

Recent Trends and Developments under Canada's *Corruption of Foreign Public Officials Act*

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In recent years, there has been an increase in the number of investigations conducted¹ and criminal proceedings brought under the Canadian *Corruption of Foreign Public Officials Act*² ("CFPOA"). A conviction for an offence set out in the CFPOA can result in significant fines for organizations and both fines and imprisonment for their directors, officers and employees. With the globalization of the economy, an ever-increasing number of firms are expanding their activities abroad. In this context and given the hefty fines, negative reputational impact and collateral consequences that can result from a criminal conviction, it is critical for organizations conducting business in foreign states to be aware of the behaviour of their employees, agents and officers that may attract criminal liability in both their home country and abroad.

This bulletin discusses the foreign corrupt practices and bribery regimes under the CFPOA in light of recent developments, including the 2013 amendments, case law rendered in the past two years and recent criminal proceedings.

Amendments to the CFPOA and OECD Reports

In order to combat foreign bribery, Canada ratified the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the "OECD Convention") in 1998. The same year, the Canadian government enacted the CFPOA to meet its obligations under the OECD Convention. Since then, the CFPOA has been amended twice, first in 2001 and more recently in 2013.

Bill S-14, which came into effect on June 19, 2013, amended the provisions of the CFPOA to broaden its scope by expanding the jurisdiction of Canadian courts and toughen the penalties in an attempt to further deter the corruption of foreign public officials by Canadian individuals and legal entities. The Foreign Affairs Minister at the time, Minister John Baird, explained the rationale for the amendments by stating that they were intended to "further deter and prevent Canadian companies from bribing foreign public officials [...] and help ensure that Canadian companies continue to act in good faith in the pursuit of freer markets and expanded global trade."³ Among other changes, under the amended CFPOA, the RCMP

is now the only competent authority to bring foreign bribery charges⁴ and non-profit organizations are now subject to the *CFPOA*. These amendments are dealt with in further detail in the sections below.

It is worth noting that Canadian courts have yet to apply the amended provisions of the *CFPOA* and considering that they are not retroactive, it will likely take some time. Only offences committed after June 19, 2013 will be captured by the amended *CFPOA*.

The 2013 amendments followed the publication in 2012 of Transparency International's eighth report on the implementation of the *OECD Convention*, which placed Canada in the "Moderate Enforcement Category".⁵ According to Transparency International, only states which fall within the next category, "Active Enforcement", can claim to be effectively deterring foreign bribery. Despite the amendments, Canada fell down to the "Limited Enforcement Category" in 2013, only to climb back to the moderate category in 2014. Transparency International has criticized the fact that the *CFPOA* lacks a non-criminal, civil enforcement alternative to cumbersome criminal proceedings, which are inappropriate in certain cases.⁶ As of today, Canada remains in the "Moderate Enforcement" category.⁷

A Conspiracy to Commit a CFPOA Offence is Sufficient

The *CFPOA* contains two criminal offences relating to the corruption of foreign officials: (i) the bribing of a foreign public official to obtain an advantage⁸ and (ii) the perpetration of accounting operations for that purpose or for purpose of hiding such bribery.⁹

In 2013, the Ontario Superior Court convicted and subsequently sentenced an individual for the corruption of a foreign public official under s. 3(1)(b) of the *CFPOA*. In *R v. Karigar*,¹⁰ Hackland J. rejected the defence's submission that the offence under s. 3(1) requires proof that the bribe was effectively offered or given to a foreign public official. This case involved the bribing of Air India officials and an Indian Cabinet Minister by Mr. Nazir Karigar, an agent acting for an Ottawa-based technology company in the context of an RFP issued by Air India, in a failed attempt to win a \$100-million contract.

Hackland J. found that if such interpretation were to be accepted, the Crown would have to adduce evidence from the foreign jurisdiction, which would risk putting foreign nationals at risk and "make the legislation difficult if not impossible to enforce and possibly offend international comity."¹¹ In other words, a conspiracy or an agreement to bribe foreign public officials is in itself a violation of the Act. It is worth nothing that the offence in this case was committed prior to the coming into effect of the 2013 amendments.

