare a statement to the media in the event that inquiries are made.

PRODUCTION ORDERS

A search warrant is not the only tool through which law enforcement agents can potentially access an organization's records/documents. In reality, a search warrant is a rather blunt tool when it comes to the investigation of corporate and financial. The investigation of such crimes frequently involves obtaining evidence in the form of financial records and information that exists in electronic format on the hard drives of computers or servers. While search warrants do permit law enforcement agents to access information in these formats, the search for and organization of this type of information through a search warrant can be difficult and cumbersome. An alternative tool that is more likely to be used in the context of investigation of white-collar crimes is a production order.[21] A production order is an order of the court requiring a person, other than a person under investigation for an offence under the *Criminal Code* or other act of Parliament, to provide copies of specified information or data to law enforcement agents. In particular, a production order can require the organization:

1. to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or
2. to prepare a document based on documents or data already in existence and produce it.[22]

In general, production orders require a person, financial institution or entity to produce the document to a peace officer or public officer named in the order within the time, at the place and in the form specified in the order. Specialized production orders for communication transmission data (under section 487.015), described below, must require production "as soon as feasible" after the order is served.[23]

Like a search warrant, a production order is available upon application to a justice of the peace or a judge. Like an application for a search warrant, an application for a production order is made in the absence of the subject of the order. The law enforcement agent seeking a production order must provide the justice of the peace or judge with a sworn affidavit setting out the reasonable grounds for belief that:

1. an offence has been or will be committed under this the *Criminal Code* or any other act of Parliament; and
2. the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

The justice of the peace or judge who issues a production order may impose such terms and conditions as he/she considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client.

In December 2014, Bill C-13, the *Protecting Canadians from Online Crime Act*, received Royal Assent. Among the changes to the *Criminal Code* are provisions creating preservation orders that require the preservation of computer data in the possession or control of an individual or organization.[24] The amendments also created specialized production orders dealing with communication transmission and tracking data.[25]

21 Section 487.014.
22 Section 487.014(1).
23 Section 487.092(2).
24 Section 487.013.
25 Section 487.015-017.

DEFERRED PROSECUTION AGREEMENTS

Financial institutions (other than those under investigation for an offence under the *Criminal Code* or other act of Parliament) may be subject to a specialized form of a production order that permits law enforcement agents to obtain so-called "tombstone" information about a particular person.[26] This order requires the financial institution to produce in writing the account number of a person named in an order or the name of a person whose account number is specified in the order, the status and type of account and the date on which it was opened or closed. To confirm the identity of the person named in the order, the order can also require the financial institution to produce that person's date of birth, current address and any previous address. This is information that law enforcement agents use to establish connections between targets of an investigation by tracing the flow of money through financial institutions.

Of particular interest with respect to this specialized production order is that it appears to be more readily available than a general production order. Whereas a general production order requires proof of "reasonable grounds for belief," this specialized production order requires merely "reasonable grounds to suspect".[27] For this reason, financial institutions are more likely to be subject to this specialized form of production order where only the "tombstone information" is sought.

The execution of a production order may be less disruptive to the corporation's operations, but in-house counsel should remain vigilant in protecting the organization's interests when served with a production order. The assistance of outside counsel is still important. It is open, for example, to the subject of the production order to request an exemption on the basis that the information sought is "privileged" or otherwise protected from disclosure by law, or where requiring production would be "unreasonable" or where it does not, in fact, have control of the document or data sought. Further, as with a search warrant, it is open to the company to apply to quash the production order or to seal the affidavit relating to same.

26 Section 487.018.
27 Section 487.018(3).

Is There a Limitation Period for Criminal Offences?

Unlike civil wrongs, where limitation periods impose a time limit on when remedies can be obtained from the courts, there are no limitation periods in Canada for the laying of most criminal charges.[28] In most cases, criminal charges can theoretically be pursued against an organization and its officers, directors or employees notwithstanding the fact that the alleged crime occurred years or even decades earlier.

Under the *Canadian Charter of Rights and Freedoms*, unreasonable delay by the prosecution after charges have been laid may be a basis for having charges stayed, as a denial of the right to a trial within a "reasonable" period of time under section 11(b) of the Charter. However, except in exceptional circumstances, pre-charge delay, that is delay in laying charges, is not a basis for staying a prosecution.

The Supreme Court of Canada recently held in *R. v. Jordan* that once charges have been laid, delays longer than 18 months for offences being tried in provincial court and 30 months for offences being tried in superior court are presumptively unreasonable.[29] The creation of these bright-line "ceilings" means the Crown must justify longer delay, or a stay of proceedings will be granted.[30] While the impact of the *Jordan* decision is still becoming clear, it may be particularly difficult to meet the 30-month presumptive ceiling in complex or document-heavy cases, including those involving financial crimes.

28 The less serious criminal offences, known as summary conviction offences, are subject to a six-month limitation period: section 786(2).

29 2016 SCC 27.

30 Under the Jordan framework, delay attributable to the defence is subtracted. See also R. v. Cody, 2017 SCC 31, affirming the *Jordan* framework.

Quick Reference Tool

CHECKLIST FOR SEARCH WARRANTS

- **DON'T** obstruct investigators
- **DO** immediately contact legal counsel and ask that execution be delayed until counsel arrives
- **DO** ask for a copy of the search warrant and review carefully
- **DO** ask for the affidavit (the "information") used to obtain the search warrant
- **DON'T** consent to a search beyond the scope of the warrant
- **DO** designate a single person as the point of contact for the search
- **DO** monitor and document the search as much as possible, but do not obstruct
- **DO** consider cooperation to minimize disruption
- **DO** assert privilege, but do not obstruct
- Where electronic files are sought, **DO** develop a protocol including a lead IT representative
- **DO** ask for copies of all materials seized
- **DO** consult with counsel on any court challenges or other steps that can be taken

Key differences with production orders include:

- typically given more time to respond
- no invasive search of business premises or computers by authorities
- easier to bring a motion to suppress before having to produce anything

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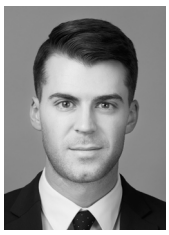

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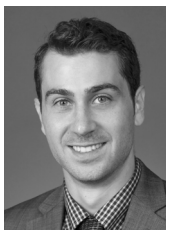

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