

February 2013

## Canada gets tough on foreign corrupt practices

On February 5, 2013, Foreign Affairs Minister John Baird announced that the federal government is amending the *Corruption of Foreign Public Officials Act* (CFPOA) to "redouble its fight against bribery and corruption." This announcement comes less than two weeks after Griffiths Energy International Inc. pled guilty and paid a C\$10.4 million fine in respect of a C\$2 million bribe in relation to oil and gas contracts in the Republic of Chad (see McMillan bulletin: [cooperating firm agrees to penalty equal to 5 times the amount of foreign bribe](#)).

Bill, S-14, titled the *Fighting Foreign Corruption Act*, will amend the CFPOA in five important ways:

**Nationality-based jurisdiction.** Canada is an outlier among developed countries and has been criticized by the OECD and others for failing to fully implement the OECD *Convention on Combating Bribery of Foreign Public Officials* because the CFPOA only applies to conduct occurring within the territorial jurisdiction of Canada. While actions that have a "real and substantial connection to Canada" fall within the concept of territorial jurisdiction, the application of that test is not clear cut. The amendments will enable the Canadian authorities to prosecute Canadian nationals and Canadian companies regardless of where the alleged bribery occurred. This will eliminate a potentially significant defence that has been asserted in the recent Karigar prosecution (see McMillan bulletin: [foreign corruption compliance: should you have an anti-bribery compliance program?](#)).

**Expansion of the definition of "business".** Another gap in the CFPOA which has attracted criticism from the OECD and others is that it only applies to "for-profit" situations. The amendments will extend the definition of business to cover entities and activities not carried on for profit (e.g. non-profits involved in foreign aid projects).

**Books and records offence.** Many jurisdictions have included requirements to maintain complete accounting and other records as a mechanism to discourage corrupt payments, make them easier to detect, and create an alternative offence where the absence of records poses evidentiary challenges for proving the payment of a bribe. The amendments will add an accounting books and records offence which prohibits falsification of records and hiding of payments. Again, this amendment is part of an overall attempt to bring Canada's foreign corruption regime into alignment with other leading international jurisdictions.

**Elimination of the facilitation payment exception.** The CFPOA incorporated an exception (allowable under the OECD Convention) for payments, usually of a relatively smaller magnitude and often called "grease payments", made to expedite or secure the performance by a foreign public official of an act of a routine nature that is part of the foreign public official's duties or functions. The United Kingdom prohibited these payments in the *Bribery Act, 2010*, and the Canadian amendments will follow that lead. However, these provisions will not come into force until a later date set by Cabinet, perhaps to allow the Government an opportunity to gauge whether this is a trend that will gain traction internationally and also to allow companies to implement the necessary compliance procedures.

**Increased penalties.** Currently the CFPOA provides for maximum penalties of up five years' imprisonment and unlimited fines. The amendments will raise the maximum to a 14-year jail term with unlimited fines. This change makes the foreign corruption offences amongst the most serious in Canadian criminal law (e.g. the same maximum penalty as treason). A similar

change was made in 2001 for cartel penalties and reflects the government's increased concern about "white collar crime". It also makes these offences subject to a recent restriction on judicial sentencing discretion which precludes the use of suspended or conditional sentences when an imprisonment penalty is imposed.

The amendments also clarify that Canada's federal police, the RCMP, have exclusive authority to lay charges under the *Act*. The RCMP International Anti-Corruption Unit has 35 ongoing investigations under the CFPOA and further prosecutions can be expected. In this environment, companies that have dealings with foreign public officials should ensure that they have updated and effective compliance programs to prevent and detect problematic activities.

For more information on this topic, please get in touch with your usual contact at [McMillan](#) or any of the following lawyers:

Ottawa	<a href="#">Elisabeth S. Preston</a>	613.232.7171 ext. 196	<a href="mailto:elisabeth.preston@mcmillan.ca">elisabeth.preston@mcmillan.ca</a>
Toronto	<a href="#">A. Neil Campbell</a>	416.865.7025	<a href="mailto:neil.campbell@mcmillan.ca">neil.campbell@mcmillan.ca</a>
Montréal	<a href="#">Emmanuelle Saucier</a>	514.987.5053	<a href="mailto:emmanuelle.saucier@mcmillan.ca">emmanuelle.saucier@mcmillan.ca</a>

#### [a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2013