

# Punishing the crime, not the process: key considerations when investigating and reporting white-collar crime

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In late 2022, the Canadian Bar Association released the *Guide for Internal Investigations of White-Collar Crime (the Guide)*<sup>1</sup>, which consolidates and clarifies best practices for corporations conducting an internal investigation in response to suspicions or allegations of criminal activity. While the Guide will help to promote consistency in approach, practitioners continue to look for guidance from Canadian courts on key issues with respect to the conduct of investigations and issues arising therefrom.

## Privilege over work product related to the investigation

Records created throughout the course of an investigation by external, independent, counsel for the purpose of obtaining legal advice and /or within the context of impending litigation will be privileged.<sup>2</sup> Where an investigation identifies criminal activity, prompt self-reporting to the appropriate regulatory authority is one strategy to mitigate the consequences flowing from a finding of illegal activity<sup>3</sup> Nonetheless, organizations must weigh this against the risk of enabling third parties (including prosecuting authorities and class action plaintiffs) to access privileged records containing sensitive, and possibly detrimental information.

In *Centre universitaire de santé McGill c. Lemay (Lemay)*<sup>4</sup>, a significant decision of the Québec Court of Appeal, the court held that the disclosure of a forensic accounting report to the local police force did not waive privilege. Rather, production of the report was an attempt to collaborate with the relevant authorities. The court found that the waiver of privilege was not “clear and unequivocal” as the report was disseminated to a limited number of people and was marked privileged and confidential. Leave to appeal to the Supreme Court of Canada was denied earlier this year, leaving this decision in good stead. Nonetheless, it is advisable that privileged documents that are voluntarily disclosed are marked as privileged and accompanied by a covering letter that clearly circumscribes the limits of disclosure, explicitly stating that privilege over the record has not been waived.

## Civil liability for reporting employee misfeasance

Employee witness interviews are a common step in internal investigations and the subsequent reporting of factual findings from these interviews to a regulator can be highly consequential for the employees involved, potentially leading to an investigation of their individual conduct and enforcement action. This raises the spectre of potential civil liability for the company making the self-report if the employee's conduct has not been accurately portrayed. Nonetheless, the B.C. Supreme Court recently confirmed<sup>5</sup> that corporations do not owe a duty of care toward employees when investigating allegations of criminal activity, striking claims alleging the defendant had conducted a negligent investigation, and that the results were not reported to the regulator with reasonable competence, thoroughness, and objectivity. Holding that these allegations did not establish the basis for a claim against an employer is consistent with similar decisions in Ontario<sup>6</sup>, which are based upon a policy of favouring the reporting of wrongdoing, even when these reports are ultimately mistaken.

Moreover, “absolute immunity” attaches to information provided to courts and regulators within a judicial or administrative proceeding, meaning that a person who gives or tenders evidence to a court or tribunal will not face legal liability in respect of that evidence.<sup>7</sup> Given this, organizations should not be deterred from investigating and reporting suspected criminal conduct by the threat of legal retaliation by an employee.<sup>8</sup>

For more information on the implementation of the Guide, or on internal investigations, please reach out to one of the key contacts listed below, or to a member of [BLG's Investigations & White Collar Defence group](#).

## Footnotes

<sup>1</sup> [Canadian Bar Association - Guide for Internal Investigations of White-Collar Crime \(cba.org\)](#) (Guide).

<sup>2</sup> Guide, Solicitor-Client and Litigation Privilege; *British Columbia (A.G.) v. Lee*, 2017 BCCA 219 at para 33,43; *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 at para 19.

<sup>3</sup> Guide, Cooperation with Government and Regulatory Authority Investigators; *R v Braille*, 2019 ABCA 477 at para 78; *Re Melville*, 2014 IIROC 51.

<sup>4</sup> 2022 QCCA 1394.

<sup>5</sup> *Salina v. Investors Group Financial Services Inc.*, 2023 BCSC 86.

<sup>6</sup> See, for example, *Correia v. Canac Kitchens*, 2008 ONCA 506, upheld i, *Lee v. Magna International Inc.*, 2022 ONCA 32

<sup>7</sup> *Lefebvre v. Durakovic*, 2018 BCCA 201 at para 19.

<sup>8</sup> Note that this does not apply to an *individual* decision maker, who can still be liable for malicious prosecution.

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