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COVID-19 & Corruption Webinar

Canada and the World



Webinar:
Thursday, May 7
12PM-1:30PM EST
Registration is free

Speakers:

Paul Lalonde, Dentons Canada LLP
Natalie Rhodes, Transparency International Health Initiative
Paul Emanuelli, The Procurement Office
Randall Hofley, Blakes LLP
Anthony Cole, Dentons Canada LLP

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Introductions



Moderator
Paul Lalonde
Dentons Canada LLP



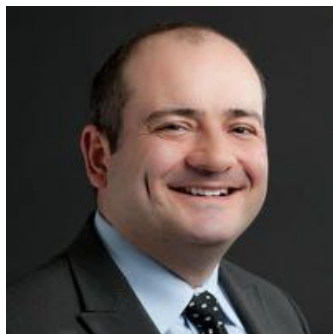
Randall Hofley
Blakes



Natalie Rhodes
Policy Officer
Transparency International
Health Initiative



Anthony Cole
Dentons Canada LLP



Paul Emanuelli
Procurement Office

COVID-19: Current Situation

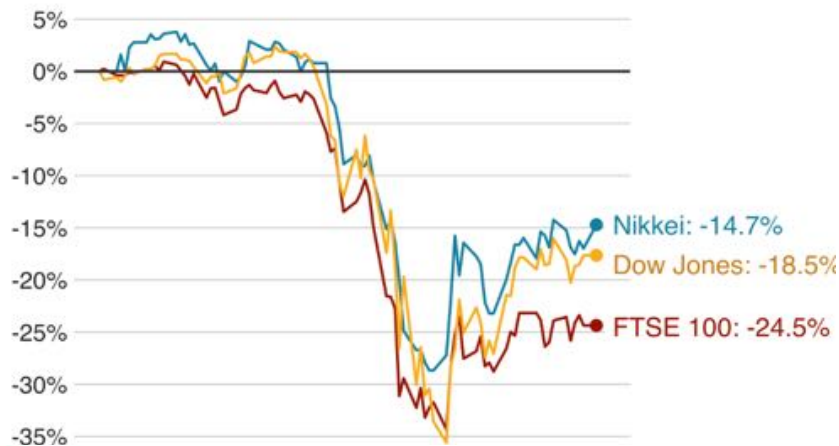
World:	Canada	US
Total Cases: 3,821,917	Total Cases: 63,496	Total Cases: 1,263,092
Deaths: 265,051	Deaths: 4,232	Deaths: 74,799
Recovered: 1,299,521	Recovered: 28,171	Recovered: 212,981

Source: <https://www.worldometers.info/coronavirus/#countries>

COVID-19: Massive Economic Devastation



The impact of coronavirus on stock markets since the start of the outbreak



WORLD

Worst ahead for Canada's economy amid pandemic: research group

BY MARTIN MACMAHON AND KATHRYN TINDALE

Posted May 5, 2020 5:34 pm PDT Last Updated May 5, 2020

European Union predicts 'recession of historic proportions' over COVID-19 impact

BY LORNE COOK - THE ASSOCIATED PRESS

Posted May 6, 2020 6:11 am

ECONOMICS | Investing

COVID-19 to spur depression '10 times worse' than 2008: Rosenberg

By David George-Cosh



CORRUPTION IN HEALTH SYSTEMS

Natalie Rhodes, Policy Officer, TI HI

Transparency International Health Initiative

CORRUPTION IN HEALTH SYSTEMS



Corruption is responsible for **1000s deaths/year**

\$500 billion (USD) of health spending lost to corruption every year

*Enough to fill the financial gap for **Universal Health Coverage***

Corruption undermines **every step** of a health system

Transparency International Health Initiative

HEALTH CORRUPTION RISKS DURING THE COVID-19 PANDEMIC



Crisis = increased pressure + resources = increased corruption risks

- Research and development – manipulation of data, non-reporting, redacted text
- Procurement - Up to 25% lost to corruption
- Service delivery – bribery, embezzlement, nepotism

