

Securities and Related Investigations **Canada**

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Published March 2017

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Regulatory environment

1 What are your country's primary securities or related law enforcement authorities?

Canada does not currently have a national securities regulator. Instead, each of the 10 provinces and three territories has its own provincial or territorial securities laws and securities regulatory authority (securities regulator or regulator). While there is an umbrella organisation – the Canadian Securities Administrators, whose objective is to “improve, coordinate and harmonise” securities regulation in Canada – ultimate jurisdiction for the regulation of securities lies with the provinces and territories. These provincial and territorial regulators are responsible for both the administrative and (to varying extents) quasi-criminal enforcement of securities laws in Canada. Securities regulator staff (staff) may investigate and prosecute regulatory breaches of securities laws, and seek administrative sanctions (fines and trading, registrant, and director and officer bans) against the alleged wrongdoer in front of a panel of commissioners of its home regulator (as applicable, the Commission). Alternatively, securities regulator staff may investigate and Crown prosecutors may prosecute breaches of securities laws, and seek quasi-criminal sanctions (fines and/or a prison term of not more than five years less a day) against the alleged wrongdoer in front of the provincial/territorial courts (in Ontario, staff may choose to assume carriage of the prosecution itself). Owing to the multilateral nature of the Canadian securities landscape, each jurisdiction pursues its own enforcement priorities according to its own market characteristics. However, the majority of enforcement activity in Canada occurs in four provinces – British Columbia, Alberta, Ontario and Quebec.

In addition to the enforcement work done by securities regulators, the Royal Canadian Mounted Police (RCMP) and local law enforcement agencies are responsible for the enforcement of the securities-related provisions of the Criminal Code, Canada's federal criminal statute, and regularly collaborate with the securities regulators in doing so (collaboration between securities regulators and law enforcement in Canada is discussed in further detail in question 4).

There are also several notable Canadian stock exchanges – the Toronto Stock Exchange (TSX), the Montreal Exchange, the TSX

Venture Exchange, ICE Futures Canada, the Canadian Securities Exchange, and the Aequitas NEO Exchange. Each exchange may set its own listing and trading rules that apply to its members and listed issuers. Enforcement tools available to the exchanges include trading halts and delistings.

The Canadian securities industry also has many self-regulatory organisations (SROs), which regulate the day-to-day activities of their respective members. These include the Investment Industry Regulatory Organization of Canada (IIROC), which regulates the qualification, registration and activities of dealers, advisers and other financial intermediaries; the Mutual Fund Dealers Association of Canada (MFDA), which regulates registered mutual fund dealers; and the *Chambre de la sécurité financière* (CSF), which regulates activities related to group savings plan brokerage, financial planning, insurance of persons, group insurance of persons, and scholarship plan brokerage in Quebec. These SROs may discipline their members and may impose sanctions such as fines, suspension of membership and expulsion.

IIROC, in addition to the professional regulation of its members, also provides market surveillance and market oversight services for Canada's various securities exchanges. In this role, IIROC has the power to impose temporary trading halts.

2 What are the principal violations or legal issues that the securities or related law enforcement authorities investigate?

In the administrative enforcement context, staff of the securities regulators investigate and pursue securities-related misconduct, which mainly consists of illegal distributions, misconduct by registrants, illegal insider trading and disclosure violations.

In the quasi-criminal enforcement context, securities regulators investigate and Crown prosecutors prosecute the same types of misconduct as in the administrative enforcement context, but in front of the courts for generally greater penalties.

In the criminal enforcement context, law enforcement agencies investigate and Crown prosecutors prosecute breaches of the Criminal Code for both specific securities-related criminal offences (such as market manipulation and illegal insider trading), and more general economic crimes (such as fraud) that may involve either the trading of securities or the performing of registrant activities.

In recent years, enforcement staff from the securities regulators have continued to emphasise the prosecution of illegal distributions and fraud. Among the proceedings commenced by securities regulator staff in 2015 (the most recent year for which statistics were available), staff alleged illegal distribution against 46 per cent of the respondents, and alleged fraud against 24 per cent of the respondents. For the years 2013, 2014 and 2015, these two types of misconduct have consistently been the most and the second most often alleged and concluded types of misconduct by the securities regulators, respectively.

In addition, SROs discipline their members for breaches of SRO regulatory rules. The top three complaints received and files opened by IIROC in recent years have consistently been: breach of suitability obligations (33 per cent in 2015, the most recent year for which statistics were available), unauthorised and discretionary trading (17 per cent in 2015), and misrepresentation (3 per cent in 2015). The top three types of cases opened by the MFDA in 2016 were: pre-signed forms (16 per cent in 2016), other signature falsification (12 per cent in 2016), and suitability (9 per cent in 2016).

3 If there is more than one authority involved in a securities or related investigation, how is jurisdiction allocated? What is the interplay between the securities regulator and the public prosecutor?

If the file is multi-jurisdictional in nature (ie, the file properly falls under the authority of more than one securities regulator), securities regulator staff of the relevant jurisdictions often will work together on the investigation, with one of the jurisdictions taking the lead. There is no formal process to determine which jurisdiction will take the lead. In addition to joint investigations, hearings may be conducted simultaneously as between two securities regulators, resulting in a joint decision.

