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Anti-Corruption

Canada: Law & Practice

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practiceguides.chambers.com

2021

CANADA

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

On 17 December 1998, Canada ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Canada also agreed to the 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials. In addition to the OECD Convention, Canada is a party to the Inter-American Convention against Corruption (ratified 1 June 2000), and the United Nations Convention against Corruption (ratified 2 October 2007).

1.2 National Legislation

Canada followed through on its obligation under the OECD convention to implement legislation to criminalise bribery of foreign public officials by enacting the federal Corruption of Foreign Public Officials Act (CFPOA) on 14 February 1999. The CFPOA only addresses the bribery of public officials who are outside Canada.

The federal Criminal Code contains a number of domestic offences for bribery, fraud, breach of trust, corruption, and influence-peddling, among other offences, which are applicable to both public officials and private parties. The province of Quebec is the only sub-federal jurisdiction in Canada with its own anti-corruption legislation. Its Anti-Corruption Act came into force on 13 June 2011, at a time when allegations of significant corruption in relation to public construction contracts were being investigated.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There is limited official guidance relating to the interpretation and enforcement of Canada's anti-bribery/anti-corruption regime. In May 1999, the federal Department of Justice published The Corruption of Foreign Public Officials Act: A Guide. It provides a general overview and background information about the CFPOA. However, it has not been updated to reflect amendments to the CFPOA since its creation and does not provide significant guidance.

The Public Prosecution Service of Canada (PPSC) is the national prosecuting authority for federal offences, including violations of the CFPOA (offences under the Criminal Code are primarily the responsibility of provincial Attorneys General). The PPSC has a Deskbook that sets out guiding principles as well as directives and guidelines regarding the exercise of federal prosecutorial discretion. The PPSC Deskbook contains a specific guideline for prosecutions under the CFPOA; however, it contains little information of practical use for the non-prosecutor. Similarly, the PPSC's Proposed Best Practices for Prosecuting Fraud Against Governments does not contain information regarding interpretation and enforcement.

1.4 Recent Key Amendments to National Legislation

In response to criticism about low levels of enforcement, the CFPOA was significantly expanded through amending legislation in June 2013. The amendments broadened the scope and application of Canada's anti-bribery of foreign public officials regime, established new offences, and increased penalties, among other changes. More recently, the elimination of an exception in the CFPOA for facilitation payments (arising from the 2013 amending legislation) came into force on 31 October 2017.

On 19 September 2018, amendments to the Criminal Code authorising the use of remediation agreements (ie, deferred prosecution agreements) became available as a means of resolving criminal charges against businesses for certain offences under the Criminal Code and other criminal statutes, including the CFPOA. Deferred prosecution agreements have yet to be used in Canada since becoming available. They have been a source of considerable controversy in the few instances where they have been sought, most notably in a case involving Canadian construction and engineering giant SNC-Lavalin Group Inc.

2. Classification and Constituent Elements

2.1 Bribery

Bribery of Foreign Public Officials

Section 3(1) of the CFPOA makes it an offence for anyone

"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 decision of the foreign state or public international organisation for which the official performs duties or functions."

Definition of a Foreign Public Official

Foreign public officials are defined in section 2 of the CFPOA as:

- a person who holds a legislative, administrative or judicial position in a foreign state;
- a person who performs public duties or functions for a foreign state, including a person employed by a board,

commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
- an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

The CFPOA offence of bribing a foreign public official is a fully mens rea offence where Crown prosecutors need to prove guilt beyond a reasonable doubt.

Bribery of Domestic Public Officials

The Criminal Code contains a number of bribery and corruption offences related to government activity, including bribery of judicial officers (section 119), bribery of officers, such as police and persons employed in the administration of justice (section 120), frauds on the government (section 121), breach of trust by a public officer (section 122), municipal corruption (section 123), selling or purchasing public office (section 124), and influencing or negotiating appointments or dealing in offices (section 125). The Criminal Code also contains more general offences of fraud (section 380) and secret commissions (section 426), which apply to activities between private sector parties in addition to conduct involving public officials.

Each of the above-noted Criminal Code offences has different constituent elements; however, generally speaking, the Criminal Code provisions that address bribery and corruption in the public sphere (sections 119-125) contain similarly broad language to that of section 3(1) of the CFPOA. As a result, if the conduct involves a public official and is:

- direct or indirect;
- includes a loan, reward, commission, money, valuable consideration, office, or employment, or other advantage or benefit which:
  - (a) is given, offered, agreed, demanded, accepted, obtained; and
  - (b) relates to an official, an official's family, or to anyone for the benefit of an official;
- it is likely to be captured by one or more offences.

