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Canada

BRIBERY & CORRUPTION

Contributing firm



Baker McKenzie

John Pirie

Partner | john.pirie@bakermckenzie.com

Ahmed Shafey

Partner | ahmed.shafey@bakermckenzie.com

Christina Doria

Partner | christina.doria@bakermckenzie.com

Ben Sakamoto

Associate | ben.sakamoto@bakermckenzie.com

This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Canada.

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CANADA

BRIBERY & CORRUPTION



1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

Foreign bribery is governed by the *Corruption of Foreign Public Officials Act (CFPOA)*, which applies to all Canadian citizens, permanent residents of Canada, persons anywhere whose acts or omissions have been committed in Canada, as well as organisations incorporated or formed in Canada. Under the CFPOA, it is an offence to:

- give or offer a loan, reward, advantage or benefit of any kind to a foreign (non-Canadian) public official or to any person for the benefit of a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties/functions; or
- induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions.

The *Criminal Code* governs domestic bribery and corruption. Under the *Criminal Code* it is an offence to:

- give or offer any loan, reward, advantage or benefit of any kind to public officials (or their family members) for co-operation, assistance, exercise of influence or an act or omission in connection with any government business;
- bribe any municipal official, officer or judicial officer; or
- provide a "secret commission" to the agent of a principal, including giving or offering a reward, advantage or benefit as consideration for doing or not doing anything related to the affairs or business of an agent's principal, or demanding, accepting, or offering to accept such a reward, advantage or benefit, or otherwise knowingly being privy to a secret commission.

Offences with respect to public officials and secret commissions are subject to fines and/or imprisonment for up to five years, while offences with respect to officers and judicial officers may be liable to fines and/or imprisonment for up to 14 years. Corporate liability can arise where an offence is committed with the knowledge or direction of a "senior officer", which has been held to include individuals responsible for managing an important aspect of the activities of a business, and is not limited to senior management.

Quebec, the only province that broadly addresses bribery at a provincial level through its Anti-Corruption Act, establishes various offences pertaining to corruption, breach of trust, malfeasance, collusion, fraud and influence peddling in the public sector and in the administration of justice; the misuse of public funds; and the gross mismanagement of public contracts. The statute provides a number of penalties associated with hindering investigations and reprisals against whistleblowers.

2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

The Royal Canadian Mounted Police (RCMP), Canada's federal police service, is responsible for investigating the majority of white-collar criminal offences, and all bribery related offenses under the *Criminal Code* and *CFPOA*. The RCMP has specific programmes in place to address anti-corruption and financial crimes.

The federal Public Prosecution Service of Canada (PPSC) is an independent prosecuting authority that prosecutes federal corruption offences. The PPSC publishes guidelines for the application of the provisions of the *Criminal Code* that deal with remediation agreements, Canada's version of deferred prosecution agreements.

Provincially, Crown attorneys are responsible for prosecuting *Criminal Code* offences and in Ontario are part of the provincial Ministry of the Attorney General. Crown counsel also form part of the Ministry of the

Attorney General and prosecute regulatory offences, and may also act as civil counsel to other ministries.

- b. is appointed or elected to discharge a public duty;

3. How is bribery defined?

Bribery is not specifically defined in either the *Criminal Code* or the *CFPOA*. Instead, as discussed in response to question 1 above, these statutes broadly prohibit conferring benefits to public officials under certain circumstances.

An office is defined as:

- a. an office or appointment under the government,
- b. a civil or military commission, or
- c. a position or an employment in a public department.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

Yes. The *CFPOA* only prohibits conferring a benefit to foreign public officials. The *CFPOA* defines a "foreign public official" as:

- a. a person who holds a legislative, administrative or judicial position of a foreign state;
- b. 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
- c. an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

The main prohibition against private bribery in Canada is found at section 426 of the *Criminal Code*. Section 426 addresses secret commissions, which are more a fraud on an employer than a fraud on the public. The offence prohibits providing a benefit to an agent in consideration for doing something in return without the agent's principal's consent. Receipt of the benefit by the agent is also prohibited.

By contrast, sections 121 and 123 of the *Criminal Code* addresses frauds on the government and municipal corruption. Section 121 prohibits conferring benefits to officials. Section 123 prohibits conferring benefits to municipal officials. The *Criminal Code* defines an "official" as a person who:

- a. holds an office, or

5. What are the civil consequences of bribery in your jurisdiction?

In Canada, there are no specific civil causes of action for bribery. However, an individual who engages in bribery or corrupt activities may face tort or contract liability if another party suffers damages as a result of the bribery or corrupt activities. The Canadian government has also introduced an Integrity Regime which applies to all federal procurement and real property transactions, and debars suppliers who have been convicted of "integrity offences", such as bribery and corruption offences.