While the securities regulators have the jurisdiction to pursue administrative, and quasi-criminal infractions, purely criminal charges become the domain of law enforcement, and are generally enforced by the Integrated Markets Enforcement Team (IMET) or the Joint Serious Offences Team (JSOT) (see response to question 4).

Generally, the process for determining the jurisdiction of the investigation between the securities regulator and the public prosecutor is as follows: (a) information about potential wrongdoing is received by the securities regulator; (b) the information is passed on to the securities regulator's case assessment staff, who assess the nature and seriousness of the issue; (c) after such assessment, case assessment refers the case to either (i) SROs, if the file is within the mandate of IIROC, MFDA or CSF; (ii) the securities regulator's investigation staff, who gather evidence and facts, and consult with counsel to prepare for litigation (and seek interim cease trade orders etc. as appropriate); or (iii) IMET, JSOT, RCMP or a local police force if there is evidence of criminal activity.

If the investigation was handled by the securities regulator staff and the decision is made to prosecute, securities regulator staff counsel may choose to bring the proceeding either in front of the Commission or in front of the provincial courts. If the decision is made to bring the proceeding in front of the provincial courts, staff counsel will generally pass carriage of the prosecution to Crown prosecutors.

4 Do the securities or related law enforcement authorities have investigatory powers? Can they bring administrative, civil or criminal proceedings?

All securities regulatory authorities have investigatory powers, although generally only the four largest provincial regulators (British Columbia, Alberta, Ontario and Quebec) have the resources to actively investigate market misconduct or potential breaches of their respective securities laws. Most securities regulators choose to pursue regulatory actions against wrongdoers. However, regulators also have powers in limited respects to bring civil proceedings. Securities regulators in Canada do not have authority to investigate criminal matters or to pursue criminal prosecutions; that is the exclusive purview of the police and Crown prosecutors respectively. Most provincial regulatory statutes also contain quasi-criminal offences, which are investigated by the securities regulators' investigators, but most jurisdictions in Canada require proceedings to be brought in those cases by Crown prosecutors. In Ontario, quasi-criminal proceedings can be prosecuted by Ontario Securities Commission (OSC) staff.

With respect to purely criminal investigations, these matters are often pursued by the RCMP, IMET or JSOT. IMET is a national organisation established between the RCMP, Department of Justice Canada, the securities regulators of British Columbia, Alberta, Ontario and Quebec, and various provincial police forces. It has offices in the four main Canadian financial centres – Toronto, Calgary, Montreal and Vancouver, and is composed of police officers of the RCMP, lawyers, forensic accountants and other investigative experts who work closely with the provincial securities regulators to “detect, investigate, and deter capital markets fraud by focusing resources on the investigation and prosecution of the most serious market-related crimes”.

In the case of Ontario, JSOT was established between the OSC, the RCMP Financial Crime program, and the Ontario Provincial Police Anti-Rackets Branch. OSC works closely with JSOT in bringing quasi-criminal and criminal charges in cases of serious securities law breaches. Other jurisdictions have arrangements in place between regulators and police authorities, the formality of which varies from jurisdiction to jurisdiction.

5 Are regulatory or criminal securities and related investigations public? Under what circumstances?

Criminal and regulatory investigations are not public. In most jurisdictions, securities regulators pursue both informal and formal investigations (discussed in detail under question 7).

In the ordinary course, enforcement staff at the securities regulator generally will not disclose the existence or nature of an investigation. The investigation is kept confidential both to avoid compromising the investigation, and to protect the reputation of the subjects of the investigation if no proceedings are taken. In fact, in most jurisdictions, it is prohibited by statute for persons or companies to disclose the existence and nature of an investigation to anyone except his or her own counsel. In Ontario, under section 17 of the Securities Act (Ontario) (OSA), staff may seek the permission of the Commission to disclose certain information if it would be helpful to the investigation to do so, or for some other justifiable reason.

Once a proceeding has been commenced, the hearings are generally open to the public and to the media. All documents that are required to be filed or received in evidence in a proceeding are available to the public, with the exception of documents

that the Commission has ordered to be kept confidential. If a document contains confidential information that a party wishes to keep private, they may request a confidentiality order from the Commission. Such an order prevents public access to the confidential information and may be requested for any document filed with the Commission as well as for any transcript of the proceeding.

6 Are regulatory or criminal securities and related investigations targeted at the company or the individuals involved, or both?

Investigations may target both individuals and corporations. The nature of the investigation may depend on the target (ie, individuals may be investigated for insider trading; corporations may be investigated for disclosure violations), however, certain investigations may target both a corporation and individuals within the corporation.

Investigation procedure

7 How do the securities and related law enforcement authorities typically begin an investigation?

An investigation can be triggered in a number of ways. First, an investigation can be commenced as a result of a complaint to the securities regulator. Second, most jurisdictions' securities statutes permit the regulators to conduct compliance and continuous disclosure reviews. If this compliance monitoring discloses wrongdoing or violations of securities law, staff may commence an investigation.

Investigations generally start informally, where staff will typically begin to gather publicly/readily available documents and conduct voluntary interviews without resort to its statutory investigative powers.

If, through its findings from the informal investigations, staff concludes that the use of its statutory investigative powers is warranted, it may start a formal investigation by the issuing of an investigation or examination order. Such orders allow the staff to use its broad statutory investigative powers, such as the compelling of testimony and the production of documents from any person. It is important to note that once an investigation becomes formal and staff uses its statutory investigative powers, the investigation can generally no longer be referred to criminal prosecution due to Canada's constitutional protections against self-incrimination and protection for life, liberty and security of person.