The definitions of "office" and "official" in the Criminal Code (section 118) are broad. They include any office or appointment in the government, a civil or military commission, a position or any employment in a public department, or anyone appointed or elected to discharge a public duty.

For the offences of bribery of judicial officers (section 119) and bribery of officers (section 120), it is an element of both offences that the offering, accepting, or soliciting of a bribe must be done "corruptly". There is no definition of the meaning of "corruptly" in these offences in the Criminal Code. However, Canadian courts have held that the term in this context has the same meaning as in the offence of secret commissions (section 426). It refers to an act done mala fide, not bona fide, and designed, wholly or partially, for the purpose of bringing about the effect forbidden by the offence (see, eg, R v Brown, [1956] OR 944, 116 CCC 287 at paras 20-21).

Bribery of judicial officers (section 119), which includes judges and members of Parliament and provincial legislatures, must be connected to an act by the recipient of the bribe in his or her official capacity. Bribery of officers (section 120), which includes police officers and persons employed in the administration of justice, does not have the same requirement; an offence may be committed as long as there is intent to interfere with justice.

The Criminal Code provisions referenced above are full mens rea offences. They require proof of conscious intent — namely, that the accused set out deliberately to commit the prohibited act while having subjective knowledge of the circumstances. In short, the supplier of a bribe must be aware that they are giving or offering to give a bribe to a person who is receiving the bribe because of their position and with the intention of influencing the recipient's conduct. Similarly, the recipient must have subjective knowledge and intention when accepting or offering to accept a bribe in order to possess the necessary mens rea for the commission of an offence.

Bribery in a Commercial/Other Setting

In the private or public sphere, it is an offence under the Criminal Code, directly or indirectly, corruptly to give, offer or agree to give or offer to an agent or to anyone for the benefit of the agent, any reward, advantage, or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person in relation to the affairs or business of the agent's principal (section 426). It is also an offence (under the same section) for anyone who is an agent to receive a secret commission by demanding, accepting, offering or agreeing to accept any reward, advantage, or benefit of any kind in exchange for an act described above. To qualify as an offence:

- an agency relationship must have existed;
- the agent must have received the benefit;
- the benefit must have been provided as consideration for an act to be done or not done in relation to the principal's affairs;
- the agent must have failed to make adequate and timely disclosure of the benefit; and
- the accused must have been aware of the agency relationship and knowingly provided the benefit as consideration for

an act to be done or not done in relation to the principal's affairs.

There is no general definition of bribery under Canadian law. As noted above, there are similarities between sections of the Criminal Code and section 3 of the CFPOA, which generally capture the direct or indirect offer or acceptance of a benefit by a public official or private party, in exchange for the recipient of the benefit doing or not doing something in their official capacity, or related to the affairs or business of their principal.

The Criminal Code does not define the meaning of "benefit", or "reward", "advantage" or "valuable consideration". Certain other terms used in the offences describe specific benefits that are more easily defined and understood (eg, commission, money, loan, employment) or that are defined in the Criminal Code (eg, office).

Decisions by the Supreme Court of Canada have noted the extremely broad scope of the terms "benefit", "advantage", etc, and that they can include non-criminal conduct, such as the giving or receipt of certain gifts or trivial favours (eg, the purchase of a cup of coffee or lunch, or offering someone a ride when they are caught in the rain). As a result, the court has sought to limit the scope of these terms by evaluating on a case-by-case basis whether a benefit, reward, advantage, or valuable consideration confers a "material economic advantage". This determination requires an examination of the relationship between the parties and the scope of the benefit. The closer the relationship between the parties (ie, family members or good friends versus business/professional contacts or mere acquaintances), and the smaller the benefit, the less likely it is that a benefit would satisfy the constituent elements of the Criminal Code offences. Ultimately, it is a question of fact for a judge or jury to determine based on all the evidence in a case (R v Hinchey, [1996] 3 SCR 1128, 147 Nfld & PEIR 1, at paras 40-70).

The CFPOA only criminalises the supply side of corruption (ie, the offering of bribes). In contrast, under the Criminal Code, it is also an offence to "accept" or "receive" a bribe (sections 119, 120, 121, 123, 124, 125, and 426).

The foregoing offences do not depend upon the consideration of whether the intended advantage or outcome for which a bribe was offered or accepted actually occurs. The fact that a bribe is offered or accepted can give rise to an offence.

Hospitality, Gifts, and Promotional Expenditures

The CFPOA exempts certain hospitality expenditures, gifts and promotional expenditures that are referenced in a saving provision (section 3(3)). Lawful gifts typically include items of nominal value (eg, reasonable meals and entertainment expenses proportionate to norms for the industry, cab fare, company promotional items, etc) and reasonable travel and accommodation to allow foreign public officials to inspect distant company facilities or receive required training.

