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# THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

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THIRD EDITION

EDITOR  
MARK F MENDELSON

LAW BUSINESS RESEARCH

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Third Edition

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## Chapter 3

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# CANADA

*Mark Morrison and Michael Dixon*<sup>1</sup>

### I INTRODUCTION

This chapter addresses the legislative framework and enforcement trends with respect to domestic and international bribery laws in Canada.

There are two statutes in Canada that address bribery and corruption, namely the Corruption of Foreign Public Officials Act<sup>2</sup> (CFPOA), which criminalises corruption of foreign public officials, and the Canadian Criminal Code<sup>3</sup>, which criminalises corruption of Canadian public officials and corrupt behaviour in certain transactions among private parties.

Canada has also taken strides to strengthen its foreign anti-bribery legislation. As discussed throughout this chapter, on 19 June 2013 the CFPOA was significantly amended. The amendments to the CFPOA, along with the increased enforcement focus seen from the Royal Canadian Mounted Police (RCMP) evidence an ongoing trend in Canada to prosecute bribery offences more vigorously than in the past. The recent focus on enforcement also highlights the increased importance for businesses with operations in Canada and abroad to maintain strong internal controls and a robust anti-corruption compliance programme.

In both the CFPOA and the Criminal Code, all relevant offences are criminal offences. There are no civil, strict, or absolute liability corruption offences in Canada. Additionally, there are no non-criminal resolution options currently available for corruption-related matters (such as non-prosecution agreements or civil settlements), as are used to resolve similar matters in other jurisdictions such as the United States.

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1 Mark Morrison and Michael Dixon are partners at Blake, Cassels & Graydon LLP.

2 SC 1998, c. 34. [CFPOA].

3 RSC 1985, c. C-46.

## II DOMESTIC BRIBERY: LEGAL FRAMEWORK

### i Criminal Code

The primary vehicle in Canada for addressing domestic corruption is the Criminal Code.

Sections 121, 122, 123, and 426 of the Criminal Code create offences criminalising the provision of bribes to Canadian officials, the receipt of bribes by Canadian officials and private sector bribery. These offences were updated in 2007 to implement the United Nations Convention against Corruption.<sup>4</sup>

### ii Offences involving bribery and corruption of Canadian government officials

Section 121(1)(a) of the Criminal Code prohibits the offering or giving of a benefit to a government official, or any member of his or her family, as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with the transaction of business with, or relating to, the government. An official who accepts the illegal benefit also commits an offence.

Section 121(1)(b) of the Criminal Code criminalises the provision of an award, advantage, or benefit to a government official, while Section 121(1)(c) criminalises the receipt of such a benefit. These sections do not require a *quid pro quo* arrangement and seek to preserve the appearance of integrity, rather than integrity itself. These provisions therefore penalise the simple provision or receipt of a benefit to a government employee or official, with no strings attached, though that benefit must be conferred in respect of the dealing the accused had with the government.

Sections 121(1)(a) and (b) apply only to provincial and federal government officials. Directors, officers and employees of government-owned or controlled corporations, referred to as ‘crown corporations’ in Canada, may also be considered an ‘official’ if the corporation is an agent of the federal or provincial crown.

Section 122 of the Criminal Code criminalises a breach of trust by an official. For the purposes of Section 122, the term ‘official’ is not confined to provincial or federal governments, and may include any person in a position of duty, trust or authority, especially in the public service industry, or in a corporation, society or the like. It has been held to extend to officials of First Nations bands as well.

Section 123 of the Criminal Code criminalises municipal corruption and is otherwise substantially the same as Section 121(1)(a). Section 123 of the Criminal Code applies only to municipal officials. A municipal official is defined as a member of a municipal council or a person who holds an office under a municipal government.

### iii Private corruption

Section 426 of the Criminal Code creates a ‘secret commissions’ offence, that prohibits an agent (including an employee) from receiving, or any person from corruptly offering or giving an agent, an award, advantage or benefit of any kind as consideration for doing or forbearing to do any act related to the affairs or business of the agent’s principal.

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<sup>4</sup> United Nations Convention Against Corruption, 31 October 2013, GARes 58/4 (entered into force 14 December 2005).