Extended Jurisdiction of Canadian Courts

Under the amended *CFPOA*, the Crown may commence criminal proceedings against any Canadian citizen, permanent resident in Canada and any organization incorporated, formed

or otherwise organized in Canada that commits one of the offences set out under ss. 3 and 4 of the Act, even where such offences are committed outside of Canada.¹² Prior to the 2013 amendments, the demonstration of a “real and substantial link” between the offense and Canada or that “a significant portion of the activities constituting that offence took place in Canada” was required for a conviction under the *CFPOA*.¹³ Canadian courts now also have jurisdiction based on the nationality of the offender, no matter where the *CFPOA* offence is committed. This new approach is consistent with s. 4.2 of the *OECD Convention*, which requires parties to “[have] jurisdiction to prosecute [their] nationals for offences committed abroad shall take such measures as may be necessary to establish [their] jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.”

In *Chowdhury v. H.M.Q.*,¹⁴ the Ontario Superior Court held that Canada’s jurisdiction does not extend to foreign nationals for the purpose of charging them with an offence under the *CFPOA*. The applicant in that decision, Mr. Chowdhury, was one of five individuals jointly charged with having offered or given bribes to foreign public officials of the Republic of Bangladesh for the alleged purpose of allowing engineering firm SNC Lavalin to obtain a consultancy services contract for the construction of a bridge across the Padma River. Mr. Chowdhury is a citizen and resident of Bangladesh and formerly held the position of Interior Minister of Bangladesh as well as Minister of State. Nordheimer J. observed that there was no evidence that the accused had ever been a Canadian citizen or resident, or that he had ever even travelled to Canada.

The Superior Court considered the new language in s. 5 of the *CFPOA* added pursuant to the 2013 amendments, which grants Canadian courts jurisdiction based on nationality for *CFPOA* offences, and concluded that such language “presents a strong argument against the contention that s. 3 impliedly captures the actions of persons who are both outside of Canada themselves and whose actions occur outside of Canada.” Nordheimer J. further held that the principle of international comity, under which states have exclusive sovereignty over persons located in their territory, opposes the extraterritorial application of the *CFPOA* to foreign nationals.

It is worth noting that the Superior Court did not “quarrel with the Crown’s contention that Canada has jurisdiction over the offence”; indeed, it made a distinction between jurisdiction over the person and jurisdiction over the offence. The mere fact that Canada has jurisdiction over a *CFPOA* offence, such as in the *Chowdhury* case, does not mean that all parties to that offence are captured under its jurisdiction. Therefore, Nordheimer J. found that the appropriate course of action was to stay the criminal proceedings against the accused, “unless and until the applicant either physically attends in Canada or Bangladesh offers to surrender him to Canada.” That said, given that there is no extradition treaty between the Republic of Bangladesh and Canada, it will be difficult for the Canadian government to lay hands on the accused and charge him under the *CFPOA* unless he is subject to an Interpol

“Red Notice” and is arrested in a foreign jurisdiction that has an extradition treaty with Canada.

Therefore, under the amended *CFPOA*, two different regimes apply depending on the nationality/residency of the accused:

- (1) Canadian courts have jurisdiction over Canadian nationals, permanent residents and organizations having given or offered bribes to foreign officials or conducted illegal accounting operations contrary to the *CFPOA*; they are captured under s. 5(1) of the *CFPOA* on the mere basis of their nationality; and
- (2) For a Canadian court to have jurisdiction over foreign nationals under the *CFPOA*, it must have jurisdiction over both the offence (via a substantial link to Canada) and the person (by such person being physically present in Canada).

