CANADA

Combating Bribery North of the 49th: A Wake-Up Call for Companies Doing Business in Canada

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Legislatures around the world have passed laws prohibiting bribery of foreign public officials. The Foreign Corrupt Practices Act (FCPA) has received significant public attention due to a number of high-profile prosecutions. However, the Canadian equivalent to the FCPA – the Corruption of Foreign Public Officials Act (CFPOA) – historically has not been a significant concern for businesses with a connection to Canada.

But this is changing. In the face of mounting international pressure, Canadian authorities have sent the message that they will enforce Canadian anti-corruption laws and pursue significant penalties against companies that have provided bribes to government officials. Parliament has also recently taken steps to enhance the Canadian authorities’ ability to prosecute bribes of foreign public officials. On February 5, 2013, several amendments to the CFPOA were proposed that, if passed, will have the effect of significantly broadening its international reach and providing for stiffer penalties (the Proposed Amendments). The Proposed Amendments passed through the Canadian Senate without amendment and are currently awaiting second reading in the House of Commons, where it is expected that they will pass.

This article outlines the substantive elements of the CFPOA, including the Proposed Amendments, with a view to comparing and contrasting Canada’s foreign anti-corruption scheme with the FCPA, and comments on Canadian enforcement trends, which have escalated in recent times, and which we expect will continue to increase.

An Overview of the CFPOA

Canada enacted the CFPOA on December 10, 1998 as part of its commitment to implement the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions (Convention). Section 3 of the CFPOA is the centrepiece of the act. It reads:

(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.

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(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.

This offence is indictable (roughly equivalent to a felony in U.S. legal parlance). The CFPOA currently provides for a maximum penalty of five years imprisonment for individuals and an unlimited fine in the discretion of the court in the case of a corporation. Under the Proposed Amendments, the penalty for individuals is to sharply increase to a maximum of fourteen years imprisonment. There is no limitation period, so offences dating back to its enactment may be prosecuted.

Several aspects of the Canadian foreign bribery offence are worth highlighting.

- **Person:** The use of the word “person” is intended to apply to Canadians and non-Canadians alike, including corporate bodies. Under Canadian law, corporations can be charged and convicted for the acts of their employees, agents or contractors so long as a management level employee had knowledge of, or was wilfully blind to, the circumstances that constitute the offence. An individual can be charged and convicted if he or she had knowledge of, or was wilfully blind to, the circumstances giving rise to the offence, and participated in, authorized, assisted or encouraged a breach of the CFPOA.

- **Profit:** The definition of “business” in the current CFPOA includes language that requires an undertaking be “for profit” to constitute a business. Accordingly, the phrase in section 3 “in order to obtain or retain an advantage in the course of business” implies that the underlying transaction for which a bribe was paid must be for profit to fall within the ambit of the CFPOA. The Proposed Amendments to the CFPOA remove the “for profit” language from the definition of “business”, thereby broadening the scope of activities covered. It remains the case in Canada, however, that bribes paid for purely personal health or safety reasons are not prohibited by the CFPOA.

- **Domestic Acts:** The CFPOA employs the term “business” versus “international business” in the Convention. According to the Canadian government, the rationale for this difference is to increase the breadth of the act to include bribery in respect of transactions that do not necessarily cross international borders. For example, the CFPOA would capture a bribe paid to a foreign public official in Canada for the purpose of securing business in Canada (e.g. to win a construction contract to build a new wing on a foreign embassy in Ottawa).

- **Indirect Bribes:** The reference to paying a bribe “directly or indirectly” means that a company or person remains subject to prosecution in circumstances where that person may be one or more steps removed from the actual promise or payment of a benefit. This situation can arise where a person or company employs agents to act on the principal’s behalf, or as in Griffiths discussed below, the promise or payment of a benefit is to relatives of a foreign public official for the benefit of that official.