The secret commissions offence applies to all agency and employment relationships, including private sector businesses. Secrecy is the hallmark of this offence. If the benefit is disclosed to the principal at the time it is provided, there is no offence.

#### iv Organisational liability

The liability of organisations is also contemplated by the Criminal Code. Section 22.2 of the Criminal Code governs the circumstances under which corporations can be held criminally liable for criminal offences. Section 22.2 applies to criminal offences found in both the Criminal Code and CFPOA, discussed below.

The criminal liability of corporations is determined from the standpoint of actions of their senior officers. A 'senior officer' may include a director, partner, employee, member, agent or contractor of the corporation that played an important role in the establishment of the corporation's policies or was responsible for managing an important aspect of the corporation's activities. Recent case law has confirmed that mid-level management can be a 'senior officer' and therefore can create corporate liability.<sup>5</sup> Section 22.2 of the Criminal Code makes a corporation liable for the acts of its senior officers where one of the senior officers intends to benefit the company and, acting within the scope of her or his authority, is a party to the offence, directs another director, partner, employee, member, agent or contractor of the organisation to become party to the offence, or knows a representative of the organisation is about to become a party to the offence and does not attempt to stop them.

A parent company should not be held liable for the offences of a subsidiary solely on the basis of the parent–subsidiary relationship. Unless the parent's directors, officers or employees had knowledge or were wilfully blind to the wrongful conduct, they are not a party to the offence and cannot create vicarious criminal liability for the parent. While it is within the court's power to lift the corporate veil and ignore the separate personalities of the parent and subsidiary, this should not be done lightly and requires that the subsidiary be a mere sham, alter ego or agent of the parent corporation. On the other hand, in accordance with general Canadian corporate law principles, liability would continue to a successor, as with other liabilities under law, in an amalgamation or other business combination.

#### v Liability of directors, officers and employees

Officers and directors of an organisation can only be held personally liable for the criminal acts of the organisation if they had some measure of personal involvement in the matters at issue. Because of the broad definition of a 'party' in Section 21 of the Criminal Code, criminal charges can be laid against the organisation and against any of its directors, officers, or employees who knowingly carry out the alleged criminal acts, who do or omit to do anything for the purpose of aiding a person to commit the offence, who direct or encourage a person to commit an offence, or who are part of an agreement (or conspiracy), to compel the illegal conduct. In addition, under Canadian law, wilful blindness can be used as a substitute for knowledge.

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5 *R. v. Petroles Global Inc.*, 2012 QCCS 5749.

Accordingly, when an organisation commits a criminal offence, whether its senior officers or 'directing minds' are at risk of being held liable as well depends on the extent of their involvement and knowledge (or wilful blindness). In addition, other lower level managers or employees who knowingly carry out the criminal offence or who knowingly aid or abet others can also be held liable.

#### vi Penalties

Penalties for violation of the anti-corruption offences in the Criminal Code include unlimited fines for corporations, up to five years' imprisonment for individuals (including directors and officers who assist or encourage the commission of the offence), forfeiture of any proceeds (not just profits) obtained by the illegal act, and debarment and disability to contract with the government for both individuals and corporations.

### III ENFORCEMENT: DOMESTIC BRIBERY

Historically, Canada has seen relatively little domestic bribery enforcement. However, while Canada has only seen three reported decisions in the past two years substantively relating to Sections 121, 122, 123 and 426 of the Criminal Code (none of which involved public companies),<sup>6</sup> there are a number of ongoing high-profile cases involving domestic corruption.

For example, two former executives of SNC-Lavalin, including its former CEO, are facing fraud and bribery charges under the Criminal Code relating to a contract for a multi-billion dollar health facility at the McGill University Health Centre in Montreal. In addition, SNC-Lavalin's former executive vice-president of construction has recently agreed to plead guilty to Swiss charges of bribery, money laundering and corruption, and is currently cooperating with Swiss authorities. Canadian authorities are also awaiting his extradition to Canada from Switzerland, which is expected as early as spring 2015, where he will face fraud, bribery and money laundering charges.