8 What level of suspicion of wrongdoing is required for the securities or related law enforcement authorities to begin an investigation?

There are no specific criteria for informal investigations to be pursued. For formal investigations, the securities regulators have broad discretion to order the commencement of formal investigations, and may appoint investigators for the due administration of the securities laws of its home jurisdiction or that of another jurisdiction. For example, in Ontario, section 11 of the OSA gives the OSC the power to "appoint one or more persons to make such investigation with respect to a matter as it considers expedient, (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or (b) to assist in the due administration of the securities or derivatives laws or the

regulation of the capital markets in another jurisdiction". Other provinces have like provisions.

9 May the securities or related law enforcement authorities conduct dawn raids? Does this depend on the nature and seriousness of the allegations?

Broad powers exist for regulators acting under a formal investigation order.

For example, in an investigation under section 11 of the OSA, an investigator has the authority to obtain a court order to enter the business premises of any person or company for the purposes of searching and seizing anything described in the order that is found on the premises (subsection 13(4)). In making such an order, the judge must be satisfied that there are reasonable and probable grounds to believe that there may be in the place to be searched anything that may reasonably relate to the investigation order (subsection 13(5)). The search may be conducted between the hours of 6am and 9pm, and the individual(s) specified in the order may use as much force as is reasonably necessary for the purposes of executing the order (subsection 13(6)). Section 13 does not require notice to be provided to the occupiers of the premises to be searched. Other provincial statutes, such as section 143 of the British Columbia Securities Act, and section 42 of the Alberta Securities Act, confer similarly broad investigative powers on their respective investigators.

10 Must the findings of a company internal review be reported to the securities or related law enforcement authorities? When and under what circumstances?

The decision if and when to report an internal investigation and its results is a complicated one. Companies are not *technically* required to report internal reviews. However, many companies will report suspected or potential wrongdoing to the relevant securities regulator when an internal investigation is commenced or after an internal investigation is completed, particularly if it appears that certain individuals within the company have committed offense(s) under securities legislation. While a company need not *technically* voluntarily disclose findings from an internal review, the underlying facts of the investigation are often material and therefore may have to be disclosed publicly in any event. Failure to do so could subject the company to scrutiny by a regulator for a lack of transparency or a failure to cooperate if the internal investigation reveals potential wrongdoing by an individual or the company. In addition, failure to do so may negatively impact a company's eligibility for the regulator's formal or informal credit for cooperation programme (discussed in greater detail below).

11 Are whistleblowers a frequent source of information for securities and related investigations?

While whistleblowers have not historically been a common source of information for Canadian securities regulators, two provincial regulators – the OSC and the Autorité des marchés financiers (AMF), the securities regulator for Quebec, have introduced whistleblower programmes in 2016. It remains to be seen whether this will lead to more, and more successful, enforcement activity.

The OSC programme introduces monetary incentives for would-be whistleblowers – up to C\$5 million in certain cases. The

programme is coupled with anti-reprisal and anti-confidentiality provisions.

The AMF programme also contains anti-reprisal measures but, unlike the OSC programme, does not offer awards to would-be whistleblowers.

12 Describe the typical phases of a securities or related investigation in your country.

Regulator staff determine the scope of their investigation

- i. If staff chooses to do so, staff may apply to the Chair (or a designate) of the Commission for an investigation order, which turns the informal investigation into a formal one and allows the regulator staff to utilise broad statutory investigative powers.
- ii. A formal investigation can no longer be referred to criminal law enforcement agencies, due to Canada's constitutional protections against self-incrimination.

Regulator staff begin their investigation

- i. Regulator staff will begin by reviewing the documents and information already in their possession. Interviews may also be conducted on a voluntary basis.
- ii. At any time before the commencement of a formal investigation, staff may refer the file to a police agency for criminal investigation and prosecution.
- iii. If proceeding under a formal investigation, regulator staff may compel the attendance of any person to answer questions at an interview or examination, or compel the production of documents. Search and seizure of evidence on the subject's business premises may also be carried out under a court order.

A temporary cease trade order may be issued

- i. Regulator staff can suspend all trading in a company's securities, or prohibit individuals and companies from trading in certain or all securities.
- ii. These orders are initially effective for not more than 15 days from when the order is issued. However, a temporary order may be extended.

The individual or company under investigation may seek to settle with regulator staff at any time while staff has carriage of the investigation/prosecution, up until the conclusion of the hearing on the merits.

Regulator staff may choose to proceed with a hearing

- i. If, during their investigation, staff determine that there is sufficient evidence to warrant a hearing, they will send a Notice of Hearing announcing their likely intention to commence proceedings. Please see question 27 for further details.

13 What are the mechanisms by which a securities or related law enforcement authority may cooperate and coordinate with authorities outside your jurisdiction?

The regulators of the four largest securities regulatory jurisdictions of British Columbia, Alberta, Ontario and Quebec are all party to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. In addition, eight Canadian provincial securities regulators (including the four regulators aforementioned) are

party to a separate Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Regulated Entities with the US Securities and Exchange Commission (collectively, the MOUs). Under the MOUs, the OSC and other signatories have agreed to provide one another with mutual assistance by providing access to information in agency files, taking evidence of persons and obtaining documents for investigations. The MOUs are designed to work with the existing statutory provisions in each of the jurisdictions and demonstrates a commitment by international securities regulators to work with one another in pursuing securities enforcement. In this context, targets of investigations in Canada should carefully consider the possibility of any compelled testimony being shared with regulators and law enforcement agencies in jurisdictions with no use immunity, such as the US.