- **Anything of Value:** Under the CFPOA, the bribe does not need to be cash; it can be anything that constitutes a “material or tangible gain” to the foreign official. For example, gifts,
extravagant hospitality, travel, accommodations, tickets to sporting events, use of company property or services, jobs, education or favours for family members, could be considered a bribe.

• **Foreign Official:** The reference to “foreign public official” includes any person who holds a legislative, judicial or administrative position in any level of government (national to local), and also includes employees of state owned or controlled corporations and international organizations.

• **Promise to Pay:** Criminal prosecution can flow whether or not a bribe was actually paid. A mere promise to pay will suffice. Further, it matters not that the foreign public official is without the competence to deliver on the *quid pro quo*. In other words, influence-peddling or any other use of the official's public position is unlawful conduct targeted by the CFPOA.

• **Knowledge:** Wilful blindness can substitute for actual knowledge in circumstances where an accused's suspicion is aroused to the point where he or she sees the need for further enquiries, but deliberately chooses not to do so. In the context of bribing a foreign public official, this element of the offence may, in certain circumstances, be made out where a company pays an agent and is wilfully blind as to whether any part of that payment is used to pay a bribe to a foreign public official. In such a case, the risk of having knowledge imputed to the principal would likely increase in circumstances where corruption is known to be rampant in the jurisdiction where the transaction took place and/or the commission paid was unreasonably large.

There are currently three exceptions in the CFPOA to the foreign bribery offence. As discussed below, the exception relating to facilitation payments will be removed if the Proposed Amendments are passed as currently drafted.

• **Lawful Payments:** The CFPOA allows payments permitted under the laws of the foreign state. It is important to note that the payments must actually be legal under the foreign state's laws. Payments that are merely customary or tolerated but still technically illegal are not permitted.

• **Bona Fide Expenses:** Reasonable expenses incurred by or on behalf of the foreign public official are permitted. To meet this exception, the expenses must be reasonable, incurred in good faith, and directly related to the promotion, demonstration or explanation of products or services, or the execution or performance of a contract with a foreign official's state.

• **Facilitation Payments:** The CFPOA also presently permits facilitation payments, which are small payments to low-level officials made to secure or expedite performance of “acts of a routine nature” (i.e. do not involve discretion on the part of the official, and are acts that the company is entitled to as of right). The CFPOA expressly states that “acts of a routine nature” do not include a decision to award new business or continue existing business. Accordingly, any payment for this purpose, no matter how small, is not a facilitation payment. See “Designing a Facilitation Payments Policy to Minimize Liability and Retain Flexibility (Part Two of Two),” The FCPA Report, Vol. 1, No. 5 (Aug 8, 2012).

Similar to the *U.K. Bribery Act*, the Proposed Amendments provide for removal of the facilitation payment exception – though this aspect of the Proposed Amendments only takes effect following a further Order by the Governor in Council at a currently undetermined date in the future. The fact that this aspect of the Proposed Amendments will be delayed in its implementation likely arises from some
level of recognition that an abrupt removal of the facilitation payment exception could prove difficult in practice, and could have the unintended consequence of driving conduct underground – particularly as facilitation payments remain customary in many places, and legal under the FCPA.

**FCPA versus CFPOA**

Enacted to promote the same principles, it is no surprise that the CFPOA shares a high degree of commonality with the FCPA. In particular, the essential elements of the offence are materially the same in both jurisdictions, as are the statutory defences – though they are framed as “saving provisions” in the CFPOA.

More interesting is how the respective legislative frameworks currently differ, and they do in several important ways; though in many respects, the Proposed Amendments will have the effect of bringing the legislative frameworks of the CFPOA and FCPA closer together. The current significant differences between the CFPOA and the FCPA are discussed below, along with relevant changes arising from the Proposed Amendments.