In June 2014, following its success in convicting and sentencing a Canadian businessman and Toronto resident to a 3-year prison term in *Karigar*, the RCMP announced that it filed charges against two American businessmen and one British businessmen for foreign corruption offences under the *CFPOA* in connection with the same case. The RCMP’s decision to file charges against foreign nationals can appear surprising given its defeat in *Chowdhury*. However, since Canada is party to extradition treaties with the U.S. and the U.K., the Crown may be able to establish jurisdiction on the person should the accused be successfully extradited or voluntarily surrender to Canada.

Still Waiting for the Ban on Facilitation Payments

The most significant amendment proposed under Bill S-14 is likely the removal of the “facilitation payments” exemption under s. 3(4) of the *CFPOA*. However, contrary to the rest of the bill, this amendment has yet to come into force. It is to do so by order of the Governor in Council at a later date that has yet to be determined. If and when this amendment comes into force, giving or offering payments and other benefits to “expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions” (e.g. payments to a foreign politician or public servant to accelerate the issuance of a governmental permit or authorization) will now constitute illegal bribing and trigger the application s. 3(1).

It is worth noting that in the U.S., such facilitating payments or “grease payments” are also still excepted under the *FPCA* and do not constitute an offence. The U.S. position contrasts with the U.K. approach, which eliminated the exception of facilitating payments under the *Bribery Act 2010*. Perhaps the Canadian government is concerned about giving US companies a competitive advantage over Canadian companies in that respect, or wants to

give more time to Canadian firms to change their policies in advance of the ban on facilitation payments.

Tougher Sentencing

Since the 2013 amendments, each offence under the *CFPOA* carries a maximum penalty of 14 years of imprisonment. With the coming into force of the *Safe Streets and Communities Act* (Bill C-10) in 2012, individuals convicted under the *CFPOA* are no longer eligible to be imposed a conditional sentence as an alternative to imprisonment.¹⁵

In his sentencing decision¹⁶ in *Karigar*, Hackland J. sentenced the offender to a 3-year prison term, thereby sending the clear message that Canadian courts take foreign corruption of public officials seriously. The Superior Court declared that “[a]ny person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.”¹⁷

The Superior Court considered the high degree of sophistication and careful planning of the offence, other circumstances of dishonesty (sham bid submission, use of insider information), the sense of entitlement of the accused and his personal conception and orchestration of the bribery to be aggravating factors.¹⁸ Conversely, Hackland J. found to be mitigating factors the facts that the accused had cooperated with the authorities, that he had no prior criminal record and had been a respectful businessman before committing the *CFPOA* offence and that his bribing scheme had completely failed.¹⁹

In another recent decision, *R. v. Griffiths Energy International*,²⁰ the accused corporation, Griffiths Energy International, pleaded guilty to charges of indirectly offering bribes to the Chadian Ambassador to Canada contrary to s. 3 of the *CFPOA*. The Court of Queen’s Bench of Alberta approved a \$10.35 million fine recommended by the Crown. In considering the seriousness of the offence, the judge noted the fact that “the bribe is to an official of a developing nation”,²¹ and that such bribe “undermines the bureaucratic or governmental infrastructure for which the bribed officials works.”²² The size of the bribe was considered to be the major aggravating factor. On the other hand, the Court found that the fact that the company lacked a criminal record, quickly self-reported its behaviour to the authorities, pleaded guilty before charges were formally laid down and cooperated with the authorities constituted mitigating factors.

When convicted, an organization may be sentenced to pay a fine,²³ which may be accompanied by a probation order.²⁴ In determining the amount of the fine, the court must consider, in addition to general sentencing factors applicable to individuals,²⁵ the ten mitigating and aggravating factors set out under s. 718.21 of the *Criminal Code*, namely: (1) the advantage realized by the organization; (2) the complexity, duration and degree of

planning of the offence; (3) the concealment and conversion of assets; (4) the economic viability of the organization and continued employment of its employees; (5) the costs of investigation and prosecution; (6) the concurrent imposition of regulatory penalties on the organization; (7) the prior conviction for a similar offence and the prior regulatory penalties for similar conduct; (8) the organization's imposition of penalties on its offending representatives; (9) the restitution or voluntary indemnification of victims; and (10) the measures taken to prevent recidivism. Regarding that last factor, the court will generally consider the implementation of an effective and credible compliance program as a mitigating factor. While judges are given a broad discretion in determining an adequate fine pursuant to these factors, the overarching and fundamental sentencing principle of proportionality remains applicable: the fine imposed on the organization must be proportionate to the gravity of the offence and degree of responsibility of the offender.²⁶

That said, a fine may only be the tip of the iceberg for convicted organizations. Indeed, the conviction of an organization entails other damaging consequences for the organization as well as innocent individuals and entities, such as its shareholders, employees, service providers, suppliers and lenders.