With respect to securities-related international criminal enforcement, the government of Canada has entered into mutual legal assistance treaties (MLATs) with other countries that govern cooperation between domestic law enforcement agencies and their foreign counterparts. For example, the Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters provides that the two governments shall provide "mutual legal assistance in all matters relating to the investigation, prosecution and suppression of offences", which assistance includes the examination of objects and sites, the exchange of information and objects, the provision of documents and records, and the execution of requests for searches and seizures. MLATs also exist between Canada and certain other jurisdictions with sizeable capital markets such as China, France and the United Kingdom.

In Canada, such treaties are given force through the Mutual Legal Assistance in Criminal Matters Act, under which the Minister of Justice is empowered to obtain court orders upon the request and on behalf of countries that are party to mutual legal assistance agreements with Canada (eg, the US). Other countries have like statutory provisions. For example, in the US, district courts (under 28 USC §1782 and under 18 USC § 3512) are empowered to issue orders for the giving of a testimony or statement, or to produce a document or other thing. In addition, 18 USC § 3512 empowers district courts to issue search warrants and wiretap warrants.

14 Will a securities or related law enforcement authority take into account findings by a law enforcement authority outside your jurisdiction in the course of its investigation?

As a result of the MOUs referenced in question 13, the OSC can take into account findings by other commissions, if it deems this to be appropriate.

Document production

15 What can the securities and related law enforcement authorities require to be produced as part of an investigation? Do the powers of a regulator differ from those of the public prosecutor?

In formal investigations, investigators have broad statutory powers to compel testimony and the production of documents. For example, section 13 of the OSAGrants such powers to regulator staff in respect of an investigation carried out under section 11 of

the OSA. The power is the same as that vested in provincial courts for the trial of civil actions.

16 Will a litigation hold or will other instruction to preserve documentation need to be issued? When?

It is a common, best practice for companies under investigation to preserve records.

In Ontario, while there is no formal “litigation hold” provision under the OSA, those who attempt to destroy documents “in an attempt to avoid production of records” will not receive “credit for cooperation”, detailed under OSC Staff Notice 15-702, Revised Credit for Cooperation Program.

In British Columbia, subsection 143(7) of the Securities Act (British Columbia) specifically provides that a person may not withhold, destroy, conceal, or refuse to give any information or record to an investigator. Similar provisions can be found under other provincial securities statutes, such as subsection 35(2) of the Securities Act (Manitoba), subsection 93.4(1) of the Securities Act (Alberta), and subsection 29E(2) of the Securities Act (Nova Scotia).

Further, it may be that subsection 139(2) of the Criminal Code applies to securities regulatory proceedings, as it has been held to apply to other administrative proceedings in Canada. Subsection 139(2) provides that it is an indictable offence, punishable by imprisonment for a term not exceeding 10 years, to wilfully attempt (in any manner) to obstruct, pervert, or defeat the course of justice.

Lastly, for securities laws that contain the express prohibition against the destruction, withholding, concealing or refusal to give of any information or record, breach of such prohibition may open up the person to liability under such securities laws’ general prohibition against the contravention of securities laws provision.

17 Can the securities and related law enforcement authorities request the production of materials protected by attorney–client privilege or work–product doctrine? Can the securities and related law enforcement authorities use protected materials if it obtains them from third parties?

As in other civil and criminal proceedings, the Canadian regulators cannot compel the production of materials protected by solicitor client privilege or litigation privilege. The Supreme Court of Canada recently confirmed in *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 that a statutory power to compel documents does not abrogate litigation privilege absent clear, explicit and unequivocal language.

Canadian regulators can request any materials that it determines would help its investigation – however, it is uncommon for the regulators to request a waiver of privilege.

This notwithstanding, there are practical incentives to disclose privileged materials. For example, the OSC’s Credit for Cooperation Program encourages entities or individuals under investigation to waive privilege in exchange for “credit” which can lead to more favourable settlements.

18 How is confidential information or commercially sensitive information treated by the securities and related law enforcement authorities?

Under most Canadian securities laws, documents required to be filed or received in evidence in proceedings are available to the public.

In order for documents produced in a proceeding to be treated as confidential, a request for a confidentiality order must be made to the officiating authority. A confidentiality order may be made with respect to any document filed with the Office of the Secretary, any document received in evidence, or any transcript of a proceeding. In order to grant a confidentiality order, the Commission in charge of the proceeding must be of the opinion that there are valid reasons for restricting access to the document. Once a confidentiality order has been granted, the document is withheld from the public.

A party can also apply to redact specific confidential information, rather than obtaining a confidentiality order over the entire document (which may be viewed by the Commission as less of an infringement to the public nature of securities proceedings).

19 Can the target of a document request exercise a right not to produce?

Canadian regulator staff have broad powers to compel the production of any documents for the purposes of its investigation. However, a target may exercise a right not to produce if the document is not relevant to the investigation or proceeding, or if it claims privilege over the document.