Transparency International Health Initiative

HEALTH CORRUPTION RISKS DURING THE COVID-19 PANDEMIC



- **R&D (Clinical Trials Transparency)**

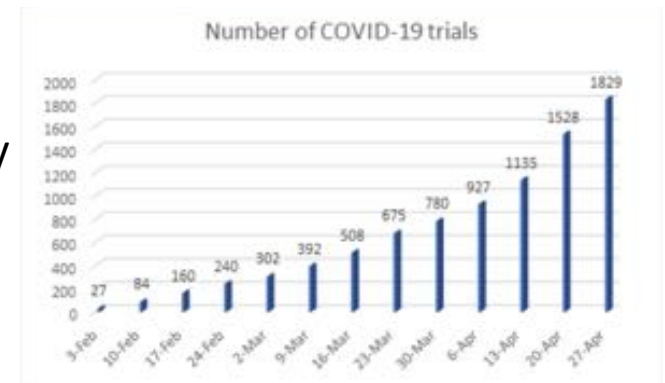
- Biggest Blockbuster in history, 1800+ clinical trials underway
- Already seeing poor research practice

- **Procurement**

- Shortages of medical equipment worldwide
- Faulty equipment, opaque contract agreements, shortened tenders

- **Service delivery**

- Seeing reports of petty corruption
- Bribes to leave quarantine, breaking of prescription guidelines for family



The Procurement Office

Procurement Advisory Office | Procurement Training Office



Procurement in the Pandemic The Emergency Rule

Paul Emanuelli

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Office. He was recognized by *Who's Who Legal* as one of the top ten public procurement lawyers in the world. His portfolio focuses on strategic governance in public purchasing and on negotiating high-profile major procurement projects. Paul has an extensive track record of public speaking, publishing and training. He is the author of *Government Procurement*, *The Laws of Precision Drafting*, *Accelerating the Tendering Cycle*, and *The Art of Tendering*. Paul hosts a monthly webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across North America through the Procurement Office and in collaboration with leading industry organizations, including NIGP, SCMA, the University of the West Indies, and Osgoode Hall Law School.

The Emergency Rule

While open tendering is a norm for awarding contracts in the public sector, those open tendering rules recognize an exception that allows for direct awards (also referred to as “sole-sourcing” or “single-sourcing”) based on legitimate emergency circumstances. This briefing will provide an overview of what constitutes an emergency, how to distinguish between poor planning and a legitimate crisis, and the three factors to consider when making direct awards based on emergency protocols.

The Emergency Rule

What is an Emergency?

The emergency exception applies to unforeseeable situations of extreme urgency.

The Emergency Rule

What is an Emergency?

For example, in its January 2015 decision in *Fairview Valley Fire, Inc. v. California Department of Forestry*, the California Court of Appeal upheld the California Department of Forestry's stand-by emergency fire services arrangement that allowed for direct contract awards under a standing agreement, ruling that those awards would be exempt from second-stage invitational tendering rules under a California Public Contract Code exemption that applies to "cases of emergency where a contract is necessary to the immediate preservation of the public health, welfare or safety, or protection of state property."

The Emergency Rule

What is an Emergency?

In this case, the government proactively set up its standing agreements for emergency call-up services in advance to deal with situations where unforeseen surges in forest fires overwhelmed government resources and required the direct award of emergency support contracts from private service providers.

The Emergency Rule

Failure to Plan is Not an Emergency

However, the failure to plan is not an emergency.

For example, in its June 2018 determination in *ALS Canada Ltd v. Statistics Canada*, the Canadian International Trade Tribunal ruled that the Canadian federal government's attempt to rely on the urgency exception to award a contract for municipal wastewater testing to monitor the pre-and-post cannabis legalization consumption rates in the population breached the procurement rules since the government should have known well in advance of the testing requirements given its long-planned cannabis legalization initiative.

The Emergency Rule

Failure to Plan is Not an Emergency

The Tribunal was also not convinced that the selected contractor was the only supplier who could provide the specialized services and awarded lost profits to the complainant for being denied an opportunity to compete for the work.