Also ongoing is the Charbonneau Commission inquiry into corruption in the management of public construction contracts in Quebec. Although the final report of the Charbonneau Commission inquiry is not expected until early 2015, the inquiry has heard testimony of rampant corruption in municipal contracting in Quebec. There have been wide ranging allegations against a large number of municipal officials, suggesting that they accepted bribes in return for awarding municipal construction contracts. Notably, allegations of corruption have resulted in the resignation of Michael Applebaum and Gerald Tremblay (former mayors of Montreal), and Gilles Vaillancourt (former mayor of Laval). Mr Applebaum and Mr Vaillancourt both face charges under the Criminal Code. Mr Applebaum has been charged with 14 offences under the Criminal Code including fraud, breach of trust, and municipal corruption. Mr Vaillancourt faces 12 charges under the Criminal Code that include conspiracy, fraud, breach of trust, and gangsterism. Additionally, there have been widespread allegations of collusion on the part of numerous engineering and construction firms when bidding on municipal contracts. For example,

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6 *R. v. Serre*, 2013 ONSC 1732, *R. v. Rudge*, 2013 ONSC and *R. v. Akolo*, 2014 BCPC 103.

Antonio Accurso, a well-known magnate in the construction industry who testified in front of the Commission in September 2014, has been targeted by Quebec's anti-corruption agency, Unité permanente anticorruption, for alleged corruption in contracts in the municipalities of Laval and Mascouche. Mr Accurso has also been charged by the RCMP for conspiracy, fraud, forgery and breach of trust on allegations that officials with the Canada Revenue Agency helped his construction firms avoid paying federal taxes.

#### IV FOREIGN BRIBERY: LEGAL FRAMEWORK

##### i CFPOA

The CFPOA criminalises bribery of foreign officials, whether that bribery occurs within Canada or abroad. Section 3 of the CFPOA is the centrepiece of the act. It criminalises providing a benefit to a foreign public official, either in return for an act or an omission by the official, or to induce the official to influence the foreign state or public international organisation for which the official performs duties or functions. The anti-bribery provisions contained within Section 3 of the CFPOA are in many respects similar to those contained within the Foreign Corrupt Practices Act of 1977 (FCPA) in the United States.

A foreign public official is defined in the CFPOA as a person who performs public duties or functions for a foreign state. This includes a person employed by a board, commission, corporation or other body or authority that is performing a duty or function on behalf of the foreign state, or is established to perform such a duty or function. This includes employees of wholly or partially state-owned or controlled corporations, and may extend to employees and members of political parties if they perform public duties or functions for a foreign state.<sup>7</sup>

The June 2013 amendments have expanded the jurisdictional reach of the CFPOA. The CFPOA as it was originally drafted contemplated territorial jurisdiction over the offence, which required a real and substantial connection between Canada and the alleged misconduct for successful prosecution. This requirement significantly limited Canada's ability to pursue charges under the CFPOA as some portion of the formulation, initiation or commission of the offence had to have taken place within Canada before Canadian courts could assert jurisdiction. However, as discussed further below, the amendments to the CFPOA have now introduced nationality jurisdiction by deeming the actions of Canadian citizens, permanent residents, corporations, societies, firms or partnerships on a worldwide basis to be acts within Canada for the purpose of the CFPOA. As a result, Canadian citizens and companies are now subject to worldwide regulation by Canadian authorities under the CFPOA, regardless of whether the entirety of the alleged misconduct occurred abroad. There are, however, limits to the jurisdiction of Canadian authorities. In 2014, the Ontario Superior Court held that Canada's jurisdiction under the CFPOA does not extend to a foreign national who is not physically present in Canada. However, the court left open the possibility of prosecution under the CFPOA

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<sup>7</sup> CFPOA, *supra* note 1 at Section 2. See also, *R. v. Karigar*, 2013 ONSC 5199.

of a foreign national in the event Canadian authorities could ‘lay hands’ on the foreign person either by that person coming to Canada or through extradition procedures.<sup>8</sup>

Following the amendments, the CFPOA also now includes an offence that criminalises the concealment of bribery in company accounting records. This new offence is discussed further below (see Section V, *infra*).

## ii Penalties

A CFPOA violation can result in imprisonment for up to 14 years (increased from a five-year maximum pursuant to the 2013 amendments).<sup>9</sup> A corporation convicted of a CFPOA offence can also be subject to significant fines. There is no upper limit to the fines that can be imposed and the quantum is left to the discretion of the court. All fines are also subject to an automatic 15 per cent ‘victim surcharge’.