1. Jurisdictional Differences

An important current difference between the FCPA and the CFPOA is jurisdictional reach. In this regard, the FCPA is presently much broader than the CFPOA. While the FCPA employs the principles of both “nationality” and “territoriality” based jurisdiction, the CFPOA has historically been limited to territorial jurisdiction only. This means that for a Canadian court to have jurisdiction, the prosecution must show that a significant portion of the activities giving rise to the offence took place in Canada, otherwise the CFPOA will not apply.

For a Canadian court to have territorial jurisdiction, there must be a real and substantial connection between the alleged conduct and Canada. Some material portion of the formulation, initiation, or commission of the offence must occur in Canada. This approach raises a challenge for Canadian enforcement authorities because in many instances the activity underlying the payment or promise of a bribe to a foreign public official will take place entirely outside Canada. Even where the person making the payment or promise is Canadian, courts have held that nationality - without more - is not sufficient to exert territorial jurisdiction under the real and substantial connection test.

Though the obvious purpose of the CFPOA is to criminalize activity likely to take place in a foreign jurisdiction, courts are unlikely to read in extraterritorial application of the CFPOA prior to the Proposed Amendments taking effect, given Parliament’s lack of express intent in this regard.

The international community has been critical of Canada’s approach to jurisdiction. In the Phase 2 Report on Canada, the OECD Working Group noted that Canada is the only party to the Convention that does not employ nationality jurisdiction in respect of the bribery offence. Furthermore, the commentary in that report states that “the lead examiners are not convinced that territorial jurisdiction under Canadian law is broad enough to enable the effective application of the offence under the CFPOA.” According to OECD interviews conducted with members of Canadian law enforcement and the Ontario Ministry for the Attorney General:

[J]urisdiction could not be exercised where a person made a telephone call from Canada to set up a meeting with a foreign public official, and then flew from a Canadian airport
to a foreign jurisdiction to meet with the foreign public official, in order to make an offer or promise or gift.

While Canadian courts have not yet tested this interpretation of the law on CFPOA jurisdiction, a pending case before the Ontario courts is likely to address this issue. In *R. v. Karigar*, the defendant is charged with bribing high-ranking officials in India's federal government in return for showing favour to a Canadian biometrics security company in the tender process for a new Air India security system.

It appears that Parliament has listened to the criticism regarding jurisdiction, and is reacting accordingly. The most significant part of the Proposed Amendments is to effectively provide for nationality-based jurisdiction for CFPOA offences. As the Proposed Amendments currently read, nationality jurisdiction is accomplished through a deeming provision that deems any conduct abroad constituting a CFPOA offence to have taken place in Canada provided the person responsible for the conduct is a Canadian citizen, a permanent resident of Canada, or a public body, corporation, society, company, firm or partnership organized under the laws of Canada or any province. Once the Proposed Amendments are passed, the addition of nationality-based jurisdiction will significantly lengthen the reach of the CFPOA.

2. Resolution Options and Processes: No Accounting Provisions or Sentencing Guidelines

A second notable difference between the FCPA and CFPOA relates to the resolution options and processes that are available under each statute. As most readers will be aware, the FCPA contains provisions requiring companies with securities registered in the United States, or who are required to periodically report to the Securities and Exchange Commission, to keep accurate records of business transactions and to maintain effective internal controls. See “An Interview with Judge Stanley Sporkin, the 'Father of the FCPA' (Part One of Two),” The FCPA Report, Vol. 1, No. 3 (Jul. 11, 2012).

Given that many bribery payments are kept off the books or are improperly recorded, this aspect of the FCPA has been an effective avenue of enforcement. In addition, the civil nature of this provision makes prosecuting violations easier on account of a lower standard of proof. See “In Distributor Margin Case with the 'Potential for Bribery,' Oracle Corporation Settles FCPA Books and Records Charges with the SEC for $2 Million,” The FCPA Report, Vol. 1, No. 6 (Aug. 22, 2012).