The CFPOA historically contained an exception for facilitation payments made to foreign officials. On 31 October 2017, this exception was repealed. As a result, facilitation payments can give rise to an offence under section 3(1) of the CFPOA (as they can under the United Kingdom's Bribery Act).

There are no de minimis or other exceptions for the offences in the Criminal Code. However, Canada's federal and provincial governments provide guidance on the acceptable provision of gifts, hospitality and other expenses to certain public officials. For example, the federal Policy on Conflict of Interest and Post-Employment permits public servants to accept "gifts, hospitality and other benefits […] if they are infrequent and of minimal value, within the normal standards of courtesy or protocol, arise out of activities or events related to the official duties of the public servant concerned, and do not compromise or appear to compromise the integrity of the public servant concerned or of his or her organisation" (Appendix B, Requirement 2.3). Similarly, the Ontario conflict of interest rules permit public servants to accept "a gift of nominal value given as an expression of courtesy or hospitality if doing so is reasonable in the circumstances" (Ontario Regulation 382/07, section 4(2)).

In assessing whether a gift is a benefit or advantage constituting a secret commission, factors of significance include the nature of the gift; the prior relationship, if any, between the giver and the recipient; the manner in which the gift was made; the agent's/employee's function with their principal/employer; the nature of the giver's dealings with the recipient's principal/employer; the connection, if any, between the recipient's job and the giver's dealing; and the state of mind of the giver and the receiver (see, eg, R v Greenwood, 5 OR (3d) 71).

Unlike the United Kingdom's Bribery Act, failure to prevent bribery is not an offence under Canadian law.

Definition of Public Officials

As previously noted, the CFPOA defines a foreign public official in section 2 as:

- a person who holds a legislative, administrative or judicial position in a foreign state;
- a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

- an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

This definition covers many types of state enterprises.

For the purposes of the Criminal Code offences that criminalise bribery and corruption in the public sphere (section 119-125), the definitions of "office" and "official" in the Criminal Code (section 118) broadly include anyone holding any office or appointment under the government, a civil or military commission, a position or any employment in a public department, or appointed or elected to discharge a public duty. Employees of Crown corporations or arm's-length federal business enterprises are not explicitly captured by the definition of "office" or "official". However, they may be considered public officials if the nature of their position and employment fits within the definitions in the Criminal Code.

Bribery between Private Parties in a Commercial/Other Setting

As previously noted, bribery of foreign public officials is an indictable criminal offence under section 3 of the CFPOA.

The CFPOA does not apply to bribery involving private parties in commercial settings.

As previously noted, bribery between private parties in a commercial setting is captured by the secret commissions offence in the Criminal Code (section 426). The general fraud offence in the Criminal Code also covers bribery in the private sphere: it is an offence for anyone to defraud the public or any person, whether ascertained or not, of any property, money, valuable security, or service, by deceit, falsehood, or other fraudulent means (section 380). The Supreme Court of Canada has determined that "other fraudulent means" is a term encompassing all other means which can properly be stigmatised as dishonest (R v Riesberry, 2015 SCC 65, at para 23). The two essential elements that must be established in a successful prosecution by the Crown are "dishonesty" and "deprivation" (R v Olan, [1978] 2 SCR 1175, at para 13). Dishonest conduct involves the wrongful use of something in which another person has an interest and has the effect, or risk, of depriving the other person of what is theirs. The use is wrongful if it is conduct that a reasonable decent person would consider dishonest and unscrupulous (R v Zlatic, [1993] 2 SCR 29). When the conduct is based on "other fraudulent means", dishonesty is to be measured against the objective standard of what a reasonable person would consider being dishonest without regard for what the accused actually knew (R v Wolsey (2008), 233 CCC (3d) 205 (BCCA)). Actual economic loss is not required for there to be deprivation. This element is satisfied when detriment, prejudice, or risk of prejudice to the economic interests of the victim is established (R v Olan, [1978] 2 SCR 1175, at para 13).

2.2 Influence-Peddling

The CFPOA does not criminalise influence-peddling.

Section 121 of the Criminal Code establishes a number of offences involving frauds on the government. Section 121(1)(a) specifically criminalises influence-peddling. The wording of the provision captures both the person supplying or offering a bribe and the public official — as well as the official's family members or anyone for the benefit of the official — receiving or offering to accept a bribe. Whether or not the official can actually provide the outcome sought in the circumstances is irrelevant.

2.3 Financial Record-Keeping

The CFPOA includes an offence related to record-keeping. Section 4 of the Act criminalises the hiding of payments, the falsification or destruction of records, and the knowing use of false documents for the purpose of either bribing a foreign public official or hiding the bribery of a foreign public official.