Notably, under PWGSC's Integrity Framework, a contractor may be debarred from government procurements for 10-year period where such contractor is convicted of or pleads guilty to "integrity offences", which includes the offences under the *CFPOA*.²⁷ This very harsh sanction can constitute the equivalent of "corporate death penalty" for certain organizations whose business mainly stems from government contracts. There is, however, a "Public Interest Exception", which applies in certain circumstances, such as where there is no other supplier capable of performing the contract, in case of an emergency, where national security health and safety commands it and in cases of economic harm. Since July 2015, under the revised debarment rules, the ban from government procurement can also be reduced to 5 years where a supplier is able to demonstrate that it cooperated with law enforcement authorities or that it undertook remedial actions to address the wrongdoing.²⁸ However, a 5-year ban may still result in the demise of a contractor that mainly does business with the federal government.

Moreover, in Quebec, the conviction of an organization or of any of its directors or officers for the offence under s. 3 of the *CFPOA* (bribing a foreign public official) can result in the *Autorité des marchés financiers'* refusal to issue or renew a prior authorization to enter into public contracts or subcontracts to the organization, or result in its decision to revoke same. Without such a prior authorization, an organization is prohibited, *inter alia*, from tendering on or negotiating public service contracts and subcontracts involving an expenditure equal to or greater than \$1,000,000 (since November 2, 2015) and \$5,000,000 for construction contracts and subcontracts or public-private partnership agreements.²⁹

The mere filing of criminal charges may in itself have serious consequences for the organization, especially where its shares are publicly traded on the stock market. For instance, on the day of the announcement that criminal charges were being laid against SNC-Lavalin Group, the price of its shares decreased by 7%, and by almost 20% in the month that followed.³⁰

Decision to File Criminal Charges

It is important to bear in mind, for organizations doing business in Canada and other countries that adopted the *OECD Convention*, that s. 5 of the convention sets out that the decision to prosecute in matters of corruption of foreign public officials should not be influenced by national economic interest considerations. This section reads as follows:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. (emphasis added)

This section can be roughly construed as meaning that in determining whether to lay criminal charges against an organization for the perpetration of *CFPOA* offences by one of its agents, OECD member states should ignore the negative collateral impacts to their economy that can ensue from the conviction of an organization. Perhaps this can partly explain the PPSC's decision to commence criminal proceedings against SNC-Lavalin for the alleged involvement in bribing Libya public officials for sums exceeding 47 million dollars and the defrauding of the Libyan Government for more than 129 million dollars,³¹ despite the collateral consequences and risks for the Canadian economy and the fact that as part of its decision to prosecute, the PPSC usually takes into account "the consequences of a prosecution or conviction would be disproportionately harsh or oppressive".³²

To date, only three corporations have been convicted under the *CFPOA*, but in each case, the organization pleaded guilty as charged. Since SNC-Lavalin has declared that it would vigorously defend itself against the charges, the resulting court decision, if any, may be the first case in which a court will interpret the (pre-amended) *CFPOA* provisions with respect to an organization, using both the identification theory and the "senior officer" regime under the *Criminal Code*.

Conclusion

Recent trends and developments demonstrate that the courts and the government take *CFPOA* offences seriously. Bribing foreign public officials to obtain an advantage in the course of cross-border business may lead to severe penalties and other consequences.