Individuals may also challenge a demand for documents by invoking section 8 of the Canadian Charter of Rights and Freedoms. Section 8 states that “everyone has the right to be secure against unreasonable search and seizure,” and operates based on the level of privacy one can reasonably expect to have in the context of their conduct. The application of section 8 varies depending on whether the proceeding is criminal (where the stakes are higher and therefore a section 8 argument is more likely to succeed) or civil (where the courts are more likely to afford a securities regulator more flexibility in its demand for documents). What is clear, however, is that participants in the securities context are deemed to have a relatively low expectation of privacy – as they have chosen to participate in this heavily regulated and monitored field (*Mitton v British Columbia (Securities Commission)* 2001 BCSC 499). As such, the bar for succeeding on a section 8 challenge is generally a high one – especially in a civil action.

Section 13 of the OSA, for example, states that if a person or company refuses to produce documents, they are liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. Other provinces’ statutes contain like provisions.

20 Do any data privacy or bank secrecy laws restrict the production of materials to a securities or related law enforcement authority in your jurisdiction? An authority outside your jurisdiction? May the company under investigation provide personal or bank customer data on a voluntary basis?

Canadian privacy laws and bank privacy policies contain exceptions that allow the production of otherwise “private” information if the production is compelled by law or statute. With respect

to voluntary disclosure of personal or bank customer data, it would depend on whether the bank or other institution had built into their privacy policies an express exception with respect to voluntary assistance in investigations.

21 Are there any data privacy, bank secrecy or other laws that restrict where documents or other communications may be stored or reviewed for the investigation?

The privacy laws of the jurisdiction apply to the securities regulator of that jurisdiction, and therefore the storage and review of documents in respect of an investigation must be consistent with such privacy laws.

22 Are the securities and related law enforcement authorities able to obtain documents from outside the country?

When an investigator makes a demand for the production of documents, he or she is not restricted to only receiving documents from the investigator's home jurisdiction. A person or company is obligated to deliver all documents requested, even if the documents are located in a different jurisdiction. As mentioned above, a person or company may only refuse to produce documents on the bases of irrelevance or privilege.

In addition, the Canadian securities regulators who are signatories to the international MOUs referenced above may request and obtain documents from the regulators of other jurisdictions under the framework of such MOUs.

Witness interviews

23 Will the securities and related law enforcement authorities conduct witness interviews? If so, will the interviews be on the record? Will the interviews be made public?

Often, regulatory staff will conduct witness interviews as part of their investigations. These interviews are conducted for the purposes of furthering the investigation and preparing for the regulatory proceeding. As such, their testimony will be on the record, and may be used in the proceeding for which it is given.

At the investigation stage, confidentiality is maintained so as not to compromise the investigation. As such, there are strict rules prohibiting the disclosure of witness' testimony if compelled at this stage, whether the testimony is taken by the securities regulator or law enforcement. However, as noted below, regulatory hearings are generally open to the public, and therefore witness interview testimony may be made public during these proceedings.

While witness interviews conducted during hearings are generally public (as are hearings in general), the panel of Commissioners in charge of the hearing may rule that portions of a witness' testimony be held in camera – that is, privately. Transcripts of in camera portions of a hearing are not available to the public. This is rare, and when it occurs, is limited to specific areas of concern expressed by the parties and/or the Commission. Similarly, section 486 of the Criminal Code provides that all criminal proceedings are held in open court. However, the presiding judge may order the exclusion of all or any members of the public from the court room for all or part of the proceedings if they are of the opinion that such an order is “in the interest of

public morals, the maintenance of order or the proper administration of justice...”

24 Can witnesses exercise a right not to testify? Will any adverse inference be drawn if they do so?

In Canada, a witness cannot exercise a right not to testify. As noted above, in an investigation under section 13 of the OSA, the investigator has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise as is vested in the provincial court of original jurisdiction for the trial of civil actions. As such, the refusal of a person to attend or answer questions makes the person liable to be committed for contempt by such court as if in breach of an order of that court.

Witnesses being compelled to testify, however, have rights under both the provincial evidence statutes and the federal Canada Evidence Act. If they claim protection under such acts, they are protected against the Crown using their compelled testimony against them in any other proceeding. See, for example, subsection 5(2) of the Canada Evidence Act, which protects the witness against the use of his or her compelled testimony given in one proceeding with respect to future criminal proceedings, and subsection 9(2) of the Evidence Act (Ontario), which protects the witness against the use of his or her compelled testimony given in one proceeding with respect to any other civil proceeding or any proceeding under any act of the legislature.

Unlike in the US, in Canada there is no equivalent to “pleading the fifth”. Witnesses must answer questions even if they are self-incriminating. However, there are protections afforded to witnesses who answer these questions, in the form of restrictions on how the answer may be used (see question 29 below explaining the right against self-crimination in section 13 of the Canadian Charter of Rights and Freedoms).

25 Do witnesses receive separate counsel? Who provides counsel for witnesses?

Section 13(2) of the OSA provides that persons or companies giving evidence have the right to be represented by counsel of their choice – though it is their responsibility to secure counsel. Other Canadian jurisdictions' securities laws provide for a similar right to representation. Company witnesses are sometimes represented by company counsel, particularly if the witness is not a target. However, counsel in these instances must be vigilant to let the witness know that they are counsel for the company and ensure there is no conflict that has or will likely arise. Uniquely, the OSC administers a litigation assistance programme that provides duty counsel services to unrepresented respondents who are involved in enforcement proceedings before the OSC.