The Criminal Code contains an offence that criminalises the destruction or falsification of books and documents with the intent to defraud (section 397(1)) and there are general offences of forgery and using a false document (sections 366-368), but there is no financial record-keeping offence specific to bribery or corruption in the Criminal Code. The secret commissions offence in the Criminal Code also contains a narrower offence covering the provision of "a receipt, an account, or other writing" to an agent, or the agent's use of such a record, with the intent of deceiving the agent's principal (see section 426(1)(b)). The Income Tax Act and corporate statutes such as the Canada Business Corporations Act also contain provisions related to record-keeping.

2.4 Public Officials

The CFPOA only criminalises the supply side of corruption. The Act does not create any offences, or impose specific obligations, on public officials.

Public officials in Canada are held to a high standard in the exercise of their duties. At all levels of government (federal, provincial/territorial, and municipal) public officials are governed by codes of conduct and conflict of interest rules.

When public officials abuse or take advantage of their position in a manner that amounts to fraud or a breach of trust, they can be charged under section 122 of the Criminal Code with breach of trust by a public officer. In a 2006 decision, the Supreme Court of Canada clarified the constituent elements of this offence as follows:

- the accused was an official (as defined in section 118 of the Criminal Code);
- the accused was acting in connection with the duties of his or her office;
- the accused breached the standard of responsibility and conduct demanded of them by the nature of the office;
- the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
- the accused acted with the intention to use his or her public office for a purpose other than the public good (for example, for a dishonest, partial, corrupt, or oppressive purpose) (R v Boulanger, 2006 SCC 32, at para 58). This fifth element constitutes the mens rea component of the offence of breach of trust by public officer.

Public officials who abuse their position could also be charged with the offence of frauds on the government under section 121(1)(d) of the Criminal Code. This provision applies if the public official purports to have influence with the government, a minister of the government, or an official, and accepts a bribe as consideration for co-operating, assisting, exercising influence, or an act or omission in connection with business transactions with or relating to the government, claims against the government or benefits the government is authorised or entitled to bestow, or the appointment of a person, including the public official themselves, to an office. In addition, a public official who misappropriates public funds could be charged with theft under section 330 of the Criminal Code.

2.5 Intermediaries

Section 3 of the CFPOA and many of the Criminal Code provisions previously noted establish offences which may be committed directly by the accused, or indirectly by the accused through an intermediary. The use of an intermediary will generally not shield a company or individual from criminal liability.

An intermediary may be charged as a party to the offence committed by another person if they aid or abet the commission of an offence (section 21 of the Criminal Code). An intermediary could also be charged with conspiracy to commit an offence, which is a separate offence under section 465(1)(c) of the Criminal Code.

There are also offences for counselling another person to commit an offence (Criminal Code sections 22 and 464). Counselling has been interpreted to mean "procure, solicit, or incite" another person to be a party to an offence. In certain situations, such offences could apply to the intermediary or the party enlisting the intermediary.

3. Scope

3.1 Limitation Period

Under Canadian law, there is no statute of limitations for indictable offences. Proceedings in relation to summary offences (or hybrid offences where the prosecution elects to proceed by way of summary conviction) must generally be instituted within six months of the offence (section 786(2) of the Criminal Code). All of the bribery and corruption offences under the CFPOA and the Criminal Code discussed in this chapter are indictable offences only, except for the general offence of fraud under section 380 of the Criminal Code, which is a hybrid offence. Fraud under CAD5,000 can be prosecuted by way of summary conviction.

3.2 Geographical Reach of Applicable Legislation

The default territorial principle underlying Canada's criminal law (which is codified in section 6(2) of the Criminal Code) is that no one can be convicted of an offence committed outside of Canada unless otherwise explicitly specified by Parliament. However, "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada" (ie, that there is a "real and substantial connection" to Canada) (R v Libman, [1985] 2 SCR 178, at para 74).

The CFPOA originally was based only on territorial jurisdiction (ie, offences where the conduct occurred in Canada or where there was a real and substantial link to Canada). However, the 2013 amendments added a broader nationality basis of jurisdiction. Section 5(1) of the CFPOA specifically provides that Canadian citizens, permanent residents, and corporations that commit the offence of bribing a foreign public official, or breaching the accounting provision, outside Canada (or who commit the offence of conspiring or attempting to commit these offences, the offence of being an accessory to these offences after the fact, or the offence of counselling in relation to these offences) are deemed to have committed the offence in Canada.

3.3 Corporate Liability

There is corporate as well as individual liability for bribery and corruption offences under Canadian law. The specific offences created by the CFPOA can be committed by any "person" as defined in section 2 of the Criminal Code, as can the Criminal Code offences. The definition of "person" includes "organisations", which in turn is defined to encompass various types of entities including corporations.