The Emergency Rule

Failure to Plan is Not an Emergency

Similarly, in its January 2014 determination in *Knowledge Circle Learning Services Inc. v. Department of Health*, the Canadian International Trade Tribunal found that the extension of standing offers beyond the originally contemplated term constituted an inappropriate sole-source in contravention of the relevant trade treaties.

The Emergency Rule

Failure to Plan is Not an Emergency

In this case, the Department of Health extended a number of standing offer agreements (SOAs) as a stop-gap measure while it waited for the Department of Public Works and Government Services to establish a new national master standing offer for the required French language training services. The complainant was one of the original standing offer contractors, but its contract was not extended.

The Emergency Rule

Failure to Plan is Not an Emergency

The Tribunal found that the extension of the standing offer for 18 months beyond its valid expiry date did not validly fall within the urgency and unforeseen circumstances exceptions under the trade treaties. The Tribunal rejected those sole-source exceptions in the circumstances, since the services were not required in an extreme urgency and since it was entirely foreseeable that the services would be required prior to the creation of a new national standing offer by the Department of Public Works and Government Services.

The Emergency Rule

The Dividing Line Between Emergencies and Poor Planning

Distinguishing between a valid emergency and an improper direct award can be a delicate balancing act since the procurement rules are heavily biased towards open tendering, while exceptions are interpreted strictly in legal disputes and audit reviews. Ultimately the onus lies with the government to defend its direct award decisions.

The Emergency Rule

The Dividing Line Between Emergencies and Poor Planning

For example, in its October 2014 decision in *Nationwide Gritting Services Ltd v. The Scottish Ministers*, the Scottish Court of Session – Outer House struck down the second year of emergency sole-sourcing for road salt after ruling that the government should have dealt with its supply shortages between winters. As the Court summarized, the “extreme urgency” exception to open tendering recognized under the procurement regulations needs to be strictly interpreted, does not apply to self-created situations, and is informed by risks to human health and safety.

The Emergency Rule

The Dividing Line Between Emergencies and Poor Planning

The Court noted that the first winter saw some of the most severe weather in decades, which resulted in dwindling road salt supplies. However, while the government made emergency purchases for the first winter, it ultimately decided against stockpiling for the future winters after being advised against oversupplying based on a single season. Unfortunately, the next winter also proved problematic, seeing the road salt reserves depleted almost immediately from high usage as the worst winter in decades caused unprecedented road closures and multiple emergency situations.

The Emergency Rule

The Dividing Line Between Emergencies and Poor Planning

The government therefore moved to directly buy more road salt on an emergency basis for the second winter in a row. The Court determined that the first year's direct purchase of the road salt fell within the emergency exception, finding that it constituted a situation of extreme urgency caused by unexpected and unforeseeable events, rather than being self-created by the government, and that the urgency precluded the use of open tendering procedures.

The Emergency Rule

The Dividing Line Between Emergencies and Poor Planning

However, the Court found that the direct award was not justified in the second winter. The Court agreed that the weather in both winters gave rise to an unforeseeable emergency situation. However, in the second winter, the Court found that the short salt supply was self-created since the government was aware that the salt supply arrangements in Scotland were fragile given its experience in the prior winter.

The Emergency Rule

The Dividing Line Between Emergencies and Poor Planning

The Court concluded that the government should have acted sooner to establish contracts that allowed for more salt supply, which could have been accomplished by initiating an open tendering process after the first winter. The failure to do so resulted in a self-created crisis in the second winter.

As this case illustrates, emergency direct awards remain controversial and subject to legal challenge and after-the-fact scrutiny. The onus lies with government institutions to defend those awards as validly falling within recognized exceptions to open tendering.

The Emergency Rule

Factors to Consider

When deciding whether to make a direct award on an emergency basis, decision-makers should follow the following protocols:

1. **Decide if it is a real emergency.** Situations of extreme urgency created by legitimately unforeseen circumstances requiring an urgent acquisition to address public health and safety concerns are recognized as falling within the emergency exception.