Advocacy

26 Can the target of a securities or related investigation challenge the investigation in court while the investigation is ongoing?

Practically, an investigation is within the regulator's discretion and there is no ability under securities legislation to challenge an investigation in court. Technically, there are avenues of judicial review that permit parties affected by government action to challenge those actions. However, Canadian courts tend to not

interfere in the securities regulators’ decisions unless there is a demonstrable abuse of process.

27 What opportunity will there be to respond to a securities or related law enforcement authority’s theories or allegations prior to the authority bringing charges?

In most jurisdictions, regulatory authorities often provide persons with an opportunity to address allegations in advance of a regulatory proceeding. In this process, staff first notifies the target of the investigation of its preliminary conclusions and gives the target an opportunity to respond by way of an enforcement notice. The target may then respond to the enforcement notice by providing information and documents to staff to attempt to persuade staff to not initiate proceedings, or at least to narrow its allegations. The response may also contain a settlement offer, which offer can be made at any time prior to the case being decided on its merits. One downside of this process is that any response the target makes is made “with prejudice”, in that the statements made in the response will be treated as admissions.

If staff nevertheless chooses to commence a proceeding, staff may, either during or after an investigation, commence proceedings against the target by issuing a Statement of Allegations and by causing the Secretary to the Commission to issue a Notice of Hearing. The proceeding is commenced when both documents are served upon the target of the investigation.

28 What form does the advocacy with a security or related law enforcement authority typically take?

As noted in question 27, initial advocacy takes the form of a written letter responding to the regulator’s enforcement notice. Once a hearing begins, formal submissions may be made, as in most administrative proceedings. If the proceeding is being heard at the court level (for civil, quasi-criminal and criminal matters), formal submissions are made in accordance with the general rules of procedure for that court.

29 Are statements or advocacy positions taken by an investigated party during the investigation process deemed admissions and binding in future proceedings? Would such statements be made public?

As noted in question 27, any response to a regulator’s enforcement notice is made “with prejudice”. As such, the information contained in any response that the subject provides would be deemed an admission and binding in the subsequent proceedings.

While compelled testimony during the investigation may be used in the proceeding for which it was gathered and may be made public, the Canadian constitutional right against self-incrimination (as set out in section 13 of the Canadian Charter of Rights and Freedoms), the provincial evidence statutes and the federal Canada Evidence Act all prevent the use of self-incriminating testimony against that individual at a subsequent proceeding, except with respect to any potential prosecution of such witness for perjury, or for the giving of contradictory evidence.

Timing

30 What is the limitation period for charges for securities and related violations?

Limitations periods in Canada vary among jurisdictions. See below for a table listing the limitation periods across different Canadian jurisdictions:

Jurisdiction	Limitation period
Alberta	6 years from the impugned event
British Columbia	6 years from the impugned event
Manitoba	8 years from offence; no more than two years from knowledge of facts
New Brunswick	6 years from occurrence of last impugned event
Newfoundland and Labrador	6 years from occurrence of last impugned event
Northwest Territories	2 years from knowledge of facts
Nova Scotia	6 years from occurrence of last impugned event
Nunavut	2 years from knowledge of facts
Ontario	6 years from occurrence of last impugned event
Prince Edward Island	6 years from occurrence of last impugned event
Quebec	5 years from opening the investigative record
Saskatchewan	6 years from occurrence of last material event
Yukon	2 years from knowledge of facts

31 When does the limitation period begin to run?

Please see question 30 for the time of commencement of jurisdiction-specific limitation periods.

32 What can suspend the running of the limitation period? Can the securities and related law enforcement authorities request a tolling agreement?

Canadian securities regulators sometimes request tolling agreements, particularly in circumstances where a limitation period is approaching and settlement discussions are ongoing. However, tolling agreements are less common in Canada than in the US, where tolling agreements are more commonly sought by the regulator generally, and used specifically in the context of deferred prosecution agreements that are not ordinarily used in Canada by regulators.

33 How long does a securities or related investigation typically take?

There is no “typical” time period, and an investigation can take months or years depending on the nature of the offense and the extent of investigation required.

Resolution

34 What is the process for closing an investigation if the investigation does not reveal a violation of securities or related laws? Will the securities or related law enforcement authorities provide written confirmation that the investigation is closed without action?

Investigations conducted under Canadian securities laws are often closed without notice. There is no requirement for the investigator to provide formal confirmation that an investigation is being closed without action. Sometimes a regulator will advise the parties of the outcome, but it is not required and is dependent on the circumstances.

35 How will the resolution or settlement process be initiated?

Settlement discussions may be entered into at any time at the request of the respondent or of staff – up until the disposition of the matter on its merits. Practically, staff will only enter into and carry on settlement discussions where they are of the view that, in the circumstances, an appropriate result may be achieved by doing so.

36 Who decides whether to proceed with charges and what charges to select?

At the very initial stage, case assessment personnel from the securities regulators assess the nature and seriousness of the issue in order to refer the investigation to the proper organisation. These organisations include the SROs, the securities regulators, and law enforcement agencies.

In matters handled by the regulator (administrative and civil), staff will determine whether the findings of their investigation merit proceeding to a hearing. In such cases, staff initiates a proceeding by issuing a Notice of Hearing that, when served, is accompanied by a Statement of Allegations.