Section 22.2 of the Criminal Code extends criminal liability to a corporation (or other organisation) when a "senior officer":

- acting within the scope of his or her authority is a party to an offence;
- having the mental state required to be a party to an offence and acting within the scope of his or her authority, directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or
- knowing that a representative of the organisation is or is about to be a party to an offence, does not take all reasonable measures to stop them from being a party to the offence.

A senior officer is not only one of the directing minds of the corporation, but is defined to include a representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities. In the case of a corporation, senior officers include directors, the chief executive officer and the chief financial officer (section 2 of the Criminal Code). In addition, courts have interpreted mid-level employees with significant managerial responsibility to meet this definition (see R v Pétroles Global Inc, 2015 QCCS 1618).

Whether the acquirer of a business can be held liable for pre-acquisition conduct of a corporation depends upon the manner in which the transaction is effected. In share acquisitions and amalgamations, the potential liabilities of the acquired corporation continue to exist. However, in an asset acquisition, it will be necessary to assess the contract between the parties to determine whether such potential liabilities were assumed by the purchaser or retained by the vendor.

4. Defences and Exceptions

4.1 Defences

The CFPOA contains exceptions to the offence of bribing a foreign public official where: (a) the benefit given is either permitted or required under the laws of the applicable foreign state or foreign public international organisation; or (b) payment was made to reimburse reasonable expenses incurred in the promotion or demonstration of the person's products and services or the execution or performance of a contract between a person and the foreign state.

None of the Criminal Code bribery or corruption offences contains any exceptions.

The CFPOA and Criminal Code offences discussed in previous sections all require a mental element of knowledge and intent (and certain offences require "corrupt" intent). As such, a number of defences recognised at common law and in the Criminal Code are available for these offences (for example, defences that negate proof of the prohibited act, such as duress, or that negate the proof of the mental element, such as mistake of fact). In addition, defendants may contest any required element of the conduct covered by each offence (ie, actus reus, for example, whether the alleged benefit does, in fact, confer a material economic advantage).

4.2 Exceptions

There are no exceptions to these defences.

4.3 De Minimis Exceptions

There are no de minimis exceptions under Canadian law for any of these offences.

4.4 Exempt Sectors/Industries

Canada's laws do not exempt any sectors or industries from the CFPOA or Criminal Code bribery offences.

4.5 Safe Harbour or Amnesty Programme

No formal safe harbour, amnesty or other self-reporting programmes have been established for bribery or corruption offences by the authorities that enforce Canada's anti-corruption laws (see **5. Penalties**). However, self-reporting, co-operation with an investigation and compliance or remediation efforts are all potential "mitigating factors" which may be considered in the negotiation of a plea agreement with prosecutors, or by a court during the sentencing process. For example, Griffiths Energy International self-reported a bribe to the RCMP that lead to a plea to bribery under the CFPOA in R v Griffiths Energy International. The CAD10.4 million fine imposed by the court reflected the company's self-reporting and co-operation, including the significant sum of money saved by not having to investigate the matter and hold a full-blown trial (see R v Griffiths Energy International, [2013] AJ No 412, at paras 15-18, 21).

Canada also recently enacted a Remediation Agreements' regime which allows prosecutors and parties involved in corruption and various other types of offences to negotiate resolutions which do not include a criminal conviction. Self-reporting is a significant factor in the exercise of prosecutorial discretion for such resolutions (see **5. Penalties**).

5. Penalties

5.1 Penalties on Conviction

The maximum penalties under Canada's bribery and corruption laws are very significant. The CFPOA offences and the offences of bribery of judicial officers, bribery of officers, and

fraud under the Criminal Code can be punished by jail terms of up to 14 years for individuals. Other Criminal Code offences discussed herein are subject to jail terms of up to five years. The CFPOA and the Criminal Code also provide for a fine to be imposed on corporations and individuals in an amount at the discretion of the court.

In addition, corporations convicted of a CFPOA offence or certain Criminal Code offences face debarment from bidding on projects financed by the World Bank Group pursuant to the Bank's fraud and corruption policies, and cross-debarment by other multi-lateral development banks pursuant to the Agreement for Mutual Enforcement of Debarment Decisions. Similarly, the Canadian government's Integrity Regime debars individuals and corporations from contracting or subcontracting with federal government departments and agencies after being convicted of CFPOA offences or certain Criminal Code offences. The debarment period can range from ten years (with a possible reduction of ineligibility of up to five years) for convictions under the CFPOA and sections 119, 120, and 426 of the Criminal Code, to an open-ended period of time for convictions under sections 121, 124, and 380 of the Criminal Code. Some provincial and municipal governments' procurement regimes or codes of conduct also include debarment rules.