The Emergency Rule

Factors to Consider

- 2. Document your rationale.** Decisions to directly award a contract can be legally challenged and are subject to future audit review. Having no records means having no defence for your direct award. Ensure that the rationale for your emergency direct award is well-documented at the time of the contract since retroactive record-keeping is typically viewed with suspicion by the courts and public auditors.

The Emergency Rule

Factors to Consider

- 3. Document and scope your deal.** Ensure that the emergency award contract is well-documented and contains clear termination rights so that you are not tied to long-term spending commitments that go beyond the scope of the emergency exception.

The Emergency Rule

Future Considerations

While matters of genuine public health and safety should remain paramount when deciding whether to directly award a contract, public institutions face significant legal and reputational exposure if they misuse the emergency exception or are retroactively found to have self-created an emergency through poor planning.

The Emergency Rule

Future Considerations

In addition to dealing with immediate emergencies, public institutions should also mobilize proactive planning strategies and pre-establish standing arrangements to ensure that their supply chains are secure in advance, particularly for critical supplies and services. The best way to respond to an emergency is to plan for it in advance so that your procurement needs are covered when that moment of crisis arrives.

The Procurement Office

Procurement Advisory Office

Procurement Training Office



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Competition Law In the Age of COVID-19

May 7, 2020

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Competitor Collaborations – Canada

Bureau to refrain from scrutinizing temporary collaborations in response to COVID-19

Parties may seek informal, non-binding guidance from the Bureau

Bureau vigilant in monitoring competitor collaborations

Collaborations must be limited in duration and scope, undertaken in good faith, and not go beyond what is needed in order to ensure the supply of products and services “that are critical to Canadians” during COVID-19

Information required includes:

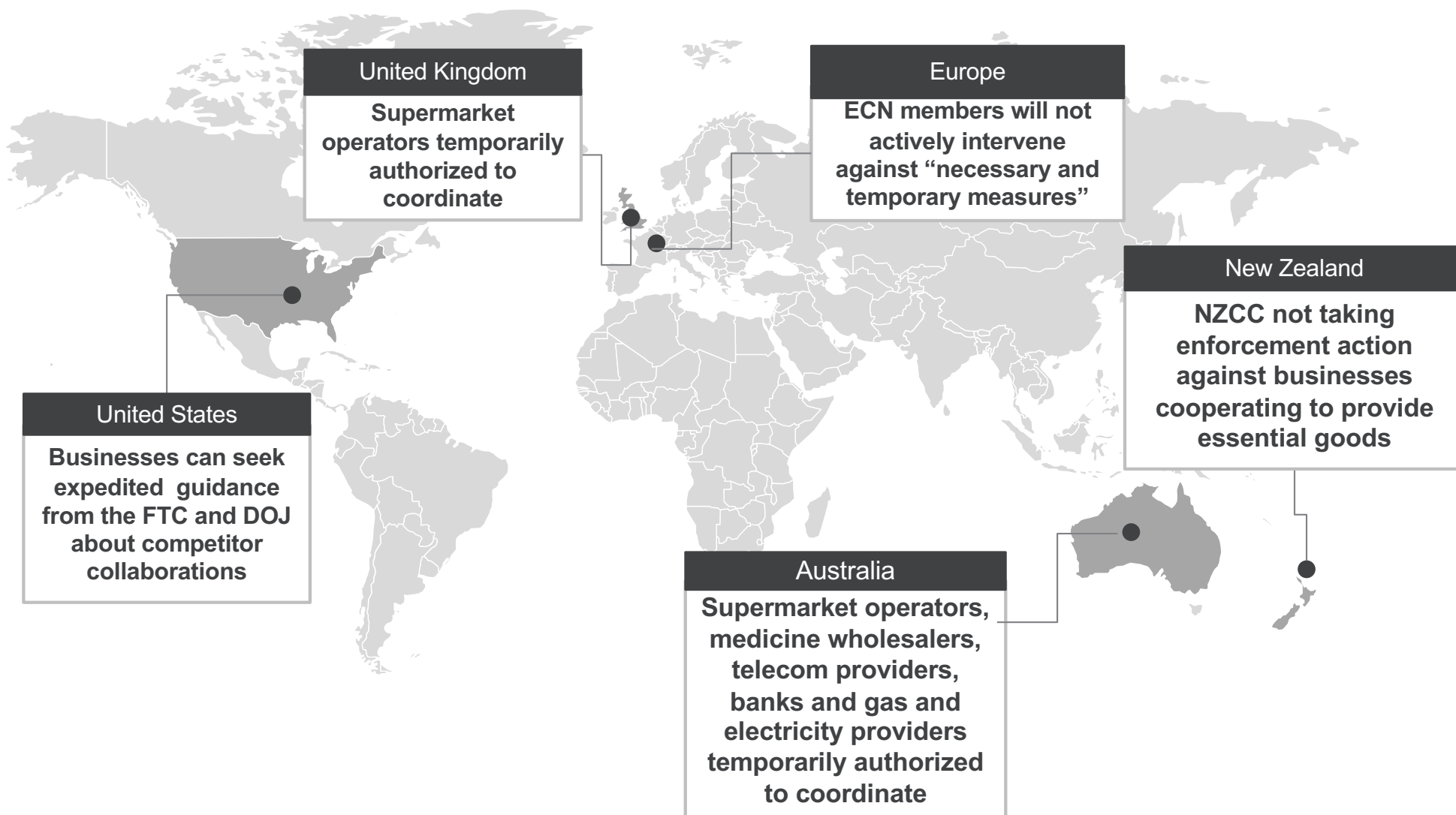
- Parties involved and collaboration parameters (scope, duration, etc.)
- Description of how the collaboration is intended to achieve COVID-19 related objective
- Explanation of why the collaboration is necessary
- Description of guidance sought