6. What are the criminal consequences of bribery in your jurisdiction?

Domestic offences with respect to public officials and secret commissions are subject to fines and/or imprisonment for up to five years, while offences with respect to officers and judicial officers may be liable to fines and/or imprisonment for up to 14 years. Corporate liability can arise where an offence is committed with the knowledge or direction of a "senior officer", which has been held to include individuals responsible for managing an important aspect of the activities of a business, and is not limited to senior management.

Foreign bribery is governed by the *CFPOA* which includes penalties, including prison terms up to 14 years and unlimited fines for corporate offenders.

In addition, corporations convicted of a *CFPOA* offence or certain offences under the *Criminal Code* may be debarred from bidding on projects financed by the World Bank Group or be debarred by other multi-lateral banks under the Agreement for Mutual Enforcement of Debarment Decisions. Canada's Integrity Regime debars individuals and corporations from contracting or sub-contracting with federal government departments and agencies, if they have been convicted of a *CFPOA* offence or certain criminal offences.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?

Yes. Hospitality, travel and entertainment expenses may create liability under the *Criminal Code* or *CFPOA*. There are no commonly accepted monetary standard or frequency limit for the gifts and hospitalities extended to government officials. The *Conflicts of Interest Act*, requires Canadian public office holders to report receiving gifts or meals from a single source in a 12-month period if the total value exceeds CAD 200. While the reporting threshold may inform what constitutes an appropriate gift, even business amenities that do not exceed this reporting threshold may be prohibited. The Values and Ethics Code for the Public Sector and the complementary Policy on Conflict of Interest and Post-Employment permit gifts, hospitality and other benefits that are infrequent, of minimal value, within the normal standards of courtesy and protocol, and do not compromise integrity.

8. Are political contributions regulated?

Contributions to political parties and candidates are regulated under federal and provincial law, with low annual contribution limits as well as specific prohibitions on contributions by corporations, trade unions, associations and groups.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

With very narrow exceptions, facilitation payments are prohibited under Canada's *Criminal Code* and under the *CFPOA*.

10. Are there any defences available?

There are exceptions to the offence of bribing a foreign public official set out in the *CFPOA* where: (a) the benefit given is either permitted or required under the laws of the applicable foreign state or foreign public international organization; 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.

There are no exceptions listed for *Criminal Code* bribery

or corruption offences.

The *CFPOA* and *Criminal Code* bribery offences require a mental element of knowledge and intent. As such, a number of defenses recognized at common law are available for these offences (for example, duress and mistake of fact).

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

As a practical matter, companies should have a well-developed compliance program in place to mitigate potential liability and penalties. This is obviously important when it comes to policies covering dealings with government officials, but equally important will be compliance with procedures governing dealings with agents and contractors, and the ongoing training of employees on compliance with the company's program.

One specific area where an effective compliance program may limit corporate exposure is with respect to offences under *section 22.2(1)(c)* of the *Criminal Code*, where a senior officer who knows that a representative of the corporation is or is about to be a party to an offence, fails to take "all reasonable measures to stop them from being a party to the offence". The law remains unsettled in this regard, however if a compliance program spells out mandatory steps to be followed that are considered "reasonable measures", it may qualify as a defense where the area of conduct was under the supervision of senior officers. Such a program, however, will not be a defense at the senior officer level, but may serve in mitigation of sentence.

The law in Canada has recognized a number of high-level elements that make up an effective compliance program. These elements include:

- Top Level Commitment: This requires that senior officers specifically address bribery risks.
- Communication, including training: Communication should come from the top, and should include the creation of a confidential means to report bribery conduct.
- Risk Assessment: External risks (such as country risk and sector risk) should be evaluated along with internal risks (such as poor training, cultures that promote excessive risk-taking and poor financial controls).
- Due Diligence: Commercial organizations should put in place due diligence procedures that adequately inform the application of

proportionate measures designed to prevent persons associated with them from bribing on their behalf.

- Proportionate Procedures: a specific, tailor made approach will be preferable to a general approach.
- Monitoring and Review: Methods may include staff surveys, testing and verification of procedures by outside parties and certified compliance by multilateral bodies.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Under both the *Criminal Code* and the *CFPOA*, individuals, public officials and corporate entities can be prosecuted for bribery offenses. As referenced above, companies may be held liable where the act was committed with the knowledge of a senior corporate officer. Recent case law suggests that “senior officers” can, in some instances, include those in middle management positions.