5.2 Guidelines Applicable to the Assessment of Penalties

The general principles and guidelines for sentencing both corporations and individuals in the Criminal Code (part XXIII, especially sections 718, 718.1, 718.2, 718.21, and 718.3) are applicable to the CFPOA as well as the Criminal Code bribery and corruption offences. Generally, there is no minimum or maximum fine for indictable offences, although section 380(1.1) provides for a minimum of two years' imprisonment when the fraud is over CAD1 million. In determining an appropriate sentence, the court will consider a number of factors, including the gravity of the offence; any advantage realised by the corporation by committing the offence; the degree of planning, duration, and complexity of the offence; whether there are other penalties being imposed, or related consequences, etc.

In accordance with the principles of sentencing, repetition of an offence after a previous conviction requires that a harsher sentence be imposed than the sentence that the accused previously received (R v Wright (2010), 261 CCC (3d) 333 (Man CA)).

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

The CFPOA and the Criminal Code do not impose on individuals or corporations any compliance programme or other obligations to prevent corruption. Nevertheless, well-managed companies in Canada will undertake risk assessments and implement compliance programmes to attempt to prevent the serious consequences that may arise from bribery or corruption. Under the Criminal Code, measures taken to reduce the likelihood of committing a subsequent offence are to be considered as a mitigating factor in sentencing a corporation (section 718.21(j)).

As previously noted, failure to prevent bribery is not an offence under Canadian law.

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Under Canadian law, no person has an obligation to report an offence or assist the police voluntarily in their investigation.

The CFPOA and the Criminal Code do not contain any self-reporting requirements. However, under the new remediation agreement regime that came into effect in Canada in 2018, whether a corporation self-reported is a factor for the prosecutor to consider in determining whether negotiation of a remediation agreement is in the public interest and appropriate in the circumstances. As previously noted, self-reporting and co-operation with an investigation are also factors under general sentencing principles.

As of June 2015, the Extractive Sector Transparency Measures Act requires that Canadian corporations operating in the extractive sector meet certain threshold conditions to disclose publicly, on a yearly basis, specific payments made to all governments in Canada and abroad. The purpose of the Act is to enhance transparency and deter corruption in the extractive sector. Failure to file a disclosure statement, filing a false or misleading statement, and structuring payments to avoid triggering reporting requirements are all offences under this legislation, which are punishable on summary conviction by fines of up to CAD250,000.

6.3 Protection Afforded to Whistle-Blowers

There are limited protections for whistle-blowers under Canadian law. Section 425.1(1) of the Criminal Code and certain other specific legislation (such as the federal Public Servants Disclosure Protection Act and Competition Act, and the Public Service of Ontario Act, 2006) prevents employers from threatening or taking retaliatory action to deter or punish whistle-blowing employees.

6.4 Incentives for Whistle-Blowers

The Ontario Securities Commission (OSC) and the Canada Revenue Agency (CRA) operate whistle-blower programmes that provide financial incentives to whistle-blowers under certain conditions. However, Canadian securities commissions and taxation authorities do not have enforcement powers for Canada's anti-bribery or corruption offences.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

Provisions regarding whistle-blowing can be found in Section 425.1(1) of the Criminal Code and certain other specific legislation (such as the federal Public Servants Disclosure Protection Act and the Competition Act, and the Public Service of Ontario Act, 2006).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

There is exclusively criminal enforcement of anti-bribery and anti-corruption laws in Canada. There are no civil or administrative enforcement bodies with responsibility for the CFPOA or offences under the Criminal Code.

7.2 Enforcement Body

Canada's national police force, the Royal Canadian Mounted Police (RCMP), has sole authority for enforcing the CFPOA. The RCMP also enforces the Criminal Code and assists other police forces with investigations, typically when enforcement efforts are national, trans-provincial, or trans-national in scope. The RCMP's jurisdictional powers are set out in the Royal Canadian Mounted Police Act.

At the provincial level, major municipal or provincial police services enforce the Criminal Code corruption and bribery provisions.

Police authorities have broad powers of search, seizure, information gathering (eg, by production orders or by wire-tapping) and arrest, which are codified in the Criminal Code and are subject to judicial oversight.

Prosecution of CFPOA offences and Criminal Code offences investigated by the RCMP are handled by the PPSC. The "Crown Attorney" (prosecutor) offices within provincial ministries of attorneys general are generally responsible for the prosecution of Criminal Code offences at the provincial level. Prosecutors review evidence referred to them by police authorities and take independent decisions regarding the laying of charges, conduct of prosecutions, and negotiation of guilty pleas (which are subject to court approval) or remediation agreements.