Foreign corruption and bribery may result in criminal charges being brought against both individuals and corporations under the *CFPOA*. Significant fines and prison terms and other indirect consequences can ensue from a conviction, including disbarment from public procurement contracts. Organizations can also see their reputation and the trust of their shareholders being negatively impacted. The share price of publicly traded companies can suffer a significant drop. The conviction of an organization under the *CFPOA* is also likely to lead to collateral consequences for those who may be completely uninvolved in the criminal behaviour, such as innocent shareholders and employees.

Prudent organizations doing business in Canada can reduce the risk of having their criminal liability engaged under the *CFPOA* by being cognizant of the types of behaviour prohibited thereunder and, accordingly, implement adequate measures and policies to prevent such behaviour. In Canada, the implementation of an efficient and proactively applied compliance program is generally considered a mitigating factor in the event of a conviction. Canadian firms should ensure that their compliance programs are adequate and up to date in order to prevent and promptly detect foreign corrupt practices.

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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.

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¹ In 2013, the RCMP was conducting more than 35 investigations for offences under the *CFPOA*.

² SC 1998, c 34 [*CFPOA*].

³ Government of Canada, Foreign Affairs, Trade and Development Canada, "*Strengthening Canada's Fight Against Foreign Bribery*", February 5, 2013.

⁴ In 2008, the RCMP established an International Anti-Corruption Unit dedicated to investigating foreign corruption cases.

⁵ Transparency International, “Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention, Progress Report 2012”, 2012.

⁶ Transparency International, “Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention On Combating Foreign Bribery”, 2013, at p 27.

⁷ Transparency International, “Exporting Corruption Progress Report 2015: Assessing Enforcement of the OECD Convention On Combating Foreign Bribery”, 2015, at p 7. At page 10 of its 2015 report, Transparency International criticized the limited availability of background information regarding investigations in Canada.

⁸ 3. (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

[...]

⁹ 4. (1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,

(a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;

(b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;

(c) records non-existent expenditures in those books and records;

(d) enters liabilities with incorrect identification of their object in those books and records;

(e) knowingly uses false documents; or

(f) intentionally destroys accounting books and records earlier than permitted by law.

[...]

¹⁰ 2013 ONSC 5199 [*Karigar*].

¹¹ *Ibid*, at para 29.

¹² *CFPOA*, s 5.

¹³ *Libman v. The Queen*, [1985] 2 SCR 178 at para 74.

¹⁴ 2014 ONSC 2635 [*Chowdhury*].

¹⁵ *Criminal Code*, RSC 1985 s 742.1(c).

¹⁶ *R. v. Karigar*, 2014 ONSC 3093,

¹⁷ *Ibid*, at para 36.

¹⁸ *Ibid*, at para 11.

¹⁹ *Ibid*, at para 12.

²⁰ [2013] A.J. No. 412 (Alta. Q.B.) [*Griffiths*].

²¹ *Ibid*, at para 8.

²² *Ibid*.

²³ *Criminal Code*, s 735(1).

²⁴ *Ibid*, s 732.1(3.1).

²⁵ *Ibid*, ss 718-718.2.

²⁶ *Ibid*, s 718.21.

²⁷ Government of Canada, Public Works and Government Services Canada, *Government of Canada's Integrity Regime*.

²⁸ *Ibid*.

²⁹ *An Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, ss. 21.17 et seq.; Order in Council 435-2015, May 27, 2015, (2015) 147 G.O. 2, 1019. See also the [Autorité des marchés financiers' information page on Public Contracts](#). Special thresholds apply to contracts and subcontracts entered into with the City of Montréal.

³⁰ Richard Dufour, *La Presse*, "[La Caisse de dépôt augmente sa mise dans SNC-Lavalin](#)".

³¹ Government of Canada, RCMP, "[RCMP Charges SNC-Lavalin](#)", February 19, 2015.

³² Considered as part of the "public interest" factor: Government of Canada, PPSC, *Public Prosecution Service of Canada Deskbook*, Part II, Section 2.3, "Decision to Prosecute", Subsection 3.2(6)(d).