Of note, under both the *Criminal Code* and the *CFPOA* liability can extend to the acts of those who “directly or indirectly” commit a bribery offense. As a consequence, a parent company can be held liable for acts carried out by a subsidiary, and where a company uses a third party agent who commits an offense, depending on the circumstances, liability can arise for both the company and agent. Under the *Criminal Code*, a parent company can also be liable for aiding or abetting or counselling an offense carried out by a subsidiary.

There are also bribery related provisions in the Conflicts of Interest Act, and the Canada Elections Act, which apply to public office holders and individuals running for election to the House of Commons respectively.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?

The Government of Canada has not published specific guidance, setting out the elements of an effective corporate compliance program. However, as Canada is a party to the OECD Conventions, Global Affairs Canada raises awareness of the OECD Guidelines for Multinational Enterprises, which were updated in May 2011. These guidelines give recommendations to multilateral enterprises operating in or from OECD

countries. The guidelines provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. Canada has a National Contact Point to support these guidelines.

In addition, the Government of Canada conducts outreach to enhance awareness and to encourage companies to adopt measures that to meet their legal obligations under the *CFPOA* and certain offences under the *Criminal Code*, to have a zero-tolerance approach to the bribery of foreign public officials.

Government bodies which provide training and outreach and/or raise awareness of anti-corruption issues include: the RCMP, Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), Global Affairs Canada, Export and Development Canada, the Canada Revenue Agency (CRA), the Department of Justice, Public Services and Procurement Canada, the Competition Bureau of Canada, and the Treasury Board Secretariat.

The RCMP has also developed an anti-corruption awareness risk assessment tool for stakeholders, which may be provided by the RCMP on request.

14. Does the law provide protection to whistle-blowers?

While there is no comprehensive whistle-blower legislation in Canada, the law provides some protections to whistle-blowers. The *Criminal Code* prohibits employers or their agents from:

- Threatening an employee to prevent that employee from providing information to law enforcement; or
- Retaliating against an employee who has provided information to law enforcement.

Provincial securities legislation also provides protections, but these protections vary from province to province. Alberta, Manitoba, Saskatchewan, New Brunswick, and Ontario have enacted protections, while other provinces have yet to legislate formal protections. Some provincial securities regulators, i.e.: the Ontario Securities Commission, have implemented incentive programs for whistle-blowers.

The CRA offers financial incentives for whistle-blowers who provide information about international non-compliance of Canadian taxpayers.

Under Canada’s Public Servants Disclosure Protection Act, federal public sector employees must create a code of conduct to protect whistle-blowers. Similar provincial

legislation exists in some provinces.

Under the federal *Competition Act*, any person may notify the Competition Bureau of an offence and request that their identity be kept confidential. Employers are prohibited from retaliating against whistle-blower employees who act in good faith and on the basis of a reasonable belief, through dismissing, suspending, demoting, disciplining, harassing or otherwise disadvantaging an employee, or denying an employee a benefit of employment.

15. How common are government authority investigations into allegations of bribery?

Canada is increasingly focusing on combating bribery, and will investigate complaints or information from whistle-blowers concerning bribery.

Police, regulators and prosecutors may initiate an investigation. The RCMP and other police services may initiate investigations independently or working alongside Crown counsel. Crown counsel play a larger role in the early stages of an investigation where judicial authorisations are required for the purposes of evidence gathering. Federally, the PPSC has drafted guidelines governing investigations and the relationship between crown counsel and investigative agencies.

16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any impact and, if so, what?

In 2017, in line with the objectives of the US Magnitsky Act, the Canadian Parliament enacted legislation of its own allowing the federal government to freeze the assets of foreign nationals responsible for, or complicit in, significant corruption or violations of internationally recognised human rights.

In September 2018, Canada enacted legislation allowing for remediation agreements in relation to certain economic crimes committed by corporations and other specified types of organizations, known as deferred prosecution agreements. Since becoming available, deferred prosecutions have not yet been used, though have been the source of controversy when they are sought, for example in the case of the Canadian SNC-Lavalin Group Inc.

In May 2020, Canada amended certain regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)*. The amendments bring Canada's efforts in this regard into line with standards

established by the inter-governmental Financial Action Task Force. Requirements to establish due diligence vis-à-vis customers now apply to accounting firms, casinos, government agencies, dealers in precious metals and real estate agents. The regulations were also updated to cover cryptocurrency businesses.