The CFPOA does not have equivalent “books and records” or “internal controls” provisions. While the Proposed Amendments do add a “books and records” provision, it is still a criminal, rather than a civil, avenue of resolution. It does not appear, at least for now, that Canada will be implementing any civil avenue of resolution in the near future. As a result, the only path available to Canadian authorities is, and will remain to be, criminal prosecution. This significantly narrows the realm of possible resolution options. As the U.S. experience has shown, dealing with matters on a civil, rather than criminal, basis has been an effective tool for combating foreign bribery.

In addition, unlike in the United States, Canada does not have sentencing guidelines that provide a measure of predictability for self-reporting bribery offences. “When and How Should Companies Self-Report FCPA Violations? (Part One of Two),” The FCPA Report, Vol. 1, No. 1 (Jun. 6, 2012). Rather, in Canada, credit for self-reporting is in the discretion of the prosecutor and sentencing judge. While Griffiths, discussed below, shows that self-reporting is taken into consideration in Canada to some degree at least, the lack of sentencing guidelines creates an all-or-nothing paradigm in Canada where a potential defendant must decide whether or not to self-report and risk prosecution without guidance on the likely disposition.
Even with some prospect of a more lenient sentence for self-reporting cases, the legal framework in Canada means that resolution of CFPOA offences will almost certainly involve a guilty plea to a criminal offence, as Canada currently lacks a legal mechanism for civil resolution of bribery matters. Canada also does not have other resolution mechanisms such as deferred prosecution agreements.

While the OECD Working Group lauded some of Canada's efforts to create awareness around anti-corruption issues, it recommended “Canada consider options for encouraging voluntary disclosure of CFPOA violations and for cooperating with investigations, which may thereby increase the reporting of violations of the CFPOA.” The culmination of these differences is that the considerations relating to self-reporting violations are very different in Canada.

*Enforcement Is On the Rise*

While the CFPOA has been in force for over a decade, it is only recently that it has been the subject of meaningful enforcement efforts by Canadian authorities. Historically, Canada has been the subject of severe criticism by the international community for its anti-bribery enforcement efforts. For example, in 2010, Transparency International classified Canada as having “little or no enforcement.”

In apparent response to mounting international pressure, the Royal Canadian Mounted Police (RCMP) created an International Anti-Corruption Unit (IACU) as a specific enforcement mechanism for the CFPOA. The mandate of this unit is to “target public sector corruption, including bribery of national and foreign public officials and related laundering of the proceeds of crime.” Though the current number of investigations is not public knowledge, toward the end of 2011 the IACU had 34 ongoing investigations pursuant to the CFPOA, which reflects a discernible increase in facility and commitment of Canadian authorities to enforce the CFPOA. These investigations are fairly certain to result in further enforcement actions in the future. Indeed, in 2012 Transparency International ranked Canada among the most improved anti-corruption enforcers.

Prior to the creation of the IACU in 2008, the sole Canadian conviction entered pursuant to the CFPOA was in 2005, when Hydro Kleen pled guilty to bribing a U.S. customs official at a Canadian airport. The $25,000 fine was less than the total value of the corrupt benefits conferred upon the immigration official. This outcome received condemnation from the OECD Working Group who stated that “the sanction applied in that case was not sufficiently 'effective, proportionate or dissuasive' as prescribed by Article 3.1 of the Convention.

1. **$9.5 Million Niko Fine**

More recent proceedings have much more closely mirrored U.S.-style enforcement. In 2011, Niko Resources Ltd. (Niko) pled guilty to a violation under the CFPOA for inducing a Bangladeshi public official to give favourable treatment to the defendant's subsidiary. According to the Statement of Facts, the bribery involved provision of the use of a $190,000 vehicle, and a trip valued at $5,000, for which a fine of $9.5 million was imposed. Notably, the sentencing precedents submitted by the prosecutor were FCPA cases. The court's willingness to accept these precedents and impose a fine of this amount now sets the benchmark for CFPOA fines in Canada. In its submissions, the prosecution also specifically noted that it was unable to prove the amount of any benefit to the company arising from the bribery, raising the prospect of even more significant fines in future cases where the gains of a company arising from bribery may be quantified.
Also of particular significance were the probationary terms imposed upon Niko for three years. The Probation Order, much like a U.S.-style FCPA plea agreement, places a proactive obligation upon Niko to undertake a number of steps including:

- broad ongoing documentary disclosure obligations to the RCMP;
- broad obligations to self-report any potential further criminal conduct it becomes aware of;
- implementing detailed compliance, record-keeping and monitoring standards;
- providing regular reporting to the RCMP on its implementation of its anti-corruption compliance, record-keeping and monitoring standards; and
- at its own cost, to retain an independent auditor to prepare an initial review and written report documenting Niko's remediation efforts and compliance with anti-corruption laws, as well as two follow up reports. Copies of each of these three written reports are to be provided to the court and to the RCMP.

The extensive proactive monitoring and reporting obligations placed on Niko are reflective of the kinds of sentences more typically seen under the FCPA and signify a clear message from Canadian authorities that violations of the CFPOA will be met with significant penalties.

2. $10.35 Million Griffiths Fine

The most recent conviction in Canada under the CFPOA involved Griffiths Energy International Inc. ("Griffiths"). In early 2013, Griffiths pled guilty to a violation of the CFPOA for directly agreeing to provide, and indirectly providing, improper benefits to a Chadian public official to induce that official to assist Griffiths and its subsidiaries to procure certain oil rights in Chad.

According to the Agreed Statement of Facts, Griffiths agreed to and paid a $2 million consulting fee to a company controlled by the wife of Chad’s ambassador to the United States, Canada, Brazil, Cuba and Argentina. Griffiths also agreed to issue founders shares to parties nominated by the ambassador's wife. These agreements and payments were made to persuade the ambassador to exercise his influence to help Griffiths enter Chad's oil and gas industry.

The Agreed Statement of Facts notes that the management of Griffiths (none of whom were with the company at the time of the impugned agreements) self-reported the violation immediately upon learning of it and cooperated fully with the RCMP's investigation, including engaging independent outside counsel to conduct a comprehensive internal investigation and waiving privilege over otherwise privileged legal documents. Griffiths also proactively adopted a robust anti-corruption policy and took steps to significantly strengthen internal controls. Consequently, the fine of $10.35 million is undoubtedly less than it would have faced if it had been prosecuted and convicted in the absence of a self-disclosure. Griffiths was also not subject to a probation order in this case, likely largely due to both the self-disclosure and the remediation steps undertaken at the time of sentencing.

It is further noteworthy that the Ambassador’s wife was resident in the United States when she entered into the agreement with Griffiths, and received payment in the United States, factors which could (arguably at least) have lead the Department of Justice to assert jurisdiction. Recognizing the degree of
communication which exists among international enforcement agencies, this case appears to reflect a potential willingness of U.S. authorities to defer to their Canadian counterparts on appropriate cases – itself a sign of the evolution of anti-corruption enforcement in Canada.

3. Individual Charges

The RCMP has also followed the U.S. enforcement strategy of pursuing charges against individual executives. In addition to the charges against Mr. Karigar noted above, CFPOA charges have recently been laid against former executives of a major Canadian engineering firm.

We anticipate that the trend towards increased CFPOA enforcement will continue in Canada and 2013 will see additional CFPOA prosecutions.

Conclusion

Companies and individuals operating in Canada should be aware of Canada’s anti-bribery legislation and recognize the trend of increasing enforcement. In practice, this should translate into developing a compliance policy that is global in scope and which considers the various legislative frameworks in the territories in which the company operates. Companies must also be mindful of the long arm of the FCPA and U.K Bribery Act if they want to avoid bad publicity, heavy fines, potential incarceration for implicated individuals and the devaluation of their stock price.

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