Sentences, including fines, will be based on the circumstances of each case, including a consideration of the range of sentences that have been imposed in the past for similar offences. Canada does not have any formal sentencing guidelines. Therefore, for sentencing guidance, reference may be made to United States FCPA cases, which have been accepted as applicable precedents in Canadian proceedings.

In addition, Canadian courts can and have ordered corporate probationary terms, including the appointment of a third-party monitor (for discussion of the *Niko* case, see Section VI, *infra*). Conviction under the CFPOA and certain offences under the Criminal Code can also result in debarment or incapacity to contract with the government. Any proceeds (not just profits) obtained as a result of a CFPOA or Criminal Code offence may also be ordered to be forfeited to the Crown.

## iii Organisational liability

The discussion of organisational liability in Section II, *supra* is equally applicable to offences in the CFPOA. Accordingly, Section 22.2 of the Criminal Code can be used to assert organisation liability for foreign bribery offences.

# V ASSOCIATED OFFENCES: FINANCIAL RECORD KEEPING AND MONEY LAUNDERING

## i New books and records offence in the CFPOA

As part of the 2013 amendments to the CFPOA, a new offence was created for concealing bribery in accounting records. Pursuant to the new books and records provisions, it is an offence in Canada to keep secret accounts, falsely record, not record or inadequately identify transactions, enter liabilities with incorrect identification of their object, use false documents, or destroy accounting books and records earlier than permitted by law for the purpose of concealing bribery of a public official. Similar to the bribery offence

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8 *Chowdhury v. Canada*, 2014 ONSC 2635 at para 57.

9 CFPOA, *supra* note 1 at Section 3.

under the CFPOA, the new books and records provisions carry a maximum sentence of 14 years' imprisonment.<sup>10</sup>

While this new offence shares some similarity with the books and records provisions of the FCPA, it is not likely to have the same impact in Canada as it has had in the United States because of the lack of a Canadian civil resolution mechanism. As noted, in Canada the new books and records provisions are purely criminal (as with all other corruption-related offences in the Criminal Code and the CFPOA), meaning both that the authorities must prove an offence to the higher standard of proof, and also that there is no option for a resolution outside the criminal justice system.

## ii Canada's anti-money laundering regime

Money laundering has been a Criminal Code offence in Canada since 1989. In addition to the Criminal Code, other statutes relevant to anti-money laundering in Canada include the Proceeds of Crime (Money Laundering) and Terrorist Financing Act<sup>11</sup> (PCMLTFA).

The RCMP has specialised units that focus on economic crimes such as money laundering. The Proceeds of Crime (POC) Branch of the RCMP investigates money laundering and targets the proceeds of organised crime for seizure under Part XII.2 of the Criminal Code. The POC Branch has 256 members and support staff in 19 POC units, 12 of which are Integrated Proceeds of Crime units, which include members of other police forces, the Canada Revenue Agency, the Department of Justice, forensic accountants and seized property management personnel. There are also 43 members in five money laundering-specific teams located in Vancouver, Calgary, Toronto, Ottawa and Montreal. The Branch has seized over \$243 million worth of criminal assets since 2000.

Canada's Financial Transactions and Reports Analysis Centre (FINTRAC) also plays an important role in Canada's anti-money laundering regime. FINTRAC operates within the ambit of the PCMLTFA. Its mandate is to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorist activities, while ensuring the protection of personal information under its control.<sup>12</sup>

## VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

### i Recently decided cases

There have been three high-profile prosecutions under the CFPOA in the past two years. In June 2011, Niko Resources (Niko) pled guilty to an offence under Section 3(1)(b) of the CFPOA for bribing a public official in Bangladesh through the provision of the use of a \$190,000 vehicle and a trip valued at \$5,000. Niko and the Crown put forward

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10 Ibid, Section 4.