With respect to cases referred to law enforcement agencies, criminal charges may be brought against potential wrongdoers for alleged breaches of the securities or securities-related provisions in the Criminal Code. If that is the case, law enforcement agencies

(generally IMET or JSOT, depending on the jurisdiction) and Crown prosecutors will jointly decide on how to proceed with respect to the charges.

37 What factors would a securities or related law enforcement authority consider in selecting charges and the severity of any penalty or fine?

For securities regulators, if in the view of staff, a person’s conduct violates the relevant securities laws, or was otherwise “contrary to the public interest”, it may commence a regulatory proceeding. While there is no definitive list of factors published, staff will no doubt be influenced by such factors as the perceived harm to investors and the capital markets by the impugned acts, whether those acts are identified as being relatively widespread such that general deterrence can be achieved, and the level and availability of resources to prosecute the matter.

With respect to charges brought under the Criminal Code, IMET or JSOT, in conjunction with the appropriate securities regulator, would consider whether the evidence that has emerged from their investigation could sustain the charges as laid out in the Criminal Code. There are no specific factors that they would look to, as each charge requires a contextual analysis in view of the evidence.

With respect to the severity of any penalty or fine, it is again contextual. Canadian regulators have the power to levy monetary penalties, administrative penalties, disgorgement orders, and even jail sentences (in the quasi-criminal enforcement context).

38 What remedies can the securities or related law enforcement authorities consider? How are penalties calculated?

Securities regulators are primarily concerned with stopping harm to investors and protecting the integrity of the capital markets within their respective jurisdictions. To this end, Commissions can impose bans on future activity, such as bans on trading in securities, acting as a director or officer of a public company, and acting as or becoming a registrant. The Commissions also have powers to impose administrative penalties and order disgorgement where a specific violation of securities law has been found.

Criminal law enforcement agencies have the power to seek monetary damages, jail sentences, and any other such remedy as a court may see fit to dispense.

39 Do illegal profits have to be disgorged, and if so, how are they determined?

Profits may have to be disgorged if the tribunal sees it as an appropriate remedy. The case of *Re Limelight Entertainment Inc.*, (2008) 31 OSCB 12042, for example, sets out a list of non-exhaustive factors that a panel of Commissioners can consider in respect of whether a disgorgement order would be appropriate:

- whether an amount was obtained by a respondent as a result of non-compliance with the OSA;
- the seriousness of the misconduct and the breaches of the OSA and whether investors were seriously harmed;
- whether the amount that a respondent obtained as a result of non-compliance with the [OSA] is reasonably ascertainable;
- whether the individuals who suffered losses are likely to be able to obtain redress; and

- the deterrent effect of a disgorgement order on the respondents and other market participants.

The matter is ultimately discretionary, however, and depends on a Commission's determination of what is in the public interest. It is never mandatory in these circumstances. The amount to be disgorged by the respondent, if ordered, is generally reflective of the amount obtained by the respondent as a result of the misconduct.

40 Can criminal charges be brought against companies in your jurisdiction for violations of securities and related laws?

There are a number of securities-related provisions in the Criminal Code, such as market manipulation and insider trading. These provisions can be, and have been used by law enforcement agencies (notably IMET and JSOT) to bring criminal charges against alleged wrongdoers.

As well, under the various securities statutes, there are a number of quasi-criminal, or provincial criminal-like provisions that can be pursued in the criminal courts. These offences tend to have lower penal consequences than pure (federal) criminal offences. For example, under the OSA, the quasi-criminal penalties subject wrongdoers to potential liability of not more than \$5 million in fines or to imprisonment of not more than five years less a day, or to both.

41 Will the securities and related law enforcement authorities provide a reduced penalty for cooperation? What standard will the authority use when taking into account any cooperation?

Most regulators have formal credit for cooperation policies, as well as traditional informal approaches. For example, in Ontario, the OSC operates the OSC Credit for Cooperation Program whereby cooperation with staff may lead to staff recommendations which:

- narrow the scope of the allegations set out by staff;
- reduce the sanctions recommended by staff;
- propose the resolution of the matter on the basis of a settlement agreement (including no-contest settlements); and
- in limited circumstances, result in staff agreeing to take no enforcement action.

In order to qualify for cooperation credit, the respondent must fully cooperate with the OSC. This means providing assistance when requested, fully responding to all production orders and summonses, the taking of corrective action, the use of appropriate discipline against employees, officers or directors, and providing adequate compensation to any investors that may have been harmed.

42 Are deferred prosecution agreements or non-prosecution agreements permitted?

Deferred prosecution agreements are generally not used in Canada.

Some jurisdictions' credit for cooperation programmes allow staff to agree to take no enforcement action. For example, the OSC Credit for Cooperation Program allows for staff to agree to take no enforcement action in limited circumstances. In exercising its discretion not to take enforcement actions, staff will consider

a number of factors, including the degree of harm caused by the respondent's misconduct, whether the misconduct was an inadvertent or a technical breach of securities law, and the level of cooperation demonstrated by the party.

43 Will a court need to approve the settlement agreement with a securities or related law enforcement authority?

The Commission must approve all settlement agreements. Court approval is not required.

