



Anti-Corruption Laws: What do you need to know?

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The Corruption of Foreign Public Officials Act

The anti-corruption landscape in Canada changed on February 14, 1999 when the *Corruption of Foreign Public Officials Act* ["CFPOA"] came into force.¹ It was passed to bring Canada into compliance with the Organization for Economic Co-operation and Development's ["OECD"] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in November 1997. Prior to the passing of the CFPOA, Canadian bribery charges applied only to domestic acts. International acts of bribery not only escaped prosecution, but were also tax deductible expenses (until 1990).² A lot has changed.

The CFPOA criminalizes three offences: bribing a foreign public official, laundering property and proceeds, and possession of property and proceeds. In addition, the CFPOA offences include conspiracy or attempt to commit, aiding and abetting, intention in common to commit, and counseling others to commit the named offences.³ The CFPOA was based, in large part, on the requirements of the Anti-Bribery conventions and policy concerns reflected in other legislation, such as the U.S. *Foreign Corrupt Practices Act* (discussed further below).⁴

Prosecutions under the CFPOA

Despite the passing of the CFPOA, prosecutions have been few and far between. The first conviction under the act occurred in 2005, when Hydro-Kleen Group Inc. plead guilty to two counts of bribery and was fined \$25,000.⁵

Then in 2008, the Royal Canadian Mounted Police's International Anti-Corruption Unit was established, made up of two seven-person teams based in Ottawa and Calgary. In addition, the

¹ <http://laws.justice.gc.ca/eng/acts/C-45.2/>

² Kevin O'Callaghan, Steven Beharrell. Bribery Laws: Protecting Your Good Name Part I - Corporate Legal Counsel. (Fasken Martineau, Corporate Social Responsibility Bulletin, February 16, 2012) <http://www.fasken.com/bribery-laws-protecting-your-good-name-part-i-corporate-legal-counsel/>

³ DOJ. The Corruption of Foreign Public Officials Act: A Guide. May 1999. <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/index.html>

⁴ <http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html>

⁵ DFAIT. Corporate Social Responsibility - Bribery and Corruption Fifth Report to Parliament (October 26, 2004) http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/5-report_parliament.aspx?lang=en&view=d

Public Prosecutions Service of Canada, created in 2006, created a subject-matter expert position for international corruption cases.⁶

The second set of charges were laid on May 28, 2010, against Mr. Nazir Karigar under paragraph 3(1)(b) of the CFPOA for allegedly making a payment to an Indian government official in order to obtain a multi-million dollar Air India contract for the supply of a security system by Cryptometrics, an Ottawa-based high-tech firm.⁷ The trial is set for September 2012 in Ottawa, and if it proceeds, will be the first prosecution to go to trial.⁸

The third, and most widely publicized case, is that of Niko Resources Ltd. [“Niko”]. On July 24, 2011, Niko, a publicly traded company based in Calgary, plead guilty to one count of bribery. Niko admitted that in May 2005, through its Bangladesh subsidiary, it provided a \$200,000 vehicle for the use of the then Bangladeshi State Minister for Energy and Mineral Resources. In addition, Niko paid the Minister’s travel and accommodation expenses to travel from Bangladesh to Calgary to attend an oil and gas conference, and \$5000 more for the Minister to visit his family in New York and Chicago. As a result of the conviction, Niko was fined \$9.5 million and placed under a Probation Order for three years, requiring the company to conduct audits overseen by the Court ensuring compliance with the CFPOA.⁹

Comparison to the US Foreign Corrupt Practices Act

Despite the Niko conviction, however, the CFPOA is not considered a particularly strong Act. Until recently, the US *Foreign Corrupt Practices Act* [“FCPA”], passed in 1977, was considered the most stringent anti-corruption legislation in the world. Although the CFPOA was based in part on the FCPA, the FCPA contains some important features that make it far stronger.

Firstly, the FCPA regulates behaviour not just of US officials and US companies, but any company listed in a US Securities exchange. Whereas the CFPOA requires a “real and substantial” connection to Canada, the FCPA can apply to situations only tangentially connected to the US. For example, in one case, the Assistant to the Vice President of the Latin American Region for Alcatel, Inc., a French communications company, was arrested while in transit through the US. Alcatel had wholly-owned subsidiaries operating in Costa Rica. In 2000, Alcatel violated the FCPA by arranging and making bribes to Costa Rican government officials. The connection to the US was that money was moved through a US bank account. Mr. Sapsizian, a French national, was sentenced in 2008 to 30 months in prison.¹⁰

⁶ DFAIT. Corporate Social Responsibility - Bribery and Corruption
The Twelfth Annual Report to Parliament (October 17, 2011)

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d>

⁷ Greg McArthur, David Montero and Stephanie Nolen, “Canadian accused of bribing cabinet minister in India is a test case for Canada’s foreign anti-corruption law” (Globe & Mail, Feb. 1, 2012)

⁸ DFAIT. Corporate Social Responsibility - Bribery and Corruption
The Twelfth Annual Report to Parliament (October 17, 2011)

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d>

⁹ DFAIT. Corporate Social Responsibility - Bribery and Corruption
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<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d>

¹⁰ US. Department of Justice. “Former Alcatel CIT Executive Sentenced for Paying \$2.5 Million in Bribes to Senior Costa Rican Officials” Tuesday, September 23, 2008 <http://www.justice.gov/opa/pr/2008/September/08-crm-848.html>

The FCPA also requires that companies listed on a US securities exchange must keep accurate accounting records. Although this aspect of the Act has been primarily enforced through civil violations of the SEC, it has also proven to be one of its most effective tools for combating anti-corruption.¹¹ In contrast, the CFPOA does not contain similar record-keeping provisions.