Prosecutors and police authorities often work together to ensure investigations are complete before charges are laid, so that prosecutors can bring cases to trial promptly. In Canada, an accused person has the right to be tried within a reasonable period of time. In R v Jordan (2016 SCC 27), the Supreme Court of Canada established that this means a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable. In the absence of exceptional circumstances, the presumptive ceiling is 18 months for summary conviction cases tried in provincial courts, and 30 months for indictable offences tried in the superior courts (or cases tried in provincial courts after a preliminary inquiry).

COVID-19 has drastically reduced the progress of investigations of bribery and corruption and enforcement of the CFPOA and the Criminal Code corruption and bribery provisions. The trend toward working from home means police authorities do not have the same level of access to their offices. Further, social distancing efforts and reduced in-person contact have made it more difficult for police authorities to engage with witnesses. As a result, investigations are delayed. However, COVID-19-related suspensions of various legal time periods likely means that delays in prosecutions arising from COVID-19 will not be impacted by the presumptive ceilings established in R v Jordan.

7.3 Process of Application for Documentation

Enforcement authorities' powers to gather evidence using search warrants, production orders (subpoenas) and wire-tapping generally require advance authorisation by the courts (see, eg, Criminal Code sections 185, 487, 487.014). Production orders can only be used to compel records from persons who are not under investigation.

7.4 Discretion for Mitigation

As of 19 September 2018, amendments to the Criminal Code have created the option of entering into a remediation agreement (essentially a deferred prosecution agreement). This type of resolution is likely to be used for some cases under the CFPOA and for Criminal Code bribery and corruption offences where it may be appropriate to avoid the severity of criminal convictions and automatic debarment consequences under applicable government procurement regimes.

Prosecutors have full discretion to initiate and conduct a prosecution and to negotiate guilty pleas (which are subject to approval by the court). Even if there is a reasonable prospect of conviction, prosecutors can, at their sole discretion, refuse to conduct a prosecution or stop the proceedings if a prosecution would not best serve the public interest.

7.5 Jurisdictional Reach of the Body/Bodies

The scope of jurisdiction under the CFPOA and applicable Criminal Code provisions is discussed in previous sections. However, Canadian courts cannot exercise personal jurisdiction over individuals or corporations unless they are properly charged and brought before the court in Canada. The RCMP does not have any formal powers to take enforcement action outside of Canada.

The RCMP may co-operate with foreign policing agencies, as well as international organisations such as the World Bank, in the investigation and enforcement of the CFPOA and the Criminal Code outside of Canada. For example, Canada has mutual legal-assistance treaties with numerous countries that facilitate cross-border criminal investigations. (These treaties are implemented pursuant to the Mutual Legal Assistance in Criminal Matters Act.)

Canada also has extradition treaties with numerous countries. Such treaties allow Canada to seek the extradition of Canadian citizens or foreigners for purposes of prosecution of offences under Canadian laws, including the CFPOA and the Criminal Code, in certain circumstances.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

Canadian construction and engineering giant SNC-Lavalin Group Inc was charged with criminal fraud under section 380(1)(a) of the Criminal Code and bribery contrary to section 3(1)(b) of the CFPOA in February 2015, in connection with millions of dollars of alleged bribes for public officials in Libya. In October 2018, the company announced that the Director of Public Prosecutions (head of the PPSC) had informed SNC-Lavalin that it would not be invited to negotiate a remediation agreement. In May 2019, a judge of the Court of Quebec ruled at a preliminary inquiry that there was enough evidence to send SNC-Lavalin to trial. In December 2019, the construction division of the company pleaded guilty to the charge of criminal fraud and negotiated a penalty of a CAD280 million fine (paid over five years) and a three-year probation order. All charges against the parent company and its international unit, and the charges under the CFPOA, were withdrawn as part of the guilty plea.

In January 2020, Sami Bebawi, an SNC-Lavalin executive, was sentenced to eight and a half years' imprisonment for fraud, corruption of foreign officials and laundering the proceeds of crime in connection with the company's conduct in Libya. The prison sentence is currently under appeal. Bebawi was also fined CAD24.6 million in lieu of the seizure of additional proceeds of crime. Failure to pay the fine within six months will result in Bebawi serving an additional ten-year prison sentence.

Between 2011 and 2015, the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (the Charbonneau Commission) investigated and reported on widespread corruption and collusion in the awarding and management of public construction contracts in Quebec. The final report made 60 recommendations to address the problems exposed during the inquiry. More than 300 people and companies have been charged since 2011 by Quebec's anti-corruption police force, Unité permanente anti-corruption (UPAC).In September 2020, the Court of Quebec ordered a stay of proceedings against Nathalie Normandeau, a former cabinet minister in Quebec, on corruption-related charges investigated by UPAC because the prosecution took too long. As previously noted, the Supreme Court of Canada's 2016 decision in R v Jordan established presumptive time limits between the laying of charges and the completion of a trial. Normandeau had been charged in March 2016 with fraud, corruption, conspiracy, breach of trust and fraud against the government in relation to a contract award for a water-treatment plant.