In June 2021, additional amendments were made to the *PCMLTFA* to strengthen Canada's regime. These amendments include rules for specific sectors, including: accounting firms, dealers in precious metals and stones, money service businesses, and securities dealers. The amendments also provide for rules of general application to all persons and entities in business sectors that are subject to the *PCMLTFA* (reporting entities). For businesses that operate in these sectors, new anti-money laundering rules may apply to their operations. This may include enhanced counter-party due diligence requirements or government reporting obligations. The updates to rules of general application to all reporting entities include:

- Requirements to update information on beneficial ownership, on an ongoing basis (which previously only applied to high risk clients).
- Special record-keeping requirements for entities that are widely held or publicly traded trusts.
- Screening requirements for politically exposed persons and heads of international organizations.
- Screening requirements to file large virtual currency transaction reports in prescribed circumstances.
- New third party determination rules requiring that reasonable measures are taken to determine whether a third party is involved in certain transactions.

In 2017, the Supreme Court of Canada clarified the legal doctrine that provides that "no cause of action may be founded on an immoral or illegal act". This doctrine (*ex turpi causa*) sometimes arises when a company brings a claim stemming from wrongdoing by an insider of the company. In *Livent Inc v Deloitte & Touche*, the Court confirmed a modern approach to the doctrine, emphasising that it is designed to protect the integrity of the justice system and should be used sparingly, with its application limited to cases where the individual wrongdoer would personally profit from the company's claim.

In September 2020, the Competition Bureau strengthened its relationships with its antitrust counterpart agencies in Australia, New Zealand, the UK

and the USA by entering into the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, aimed at enhancing and reinforcing existing assistance arrangements to allow for greater co-ordination in investigations, collaboration on cross-border matters, and intelligence-sharing.

Canada has shown a trend of increased *CFPOA* enforcement. On December 15, 2019 Mr. Sami Bebawi was found guilty on a number of bribery and corruption charges, and on January 10, 2020, he was sentenced to 8 years and 6 months of imprisonment. Mr. Bebawi is appealing his conviction. On December 18, 2019, SNC-Lavalin Construction Inc. pleaded guilty to fraud contrary to the *Criminal Code*. The PPSC and counsel for SNC-Lavalin Construction Inc. made joint submissions for a fine of \$280,000,000. The court also ordered a 3 year probation order that the company cause the SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures.

The Covid-19 pandemic has impacted and will continue to impact efforts to combat bribery and corruption in Canada. First, corruption and emergencies fuel each other. During the pandemic, governments have had urgent need for large sums of money and essential goods. This urgency and need can increase opportunities for corruption and bribery to occur, while weakening the mechanisms to prevent it. At the same time, the presence of bribery and corruption will undermine a government's ability to deliver essential services during an emergency. The second impact Covid-19 may have in Canada is increased awareness and training in anti-bribery and corruption measures. However, this is more likely to occur once the Federal Government and provinces are no longer in states of emergencies and can begin to address the detrimental side effects of the Pandemic.

17. Is there a process of judicial review for challenging government authority action and decisions?

Decisions and actions of government bodies and agencies are subject to judicial review at both the provincial and federal level, depending on the source of statutory authority of the administrative decision maker. A party can challenge both the substantive decision itself and/or the fairness (or lack thereof) of the process that led to the decision. Only final decisions are subject to judicial review and, depending on the jurisdiction, there may be strict time limits for commencing an application. Generally, a party must exhaust all alternative remedies within the statutory or administrative framework being

challenged before applying for judicial review.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

Recent reforms are set out above under question 16. There no material reform plans to Canada's bribery and anti-corruptions laws on the agenda at this time.

19. To which international anti-corruption conventions is your country party?

Canada is a signatory to the OECD Convention. The *CFPOA* was enacted in order to implement Canada's obligation under this Convention. As a member of the Organization of the American States, Canada is also party to the *Inter-American Convention against Corruption (IACC)* along with 35 other Member States. Finally, Canada ratified the *United Nations Convention against Corruption* in 2004.

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

Yes. Both lawyer-client (also known as legal advice privilege or attorney-client privilege) and litigation privilege (also known as work product privilege) may apply to a lawyer-led investigation in Canada.

Lawyer-client privilege protects communications between a lawyer and client that is in furtherance of providing legal advice. The communication must be in relation to the giving or obtaining of legal advice and there must be an expectation of confidentiality over the communication. Lawyer-client privilege may apply to communications from both in-house and outside counsel. It is the client that holds the privilege and only the client can decide to waive the privilege.