44 If a settlement occurs, will an admission to certain facts or wrongdoing be required?

Traditionally, admissions of wrongdoing have been required before staff will enter into a settlement agreement. This is not a legal position, but a policy position of staff. Recently that has changed with the introduction of the OSC's no-contest settlement policy in 2014, the OSC being the first among the Canadian regulators to adopt such a policy (set out under OSC Staff Notice 15-702, Revised Credit for Cooperation Program). Under that policy, a respondent may settle with the OSC while neither confirming nor denying facts that were declared true by OSC staff during their investigation. Most importantly, the respondent need not admit that it violated securities laws or acted against the public interest.

No-contest settlements are relatively rare and availability is in the discretion of OSC staff and subject to Commission approval. Staff will generally consider a no-contest settlement inappropriate in cases of abusive, fraudulent, or criminal conduct or cases where a settlement would not adequately remedy harm done to investors as a result of the respondent's misconduct. A no-contest settlement will also not be appropriate where the respondent has not fully cooperated with staff.

In order to enter into a no-contest settlement, the respondent will need to agree to remedies levied by the Commission and to certain facts that will satisfy the Commission that the settlement is in the public interest.

45 Can the findings or decisions of the securities or related law enforcement authorities be administratively appealed? Appealed to a court?

Canadian securities laws provide a right of appeal to a company or person that is directly affected by a final administrative decision made by a Commission to an appellate court.

46 If a decision can be administratively or judicially appealed, what are the consequences of an adverse decision on appeal? What are the consequences of a positive decision on appeal?

A successful appeal can give rise to a dismissal of the proceeding, a direction for a new hearing, or the substitution of the court's view on certain aspects of the decision.

An unsuccessful appeal can be appealed to the next level of court, with leave to appeal.

Collateral consequences

47 What are some of the collateral consequences to a resolution or settlement with a securities or related law enforcement authority?

A settlement or resolution with a securities regulator could include any of the available penalties noted in question 38, namely, a ban on trading in securities, acting as a director or officer of a public company, and acting as or becoming a registrant. In the case of disclosure violations, a settlement could require the company to file amended disclosure. Because Commissions' decisions will contain findings of fact, and because settlements (with the exception of no-contest settlements) will contain the respondent's admissions, these findings or admissions could be relied on by plaintiffs in subsequent class actions, or by any other litigant or regulator who may seek to rely on them in the future.

48 What are some of the collateral consequences to a conviction or the imposition of liability by a court?

See response to question 47.

49 Can private securities or related legal claims proceed parallel to investigations by securities and related law enforcement authorities?

There are no restrictions preventing concurrent private legal action against those who are the target of investigations and enforcement proceedings by Canadian regulators.

50 What effect will findings by an authority in another jurisdiction have in private proceedings?

The findings by an authority in another jurisdiction would not be binding in private proceedings, but would likely be adduced as evidence of wrongdoing. For example, in a civil suit or class action in respect of an act that formed the basis of enforcement proceedings in another jurisdiction, the findings from the enforcement proceeding would likely be relied on by the plaintiff in an attempt to establish liability. The ability to rely on these findings in each case is fact specific.

51 Can private plaintiffs obtain access to the files or documents the securities or related law enforcement authorities collected during the investigation?

Since the documents and files collected during a regulator staff investigation may become public as part of a hearing, it is possible that private plaintiffs could obtain access to them once the motion proceeds. As such, it is important to request confidentiality orders for documents that contain sensitive information. Otherwise, documents collected under the regulator's compelling powers are protected by statute.



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Larry Ritchie chairs Osler’s cross-disciplinary Risk Management and Crisis Response national practice and co-chairs the Securities Regulatory Enforcement and Broker-Dealer Practice. His practice involves dispute avoidance and resolution across a range of capital markets, the financial sector and other regulated industries and activities. His experience encompasses all aspects of enforcement and other regulatory proceedings and related litigation, including class actions. He advises public corporations, their officers, in-house counsel and directors on avoiding, preparing for, managing and responding to extraordinary “crisis” situations. He also advises on the conduct and response to internal and regulatory investigations.

Larry returned to Osler in 2014 after a seven-year term as Vice-Chair of the Ontario Securities Commission, which included a secondment to the Canadian Securities Transition Office as its Executive Vice-President and Senior Policy Adviser. At the OSC, Larry chaired adjudicative panels that heard and decided enforcement and transaction related proceedings, regulatory policy matters and appeals of decisions of OSC staff and recognised self-regulatory organisations and acted as executive sponsor for the development of a number of important securities policies and rule-making initiatives.

During this same period, Larry helped establish the Canadian Securities Transition Office, the federal statutory organisation charged with leading the transition to a single national securities regulator. He advised the federal Minister of Finance on and assisted the Department of Finance with all aspects of that initiative including the proposed capital markets legislation and regulations and the development and operationalisation of a national capital markets regulatory authority, including its governance and tribunal.



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Lauren practises corporate-commercial civil litigation, with particular emphasis on class actions defence, securities litigation and securities regulatory enforcement and international commercial arbitration.

Lauren’s practice involves expedited hearings before the Ontario Securities Commission, oppression claims and corporate governance matters. She has experience in multijurisdictional and cross-border securities investigations. Her recent experience involves parallel investigations by both the Securities and Exchange Commission and Canadian regulators.

Lauren represents clients facing class actions in a variety of circumstances and often in a multijurisdictional or cross-border context, including claims of environmental property damages, securities, product liability and pensions and benefits. She has experience at all stages of a class proceeding, including certification motions, various procedural motions, and a large common issues trial and appeal. Lauren has acted on teams representing clients in situations giving rise to both class actions and regulatory investigations.

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