11 SC 2000, c. 17.

12 The Financial Transactions and Reports Analysis Centre of Canada, 'Who We Are', [www.fintrac-canafe.gc.ca/fintrac-canafe/1-eng.asp](http://www.fintrac-canafe.gc.ca/fintrac-canafe/1-eng.asp).

a joint submission for a fine amounting to \$9.5 million in total.<sup>13</sup> In addition, Niko's sentence provided for three years' probation with extensive monitoring conditions. In this case, the Prosecutor relied on US FCPA cases as sentencing precedents.

In January 2013, Griffiths Energy International (Griffiths) plead guilty to an offence under Section 3(1)(b) of the CFPOA and agreed to pay a fine totalling \$10.35 million in relation to it having entered into consulting agreements to make payments in the amount of \$2 million to two entities owned and controlled by Chad's ambassador to Canada and his spouse. In assessing the fine, the court noted that Griffiths self-reported, took the extraordinary step of sharing privileged materials, spent \$5 million conducting an internal investigation, had to postpone its planned IPO at a cost of \$1.8 million and implemented a robust anti-corruption compliance programme and internal controls. Without these mitigating circumstances, it is likely that the fine would have been much more significant.<sup>14</sup>

In August 2013 a decision in the trial of Nazir Karigar, the first individual charged under the CFPOA, was released. Mr Karigar was a former employee of Cryptometrics, a company developing facial-recognition software for airports and governments. The RCMP laid charges against Mr Karigar individually, alleging that he violated the CFPOA by paying bribes to Indian officials in relation to a security system contract. Notably, the trial judge convicted Mr Karigar notwithstanding the lack of evidence that bribes were actually paid, holding that Section 3 of the CFPOA also prohibits any conspiracy or agreement to bribe foreign public officials. Accordingly, it was held that the prosecution does not have to prove that a bribe was actually paid and received.<sup>15</sup> Mr Karigar was sentenced to three years in prison.<sup>16</sup> This is the first time that a jail term has been handed out to an individual convicted under the CFPOA. This case will likely stand as a precedent for sentencing in future corruption cases.

As a corollary to the investigation into Mr Karigar, in June 2014, the RCMP charged US nationals Robert Barra (former Cryptometrics CEO), Dario Berini (former Cryptometrics COO) and UK national Shailesh Govinda, who worked with Cryptometrics, with bribing a foreign public official under the CFPOA and fraud contrary to Section 380 of the Criminal Code.

## ii Ongoing investigations

The high-profile investigation into SNC-Lavalin and its subsidiaries remains ongoing. On 1 September 2011 the RCMP raided SNC-Lavalin's offices in connection with a corruption probe into the bidding process for the World Bank-funded Padma Bridge

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13 Niko Resources Ltd, press release, 'Niko agrees to Pay \$9,499,000 According to Agreed Statement of Facts' (6 July 2005), [www.nikoresources.com/upload/news\\_release/141/01/press-release.pdf](http://www.nikoresources.com/upload/news_release/141/01/press-release.pdf).

14 Agreed Statement of Facts. Her Majesty the Queen and Griffiths Energy International Inc., dated 24 January 2013 and submitted to the Alberta Court of Queen's Bench 22 January 2013.

15 *R. v. Karigar*, 2013 ONSC 5199 at paras 28–29.

16 *R v. Karigar*, 2014 ONSC 3093 at para 37.

Project in Bangladesh. On 11 April 2012, two former executives of SNC-Lavalin were charged with one count each of corruption under the CFPOA. Additional charges against three other individuals, including an SNC-Lavalin senior executive were laid in September 2013. In addition, in April 2013, SNC-Lavalin agreed to a 10-year ban from World Bank projects. In June 2013, SNC-Lavalin offices in Algeria were raided for information on potential bribes paid regarding certain infrastructure contracts SNC-Lavalin that had bid on.<sup>17</sup>

SNC-Lavalin has also been embroiled in an investigation into bribes provided to Saadi Gaddafi, the son of the late Libyan dictator Muammar Gaddafi. In February 2014, Sami Bebawi, former senior executive with SNC-Lavalin, was charged with bribing a foreign public official under the CFPOA.<sup>18</sup>

The RCMP has also recently indicated that it has 36 active and ongoing CFPOA investigations.

## VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Canada is a member of the Organisation for Economic Co-operation and Development (OECD). It took part in negotiating the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was the impetus for passing the CFPOA. While passing the CFPOA in 1999 allowed Canada to ratify the convention, in the following years Canada faced significant international scrutiny over what was perceived as an ineffective and inefficient enforcement of its international anti-corruption legislation. In March 2011 the OECD Working Group on Bribery issued a report imploring Canada's government to urgently take up measures to facilitate the prosecution of its nationals for bribery of foreign public officials.

The amendments to the CFPOA and recent prosecutions were the government of Canada's response to this international scrutiny. The amendments took into consideration a number of recommendations from the OECD's March 2011 report and have been designed to bring Canada's anti-corruption enforcement regime in line with those of other leading nations.

## VIII LEGISLATIVE DEVELOPMENTS

On 19 June 2013, the amendments to the CFPOA received royal assent following passage by the Parliament of Canada on 18 June 2013. The amendments are intended to close significant loopholes, create new offences and generally strengthen Canada's primary international anti-corruption legislation.

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17 Dave Seglins and John Nichol, 'SNC-Lavalin offices in Algeria raided amid bribery probe', CBC News (3 June 2013), [www.cbc.ca/news/canada/snc-lavalin-offices-in-algeria-raided-amid-bribery-probe-1.1348485](http://www.cbc.ca/news/canada/snc-lavalin-offices-in-algeria-raided-amid-bribery-probe-1.1348485).

18 'Former SNC-Lavalin executive on the lam faces additional obstruction charge,' *National Post* (11 September 2014) A6.

The amendments are a significant development for Canadian anti-corruption and anti-bribery law. As noted above, paired with the relatively recent increase in investigations and prosecutions, the amendments highlight the increased importance of a strong anti-corruption compliance programme.

In addition to the new books and records offence noted above, the following are the key changes and additions that the amendments introduce:

- a* Nationality Jurisdiction: prior to the amendments the CFPOA contained a significant loophole by applying territorial jurisdiction. Territorial jurisdiction created enforcement difficulties as there must be a territorial nexus between Canada and the offence for the CFPOA to apply. The amendments have closed the territorial jurisdiction loophole by employing nationality jurisdiction in line with other global anti-corruption legislation, such as the FCPA. The relevant provision deems acts of Canadian citizens, permanent residents, corporations, societies, firms or partnerships on a worldwide basis to be acts within Canada for the purposes of the CFPOA. This provision essentially subjects all Canadian citizens and companies to global regulation by Canadian authorities under the CFPOA.
- b* Increased penalties: the amendments have significantly increased the penalties for violations of the CFPOA. Maximum imprisonment for violation of the CFPOA is now 14 years, as opposed to five years prior to the amendments.
- c* No facilitation payments: prior to the amendments, an exception from the CFPOA's bribery prohibition existed in respect of facilitation payments. Under the amendments, the exception for facilitation payments will eventually be removed. The timing for removal of such an exception is subject to a further order of the Governor in Council.
- d* No for-profit requirement: prior to the amendments, application of the CFPOA was restricted to for-profit transactions. This allowed for potential arguments that any particular payment did not violate the CFPOA because it was not directly tied to a for-profit purpose. Under the amendments, this potential argument is no longer available as the for-profit restriction has been removed.
- e* Double jeopardy: previously, the CFPOA did not specifically address the potential availability of double jeopardy protection in circumstances involving prosecutions for the same conduct in different jurisdictions. While common law arguments for such protection did exist, the availability of a double jeopardy defence was by no means certain. The amendments now clarify this uncertainty so that Canadian companies and individuals tried and sentenced in another jurisdiction cannot be convicted for the same conduct in Canada (subject to certain exceptions).

## **IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

When faced with a potential corruption issue, and an associated internal investigation, it is important for companies to understand Canadian privilege laws and how to properly protect privilege through the course of the investigation. Without careful consideration, privilege can inadvertently be waived, potentially resulting in loss of privilege over investigation documents or a company's counsel becoming a witness. While a full review

of the law of privilege in Canada is beyond the scope of this chapter, it is important to determine the purpose and scope of the investigation early in the process, as well as involve counsel (internal or external, depending on the circumstances) to protect privilege. Properly structuring an investigation through counsel can go a long way towards ensuring that privilege is protected under Canadian law.