Often in an internal investigation initiated to address potential bribery or corruption it is the work product itself that the party wants to protect. Litigation privilege applies where the document at issue was created for the dominant purpose of preparing for actual or anticipated litigation. Litigation privilege may extend to communications with, and documents prepared by, third parties engaged to assist with litigation (such as forensic or accounting experts).

Whether considering lawyer-client or litigation privilege it will be important to clearly establish the identity of the client at the beginning of the investigation. Is it just the corporation, does counsel also act for certain directors or officers of the company, or is the representation limited to a special committee struck for the purpose of the investigation? Clearly delineating the parameters of the relationship will help ensure privilege is not erroneously waived.

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

To date, Canada has not pursued bribery and corruption matters with the same vigour as, for example, the United States or the UK. Canada has been criticized in recent years for its limited enforcement efforts. However, as outlined above, there have been recent amendments to anti-corruption laws, including the establishment of a Serious Fraud Office (SFO) in Ontario with some noteworthy early prosecutions under way, and Canadian agencies have entered into further multi-national cooperation agreements. Increased fines and sentences have been apparent as well for corruption related offenses. Domestically, there have been a number of recent ethics inquiries into Canadian government dealings. While time will tell, on balance, these developments signal a more serious approach to preventing and pursuing corruption in this jurisdiction.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

Canadian corporations are becoming more serious about preventing bribery and corruption, particularly those with cross border operations that may be captured by aggressive regulators, like the US or UK. Canada is a resource rich country, with Canadian companies regularly conducting resource exploration and projects in other jurisdictions, which can have poorly enforced anti-corruption laws. Canadian mining companies now tend to consider bribery and corruption as one of the initial risk assessments to be undertaken before entering into a new jurisdiction, and continually train and monitor staff and agents regarding interactions with public officials, including issues around gift giving, hospitality and human rights violations. It is increasingly common to have annual 'health checks' of compliance policies and

training procedures to ensure up-to-date compliance with Canadian legislation.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

A significant challenge facing Canadian authorities is the proliferation of electronic data and the effect this has had on the time and expense of investigations. The government must accept that this challenge will continue to intensify and adequate resources will need to be allocated for appropriate electronic evidence platforms.

In addition, the Covid-19 pandemic has impacted and will continue to impact efforts to combat bribery and corruption in Canada. Corruption and emergencies fuel each other. During the pandemic, governments have had urgent need for large sums of money and essential goods. This urgency and need can increase opportunities for corruption and bribery to occur, while weakening the mechanisms to prevent it.

24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

Two serious challenges faced by Canadian businesses conducting internal investigations are:

- Defining the scope and scale of an investigation. Careful planning is necessary at the outset to ensure the investigation is proportionate and effective in isolating the relevant conduct, and the relevant universe of documents. In our experience businesses in crisis will sometimes apply parameters that are too broad in scope, which can be a costly and distracting exercise.
- Electronic document preservation, management and review. As the proliferation of electronic data expands, this aspect of an investigation has become crucial and requires the effective use of technology. Handling documents in an investigation now requires consideration of a number of overlapping regulated issues including data privacy and security of evidence.

25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

We are now seeing the impact of the Covid-19 pandemic across all business sectors, including in the exposure of increased levels of internal fraud and corruption. As in the years following 2008, we expect this trend will intensify over the next 18 months, with a range of large-scale frauds coming to light as business operations and internal procedures slowly normalize. While we expect to see this trend continue in all areas it will, not surprisingly, be most immediately apparent in the healthcare sector.

26. How would you improve the legal

framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

As mentioned above, Canada has been criticized for its relatively weak anti-corruption enforcement efforts to date. Unlike in the US, in Canada there have been limited resources focused on bribery, corporate fraud and white collar matters. Few cases have been prosecuted, and under Canada's relatively new remediation agreement regime, no agreements have been put in place to date. Ideally, Canada would send a stronger message when it comes to anti-corruption, by devoting more resources to the investigation, and prosecution of bribery and corruption. That said, the recent steps outlined under question #16 above suggest that Canada is beginning to take these matters more seriously. Time will tell.

Contributors

John Pirie
Partner

john.pirie@bakermckenzie.com



Ahmed Shafey
Partner

ahmed.shafey@bakermckenzie.com



Christina Doria
Partner

christina.doria@bakermckenzie.com



Ben Sakamoto
Associate

ben.sakamoto@bakermckenzie.com