Guidance does not shield parties from private legal action

The Bureau is focused on potentially harmful anti-competitive conduct, including competitor collaborations, that take advantage of consumers and businesses during the pandemic

The Bureau will generally refrain from scrutinizing short-term competitor collaborations necessary to ensure the supply of critical products and services in response to COVID-19

Competitor Collaborations – Global Updates



Refusal to Supply

No Absolute Requirement to Supply

Refusal to supply may be reviewable under the civil provisions of the *Competition Act*

Market Leaders Should Obtain Advice

Market leaders should obtain competition law advice before refusing to supply or imposing other restrictive trade terms, especially where the customer is also a competitor

Document Business Rationale

Document business rationale contemporaneously in writing for any refusal or adjustment of supply terms

The Bureau is not focused on refusal in COVID-19. Regardless, businesses should document business rationale for any refusal or adjustment of supply terms during COVID-19

Price Gouging

Set Prices Within Limits

The *Competition Act* does not prohibit price gouging but excessive price increases for essential products are at high risk of regulatory scrutiny, negative media attention and significant reputational harm

Provincial Enforcement

Ontario – Emergency order prohibiting businesses and individuals from charging unfair prices for “necessary goods” (fines up to \$10 million, and 1 year imprisonment)

BC – Police and other enforcement officers can issue \$2,000 tickets for price gouging

International Responses



President Trump issued an Executive Order prohibiting the hoarding of designated items; the Attorney General has created the COVID-19 Hoarding and Price Gouging Task Force.