Another important consideration when setting corporate policies and responding to potential bribery and corruption incidents is consideration of the treatment of whistleblowers under Canadian law. Section 425.1 of the Criminal Code makes it an offence for an employer or person acting on behalf of an employer to take disciplinary measures against an employee to prevent them from, or as retaliation for, whistle-blowing. Therefore, corporate policies should be tailored to comply with this provision. In addition, if an incident occurs, and particularly if the authorities are involved in an investigation, there needs to be very careful messaging to employees to ensure that this provision is not violated.

## **X COMPLIANCE**

One weakness in Canada's current anti-corruption landscape is the lack of transparency when it comes to compliance expectations, and how a robust anti-corruption compliance programme will factor into prosecution and sanctioning decisions if a company faces a potential corruption-related offence. There is no doubt that the compliance steps that a particular company takes are taken into consideration in the event of a corruption-related prosecution, as seen in the *Griffiths* case, where the improved compliance measures were taken into account as a mitigating factor in sentencing, though the precise amount of credit is unclear. While the *Griffiths* case, as well as jurisprudence and guidance documents from other jurisdictions are useful as some level of precedent, Canada's anti-corruption landscape would certainly benefit from a formal guidance piece in relation to expected compliance methods, and how such methods will be considered in both prosecution and sentencing decisions.

Another significant weakness in Canada's current anti-corruption regime is the lack of a civil resolution option. As the CFPOA and Criminal Code are pure criminal legislation, no option for resolution outside the criminal justice system currently exists. Practically, that means that the only resolution options available for companies and individuals is a guilty plea to a criminal offence and to be sentenced accordingly. Given the prominence that self-reporting has had in enforcement regimes in other jurisdictions, and particularly the United States, the lack of a civil resolution option, particularly for companies that detect, discontinue and self-report foreign corruption matters, is a significant shortcoming in the current Canadian regime.

## **XI OUTLOOK AND CONCLUSIONS**

The current anti-corruption landscape in Canada is stronger than it has ever been in the past. Awareness and enforcement of anti-corruption legislation is at an all-time high, and the amendments to the CFPOA culminate an increasing effort by the Canadian government to combat bribery and corruption by Canadian citizens and companies.

In the international arena, both the scope and reach of the CFPOA has been expanded by these amendments, underscoring the need for companies with international operations to ensure implementation of robust anti-corruption compliance programmes to deter and detect improper conduct.

On the domestic front, as the Charbonneau Commission inquiry continues to uncover corruption in Quebec, there will be an increased focus on uncovering and prosecuting domestic corruption in Canada.

## Appendix 1

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# ABOUT THE AUTHORS

### **MARK MORRISON**

*Blake, Cassels & Graydon LLP*

Mark Morrison is a partner in the Blakes litigation group, with a focus on anti-corruption compliance, white-collar crime defence, competition and commercial litigation. Mark regularly advises Canadian and multinational corporate clients on compliance with domestic and international anti-corruption legislation, undertakes internal anti-corruption audits and investigations, assists clients with anti-corruption due diligence during mergers and acquisitions and has successfully defended complex Criminal Code anti-corruption cases. Mark has undertaken internal anti-corruption investigations and assisted companies in resolving anti-corruption issues arising from conduct in Africa, Central America, South America and Asia. Examples of Mark's experience defending corporate clients and individuals in white-collar crime cases include defences such as: numerous Criminal Code matters including charges alleging bribery of public officials and cross-border conspiracy charges; Competition Act charges of bid rigging and allegations of price fixing; occupational health and safety charges; environmental charges; and matters before the Securities Commission. Mark has been recognised by *Who's Who Legal* as one of Canada's leading investigations and business crime defence lawyers, in *The Legal Media Group Guide to the World's Leading White-Collar Crime Lawyers*, and as a *Benchmark Canada* 'litigation star' in white-collar crime and class actions.

### **MICHAEL DIXON**

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Michael Dixon is a partner in the Blakes litigation group, with a focus on criminal law, anti-corruption and commercial disputes. Michael regularly assists clients in complex multijurisdictional investigations. He also regularly provides advice on domestic and international anti-corruption laws, including advice on gifts and hospitality, client entertainment, travel and other business development practices. Michael was also

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