

ANTI-CORRUPTION LEGISLATION IN CANADA

DAVIES

This publication summarizes Canada's foreign and domestic anti-corruption legislation in relation to dealings with public officials. It is relevant for both Canadian-based entities operating abroad and foreign and domestic businesses operating in Canada.

→ Foreign Bribery

PRINCIPAL LEGISLATION

The *Corruption of Foreign Public Officials Act* ("CFPOA") is Canada's principal legislation combating bribery of foreign public officials with respect to international business transactions.

In essence, the CFPOA prohibits anyone from giving or offering a loan, reward, advantage or benefit of any kind to a foreign public official to obtain a business advantage and as consideration for an act or omission by the official.

While the offence may initially seem straightforward, it includes a number of technical elements that both expand and limit its scope. For example:

- Even an agreement to offer such a benefit is prohibited – an offence can be committed even if no benefit is actually given. An individual has been convicted and sentenced to a prison term on this basis.
- "Indirectly" giving or offering a prohibited benefit is also an offence. For example, arranging a payment to be made through a third party could amount to giving a benefit indirectly.
- The concept of an "advantage or benefit of any kind" leaves open the possibility of even relatively small advantages or benefits falling afoul of the CFPOA, although it may be difficult to characterize a trivial benefit as being given as consideration for some act or omission. Canadian courts have yet to rule on the scope of prohibited advantages or benefits. In any event, it is clear that the offence can apply to non-monetary forms of benefits, such as free or subsidized housing or tuition, for example.
- The prohibition applies not only to benefits or advantages offered or given to legislators or judges, for example, but also to anyone holding an administrative position with a foreign state and to employees of state boards, commissions or corporations who are performing duties on behalf of a foreign state. ("Foreign state" includes both foreign countries and their political subdivisions, such as cities or provinces, and agencies.) However, the prohibition applies only in respect of persons currently holding such a position, and not former or anticipated public office holders.
- An advantage conferred on a third person (e.g., a relative or friend of a foreign public official) may violate the CFPOA if it benefits a foreign public official.

- A corporation can be liable for prohibited benefits agreed or made by its officers or employees.
- To constitute an offence, the benefit must have been to obtain or retain an advantage in the course of business (which includes non-profit activities). However, it may not be a defence that an entity making a payment to a foreign public official for a particular business benefit would have received the benefit even in the absence of such payment. Similarly, subject to the facilitation payment defence noted below, a payment made to a foreign public official to obtain a permit to which the payer was entitled in any event (e.g., to obtain the permit more quickly) may also be prohibited.

EXCEPTIONS/SAVING PROVISIONS

No CFPOA offence is committed in respect of a benefit permitted or required under the laws of the relevant foreign state, or the payment of reasonable expenses incurred in good faith by or on behalf of a foreign public official that are directly related to either (1) the promotion, demonstration or explanation of a person's products or services, or (2) the execution or performance of a contract with the relevant foreign state. Payment of taxes or prescribed fees to a foreign government is not prohibited by the CFPOA.

An amendment to the CFPOA in 2013 provides for the removal of an exemption for certain types of facilitation payments once this amendment is proclaimed in force. In the meantime, certain types of payments to expedite or secure performance of routine matters within a foreign official's duties are deemed not to be a benefit for the purpose of the CFPOA's main prohibition on foreign bribery.

BOOKS AND RECORDS

The 2013 amendments to the CFPOA also added a new offence for certain deceptive bookkeeping practices "for the purpose of bribing a foreign public official" for a business advantage or to hide such bribery. Examples include keeping separate accounts that do not appear in official records, not recording transactions, recording non-existent expenditures, falsely describing entries, and early destruction of records.

It remains to be seen whether Canadian courts will interpret the concept of "bribery" in this books and records offence as coinciding with the general CFPOA prohibition on certain benefits to foreign public officials, in which case this offence may not add much to the general prohibition. In any event, this offence is in some ways narrower than a similar offence under the U.S. *Foreign Corrupt Practices Act*, which imposes a general obligation on securities issuers to keep accurate records and does not require that any inaccuracy be for the purpose of bribery.

Offences in the Canadian *Criminal Code* and *Income Tax Act* prohibiting forgery or falsification of documents may also cover some of the same ground as the CFPOA books and records offence.

PENALTIES/CONSEQUENCES

A violation of the CFPOA is subject to a fine in the discretion of the court and imprisonment of up to 14 years. CFPOA offences are not subject to any limitation period.

The largest CFPOA fine imposed to date is \$10.35 million on a corporation. In one case, an individual was sentenced to a three-year prison term for agreeing with others to offer bribes to foreign public officials contrary to the CFPOA, even though no bribe was proved to have been paid and the company for whom the individual was acting as a paid agent did not receive the contract to which the contemplated bribe related. Other cases are pending and the CFPOA is a federal government enforcement priority to demonstrate compliance with Canada's international treaty obligations. Resolutions of charges have included ongoing probation and audits. Property obtained or derived from a CFPOA offence may in some circumstances be forfeited. Civil actions



for economic torts based on unlawful acts, such as unlawful interference with economic relations, are also possible.