In September 2020, Ontario's Serious Fraud Office (SFO), a team of investigators and prosecutors dedicated to complex financial crimes, undertook what appears to be its first enforcement activity since the SFO was established in mid-2019. Charles Debono was deported to Canada from the Dominican Republic and charged by the Ontario Provincial Police with fraud over CAD5,000, laundering crime proceeds, bribery of an agent, personation with intent, and using, dealing and acting on a forged document in connection with a CAD56-million debit terminal Ponzi scheme.

In November 2020, the RCMP charged Damodar Arapakota for bribing a public official from Botswana, contrary to section 3(1) of the CFPOA. It is alleged that Mr Arapakota, a former executive from IMEX Systems Inc, provided financial benefit for a Botswanan public official and his family. New management of IMEX Systems Inc self-reported the allegations of Mr Arapakota's conduct to the RCMP.

7.7 Level of Sanctions Imposed

Canada does not yet have an extensive history of prosecutions under the CFPOA. Since the adoption of the legislation, there have been three guilty pleas: a fine of CAD25,000 against Hydro-Kleen Group in 2005, a CAD9.5 million fine and a three-year monitoring order against Niko Resources in 2011 and, in 2013, a CAD10.4 million fine against Griffiths Energy.

On 6 July 2017, the Ontario Court of Appeal upheld a decision convicting Nazir Karigar under the CFPOA for conspiring to bribe a foreign public official. Karigar was the first person to defend charges under the CFPOA at trial and be convicted. He was sentenced to three years' imprisonment. Karigar's applica-

tion for leave to appeal to the Supreme Court of Canada was dismissed on 15 March 2018. Subsequently, in January 2019, Robert Barra and Shailes Govinda were also convicted under the CFPOA in connection with the same conspiracy. In March 2019, both men received sentences of two and a half years' imprisonment. Notably, Barra and Govinda are not Canadian and were extradited from the United States and the United Kingdom, respectively, to face trial in Canada.

As previously noted, Sami Bebawi's recent prosecution under the CFPOA resulted in a sentence of eight and a half years (although this sentence was also for convictions on other charges under the Criminal Code, not just the CFPOA).

In a case that went all the way to the Supreme Court of Canada, Bruce Carson, a senior aide to former Prime Minister Stephen Harper, was convicted of influence-peddling for using his government contacts to promote the purchase of water-treatment systems by indigenous communities. In July 2018, Carson was given a suspended sentence, one year of probation, and was ordered to perform 100 hours of community service.

Many individuals have been prosecuted and found guilty of a range of fraud and bribery offences under the Criminal Code as a result of the Charbonneau Commission and UPAC investigations. Sentences imposed range from conditional sentences, to be served in the community, to six years' imprisonment. The severity of punishment in these cases primarily reflects the level of the individual's involvement in the offence, as well as other aggravating factors.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

The OECD Working Group on Bribery issued its Phase 3 Report on Canada's implementation of the OECD Anti-Bribery Convention in March 2011. The report made a number of recommendations to strengthen the CFPOA and Canada's anti-bribery regime generally. Canada subsequently amended the CFPOA in June 2013, by adding a nationality basis for jurisdiction, establishing new offences, and increasing penalties, among other changes. More recently, the elimination of the exception in the CFPOA for facilitation payments was proclaimed into force on 31 October 2017.

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

After the enactment of the remediation agreement provisions of the Criminal Code in 2018, there are no changes or additions to Canada's anti-bribery regime on the immediate horizon.

The SNC-Lavalin case signals a strong commitment to CFPOA enforcement as it involves a major Canadian-owned multinational enterprise. The RCMP has also indicated that it has numerous other CFPOA investigations in progress, but it is not clear how many will lead to prosecutions.

McMillan LLP is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally through its offices in Vancouver, Calgary, Toronto, Ottawa, Montreal and Hong Kong. The firm represents corporations, other organisations and executives at all stages of criminal, quasi-criminal and regulatory investigations and prosecutions for all types of white-collar offences, including fraud, bribery and corruption, money laundering, cartels and price fixing, insider trading or other securities offences, economic sanctions, export/import controls and tax offences, as well as offences under health and safety, discrimination, immigration, financial services, energy, environmental and other regulatory regimes. The team also manages and defends against search warrants, inspection orders, interviews given under statutory compulsion, wire-tapping orders, and other investigative actions, and advises on risk management, regulatory compliance, reputation management and defamation, among other matters.

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