Comparison to the UK Bribery Act 2010

The UK's *Bribery Act 2010* ["Bribery Act"] is now considered the most stringent anti-corruption legislation in the world. It was passed on July 1, 2011.¹² The Bribery Act criminalizes not only the offering of a bribe, but also its receipt. It also applies to private individuals, not just public officials. Key to the Bribery Act's strength is its far-reaching extra-territorial reach, applicable to any UK citizen anywhere in the world and any company with a UK connection.¹³

One important distinguishing feature of the Bribery Act from other legislation is that "facilitation" payments are not given an exception. Facilitation payments are small, customary payments allowable in certain circumstances under the OECD Convention, the FCPA and the CFPOA, among other legislation. Groups such as Transparency International deem facilitation payments as "according to rule" corruption.¹⁴ Though facilitation payments have always been illegal under English common law, the Bribery Act codifies this violation and strengthens the available sanctions.

The strict anti-corruption requirements of the Bribery Act can apply to Canadian companies doing business in the UK, but more importantly, doing business with any UK company or citizens worldwide. If such a Canadian company is also listed on a US exchange, it will also be subject to the FCPA, as well as, of course, the CFPOA.

What Next?

Change, is afoot. Since its passing, the CFPOA has been criticized for its narrow jurisdictional application. In 2009, the Minister of Justice introduced a bill to remove the requirement of a "real and substantial" link to Canada in order to make the CFPOA more broadly applicable. The bill was at the committee stage when the House was prorogued.¹⁵ However, with the recent election of the Conservative majority government, it is likely this bill will be re-submitted to the House.

The issue of facilitation payments is of further concern – should companies take the high road and ban all facilitation payments per the Bribery Act?¹⁶ Or is banning facilitation payments impractical for small companies,¹⁷ and those working in locations where such payments are seen as a salary

¹¹ Richard A. Wagner. "Corruption and Bribery: The Challenge of Operating in the Global Government Procurement Market: Invest Ottawa 45th Circuit Presentation" March 6, 2012.

¹² <http://www.legislation.gov.uk/ukpga/2010/23/contents>

¹³ Kevin O'Callaghan, Steven Beharrell. Bribery Laws: Protecting Your Good Name Part I - Corporate Legal Counsel. (Fasken Martineau, Corporate Social Responsibility Bulletin, February 16, 2012) <http://www.fasken.com/bribery-laws-protecting-your-good-name-part-i-corporate-legal-counsel/>

¹⁴ Transparency International. "FAQ: How do you define corruption" http://www.transparency.org/news_room/faq/corruption_faq

¹⁵ DFAIT. Corporate Social Responsibility - Bribery and Corruption

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<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d>

¹⁶ See for example, Jennifer Brown, "RBC Bans Facilitation Payments." Legal Feeds, Nov. 1, 2011. <http://www.canadianlawyermag.com/legalfeeds/528/RBC-bans-facilitation-payments.html>

¹⁷ "When a bribe is simply facilitating business" The Economist, June 11, 2011. <http://www.economist.com/blogs/blightly/2011/06/anti-bribery-laws>

supplement by low-paid government workers?¹⁸ In addition, if facilitation payments are utilized, companies must be careful since the line between such a payment and a bribe (according to Canadian law) is unclear and could inadvertently trigger prosecution. There is certainly potential for further clarification of this aspect of the CFPOA.

Additionally, the CFPOA has been criticized by the OECD for only applying to “for profit” activities.¹⁹ There may also be a move to require accurate accounting requirements within the CFPOA, as opposed to relying on the provisions of the Income Tax Act. Both of these areas may attract future amendments.

Finally, with approximately 20 cases currently being pursued by the RCMP,²⁰ and a first trial likely in September, additional problems in relation to the prosecution of corruption practices may come to light. As a result, legislative amendments based on those experiences may be made to enable future successful prosecutions. Ontario lawyers advising companies involved in operations abroad should remain vigilant in their awareness of this rapidly developing area of law.

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¹⁸ Transparency International. “FAQ: Where is corruption most prevalent”

http://www.transparency.org/news_room/faq/corruption_faq

¹⁹ Kevin O’Callaghan, Steven Beharrell. Bribery Laws: Protecting Your Good Name Part II - Litigators. (Fasken Martineau, Corporate Social Responsibility Bulletin, March 1, 2012)

<http://www.fasken.com/bribery-laws-protecting-your-good-name-part-ii-litigators/>

²⁰ DFAIT. Corporate Social Responsibility - Bribery and Corruption

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<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d>