Conviction for a CFPOA offence may disqualify a corporation and its affiliates from federal or provincial government contracts in Canada, as well as from foreign government contracts or contracts financed by international organizations such as the World Bank or the African Development Bank.

JURISDICTION OF CANADIAN COURTS

The CFPOA expressly applies to conduct outside Canada by Canadian citizens and Canadian incorporated entities. Otherwise, Canadian courts have generally recognized jurisdiction over conduct that has a real and substantial connection to Canada.

A Canadian court has held that it did not have jurisdiction over an individual charged with a CFPOA offence who had never been in Canada, and all of his alleged conduct took place outside of Canada. However, the court confirmed that the individual could be charged if and when he is in Canada. Subsequently, in another matter, the Canadian government has charged two U.S. and one UK national with CFPOA violations.

LIABILITY FOR CONDUCT OF AFFILIATES

The principal CFPOA offence prohibits anyone from directly or indirectly giving, offering or agreeing to a prohibited type of benefit. In certain cases, a parent company may be considered to indirectly bring about a prohibited benefit actually paid by a subsidiary.

Individual persons who hold positions with more than one affiliate may also incur liability for more than one of them in respect of the same conduct. A parent company might also be liable for aiding and abetting or counselling a CFPOA offence committed by a subsidiary.

Domestic Bribery

The Canadian *Criminal Code* prohibits anyone from giving or offering a loan, reward, advantage or benefit of any kind to a federal or provincial government official in Canada as consideration for cooperation, assistance, exercise of influence, or an act or omission in connection with any government business.

As with the CFPOA, it is also an offence to agree to give or offer such a benefit. The prohibition extends to indirect gifts or offers, as well as to benefits given to members of the official's family, or to other persons for the official's benefit. The offence may be committed even if the official is not in fact able to provide the requested assistance or cooperation.

Separate provisions of the Code specifically prohibit, among other things: (a) giving valuable consideration to any person to promote the election of a candidate or to influence an election in order to obtain, retain or fulfill a government contract; and (b) certain types of benefits to judicial officers, members of Parliament, provincial legislators, or municipal officials. Some other federal and provincial statutes include additional specific prohibitions relating to bribery and corruption.

A Code offence for a secret commission offered to an agent as a reward or benefit for doing or omitting to do anything relating to the affairs or business of the agent's principal, or for showing favour to any person in relation to such affairs or business, could also apply to a benefit given to an agent of a government entity.

PENALTIES/CONSEQUENCES

The Code offences are punishable by fines in the discretion of the court or imprisonment of up to five, or in some cases, 14 years. As with the CFPOA, no limitation period applies.

The potential for civil actions, disqualification, forfeiture, and parent company liability discussed above in relation to CFPOA offences apply in respect of these Code offences as well.

→ Implications

Canadian businesses that deal with public officials should adopt and implement policies to ensure that their officers, employees and agents are aware of these CFPOA and Code provisions. Periodic audits of operations having regular government conduct on behalf of the business can greatly assist in conveying the importance of the policy and avoiding transgressions of applicable law.

The United States and many other countries vigorously enforce not only their own domestic anti-corruption legislation, but also prohibitions on foreign corrupt practices, similar to those in the CFPOA. Accordingly, multi-national businesses may be subject to multiple anti-corruption regimes in respect of the same conduct, which can require coordination with foreign counsel for either the establishment and implementation of compliance policies or investigations of suspect practices.

Prospective purchasers of businesses should consider, to the extent possible, due diligence of a target company's operations that directly or indirectly interface with government to help assess the risk of fines or penalties in relation to past conduct, as well as the risk of the purchaser and its other affiliates becoming disqualified from future government contracts in the event that an acquired company either has been convicted, or is subsequently convicted, of an anti-corruption offence, even if the relevant conduct occurred under prior ownership. Once an entity and its affiliates are debarred from government contracts on this basis, the term for disqualification can be indefinite, and the prospects for re-qualifying unclear.

For more information, please contact:



Stéphane Eljarrat
514.841.6439
416.863.6407
seljarrat@dwpv.com



John Bodrug
416.863.5576
jbodrug@dwpv.com

TORONTO

155 WELLINGTON STREET WEST
TORONTO ON CANADA M5V 3J7

TEL : +1 416.863.0900

MONTRÉAL

1501 MCGILL COLLEGE AVENUE, 26TH FLOOR
MONTRÉAL QC CANADA H3A 3N9

TEL : +1 514.841.6400

NEW YORK

900 THIRD AVENUE, 24TH FLOOR
NEW YORK NY U.S.A. 10022

TEL : +1 212.588.5500