The EC has indicated that manufacturers can set maximum prices for their products (to limit the possibility for price gouging within the distribution chain)



The Government of New Zealand has set up a price gouging hotline for consumers to report exploitative pricing

Excessive price increases for essential products are at high risk of regulatory scrutiny, negative media attention and significant reputational harm

COVID-19 and Corruption: Canada and the World



Covid-19: Impact on Financial Crime Risk

The situation and circumstances triggered by Covid-19 has created a **perfect storm** of financial crime risks

- Vast sums of money flowing from government coffers to fund emergency programs, initiatives and procurements
- History has shown emergency relief programs are vulnerable to abuse, e.g. Hurricane Katrina Relief, US Troubled Asset Relief Program (TARP), UN Oil-for-Food Program
 - Scale and urgency of Covid-19 programs and measures is extraordinary;
 - Scale of financial crime risks and opportunity similarly vast
- At same time, huge disruption to working practices in both public and private sector entities
 - Resources needed for oversight being diverted to address urgent issues, or are being scaled back due to profound economic pressures
 - Fact that it is a health crisis creates greater time-pressure and justifies more extraordinary measures
- Normal compliance defence mechanisms face being strained, shelved or overlooked

Corruption Risks Are Particularly Acute

- **Large number of touch points with government officials**
 - Eligibility for financial relief programs – including applications under current programs, or lobbying for new ones
 - Government procurements of emergency supplies
 - Granting of permits or exemptions to allow business to operate or deliver goods and services
 - Solicitations by government for assistance with emergency relief efforts (donations of equipment or money)
- **Some companies participating in these may have little or no experience in dealing with government officials**
 - May lack compliance infrastructure, and the experience to identify and mitigate corruption risks
- **Economic pressure on employees/consultants/service providers to take risks to preserve livelihood**
 - Provides a “motive” and “rationalization” – and opportunities abound

Investigations During/Resulting From Crisis

Regulators/Law Enforcement Agencies

- **Huge strain on investigative resources**
 - More cases, right across the spectrum of financial crime
 - Potential for redeployment of personnel, and resourcing/funding cuts
- **Impact on investigative methodology, even after lockdown**
 - Social distancing makes some measures impractical – search warrants, interviews
 - Others may be more viable – wiretaps?
 - Disruption to international co-operation between enforcement agencies
 - Although may provide an opportunity to strengthen connection and collaboration with some jurisdictions
- **Potential Solutions/Approaches?**
 - Setting clear priorities – corruption, money laundering, investment fraud?
 - Collaboration with other agencies to “divide and conquer” priorities (e.g. Competition Bureau, Securities Regulators)
 - Foster co-operation from private sector
 - **Remediation Agreements may be a timely and valuable tool**

Investigations During/Resulting From Crisis

Internal Investigations

- **Challenges**

- **Economic pressures**

- Compliance/legal team overseeing investigation may be re-deployed, or reduced;
- Employees, contractors etc. who are sources of information may be re-assigned, furloughed or terminated
- Pressure to limit investigative costs and disruption – business may be under severe financial strain to conclude/resolve issue and resume “business as usual”

- **Logistical challenges**

- Face-to-face interviews may not be possible
- Travel restrictions on-the-ground intelligence and information gathering
- Normal forensic data capture methods may be limited or impractical

Investigations During and Resulting From Crisis

Internal Investigations (cont.)

- **Solutions?**

- **Planning and executing proactive measures to identify and protect data sources is critical**
 - Identify key employees/consultants, and ensure measures are taken to avoid losing access to them, and/or control of devices
 - Data preservation is critical, even if the capture and review of it has to wait
 - Prioritize critical lines of enquiry, but document careful decision-making process/rationale
- **Situation is not normal, so may need to be creative and flexible on processes**
 - Are interviews necessary (at least in some cases) ? Are they necessary right now?
 - Can certain objectives be achieved using remote processes (initial data capture/review)
 - **But** be wary of collateral impact on integrity of process and expectations of law enforcement – “tipping off”, “trampling crime scene”
- **Be mindful of latest enforcement/regulatory guidance on co-operation credit – e.g. US DOJ/SEC, UK SFO**
 - Where appropriate, consider consulting proactively with law enforcement agencies to manage expectations
 - Required by some law enforcement agencies to receive cooperation credit
 - Absence of published guidance a potential disincentive – gives rise to uncertainty

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TI Canada's support from professionals and corporations is essential for us to continue to conduct research, raise awareness, develop publicly available materials, and hold Business Roundtables. Please visit our website at transparencycanada.ca for more information on becoming a supporter.



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