

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The sun is positioned in the upper right corner, creating a bright flare and casting long shadows. A large, semi-transparent purple shape overlays the left and top portions of the image. The overall color palette is dominated by purples, blues, and greys.

# Guide to Canada's Anti-Corruption Laws

# Guide to Canada's Anti-Corruption Laws

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## Introduction

This guide provides an overview of Canada's anti-corruption laws and considers measures that can help to reduce the risk of costly violations. Under Canadian law, potential consequences of corrupt acts in commercial contexts include:

- massive penalties;
- costly internal or law enforcement investigations;
- jeopardizing the completion of minority investments, control transactions and financings where potentially corrupt acts are discovered mid-stream;
- loss of business or permits and licences obtained corruptly;
- debarment by governments and governmental entities;
- exposure to damages claims by businesses whose employees were bribed; and
- significant reputational harm, even from an allegation that does not result in a conviction.

Compliance with anti-corruption laws is increasingly important in the context of transactional diligence relating to control transactions, minority investments and financings, as well as in a company's day-to-day commercial activities.

In response to these risks and stepped-up enforcement, Canadian businesses are conducting risk assessments and implementing robust compliance programs that are tailored to their individual risk profiles. For most companies, such programs will include anti-corruption policies, employee training programs and codes of conduct and increased efforts to screen contractual counterparties and business partners. However, companies doing business in high-risk jurisdictions abroad often consider additional safeguards, such as detailed third-party due diligence (particularly for in-country agents), payment monitoring and limits, and compliance audits.

## Overview of Canada's Anti-Corruption Laws

The two main statutes that address bribery and corruption<sup>1</sup> are the [Corruption of Foreign Public Officials Act](#) ("CFPOA") and the [Criminal Code](#).

- Often characterized as the Canadian equivalent to the U.S. *Foreign Corrupt Practices Act*, the CFPOA is aimed at Canadian businesses that offer bribes to public officials in other countries (including employees of foreign state-owned enterprises). The CFPOA applies to Canadian citizens, permanent residents of Canada, and entities incorporated or formed under the laws of Canada or one of the provinces or territories. It entered into force following Canada's implementation of the OECD's *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*.
- The *Criminal Code* criminalizes domestic corruption such as committing frauds on the government (bribing government officials) and paying secret commissions (commercial

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<sup>1</sup> In this guide we use "bribery" and "corruption" largely as synonyms.



bribery). The relevant provisions are wider than the CFPOA in that both the demand side (*i.e.*, the recipient of the bribe) and supply side (*i.e.*, the person paying the bribe) are subject to prohibitions. Businesses should generally be more concerned about the supply side restriction; in cases where one of its employees is bribed, the business is usually a victim – which may result in less damage to the business compared to circumstances where a company representative was the one offering the bribes – in other words, the latter situation is more likely to result in substantial fines, forfeiture and loss of licences or business (however, sometimes an employee *offering* a bribe also *receives* a bribe or kickback, so when the latter is discovered there should be some investigation to determine if the former is an issue as well). Insofar as bribery of governmental officials is concerned, it applies mainly to bribery of an “official”, defined in the *Criminal Code* as a person who holds a governmental office or position or is appointed or elected to discharge a public duty.

- Convictions under the CFPOA or the *Criminal Code* require proof of both criminal intent (*mens rea*) and the prohibited act (*actus reus*).
- A third piece of legislation, the [\*Extractive Sector Transparency Measures Act\*](#) (“ESTMA”) contains some sector-specific anti-corruption measures that are also discussed below.

## CFPOA Offences

- **Bribery:** Section 3 of the CFPOA makes it an offence for a person to bribe a foreign public official. It prohibits, directly or indirectly giving, offering or agreeing to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official (or to someone else for the benefit of the official), either as consideration for an act or omission on the part of the official in connection with the performance of his or her duties, or to induce the official to use his or her influence to affect any acts or decisions of his or her government or employer. The CFPOA also prohibits indirect bribery. As such, bribes conveyed through an agent or for the immediate benefit of someone other than the official (such as a family member) are prohibited.
- **Books and Records:** The “books and records” offence prohibits entities, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery, from making transactions that are not recorded in their books or records or maintaining off-book accounts. It also prohibits, when done for the above-noted purposes, the incorrect recording of liabilities (e.g., to conceal a liability in relation to a bribe), recording non-existent expenditures (e.g., to conceal a bribe), the knowing use of false documents, and the intentional destruction of accounting records earlier than permitted by law.
- **Facilitation Payments:** Formerly, the CFPOA had an exemption for facilitation payments for routine services such as customs clearances. This exemption no longer exists. To the extent that they fall within the general restriction of section 3, facilitation payments are criminal acts.

## Criminal Code Offences

The main Criminal Code corruption offences that potentially result in criminal liability for businesses are as follows:

- **Quid Pro Quo Arrangements:** Sections 121(1)(a) and (e) of the *Criminal Code* establish similar offences that prohibit a person from directly or indirectly offering, giving, or agreeing to give a loan, reward, advantage, or other benefit to a federal or provincial government official as consideration for cooperation, assistance, exercise of influence or any other act or omission in connection with business with the government (essentially a *quid pro quo* arrangement). No actual reciprocal act needs to be provided by the official to trigger culpability – the core of the offence is that the loan, reward, advantage, or benefit was

intended to compromise the integrity of the official. It is also not relevant whether the official has the ability to provide assistance.

- **Bribery Without Consent:** Section 121(1)(b) makes it an offence for a person, having dealings with the government, to provide, directly or indirectly, a reward, commission, or other advantage or benefit to a government official. This section does not require a *quid pro quo* arrangement. It is not an offence under this section if the reward, commission, etc., was approved in writing by the head of the branch of government with which the accused was dealing.
- **Bribery Relating to Tenders:** Section 121(1)(f) makes it an offence for anyone who has made a tender to obtain a contract with the government to directly or indirectly give or offer a reward, advantage or benefit to another person who has made a tender to obtain a contract with the government as consideration for the withdrawal of this other person's competing tender. It also prohibits the demand or acceptance of a reward, advantage or benefit as consideration to withdraw from a tender.
- **Secret Commissions:** Section 426 makes it an offence for anyone to give, offer or receive a reward, advantage, or benefit (otherwise known as a "secret commission") as consideration for committing any act in respect of the affairs or business of the person's principal (in the agency context) or employer. Secrecy is one of the main characteristics of this offence – in other words, the offer or receipt must be done without the knowledge of the person's principal or employer. As the agent or employee need not be a government official, this offence covers bribery of persons employed by non-governmental businesses.

## Penalties and Consequences for CFPOA and *Criminal Code* Violations

CFPOA and *Criminal Code* corruption offences are punishable by

- Imprisonment (up to 14 and 5 years, respectively);
- A fine in an amount that is at the discretion of the court; and
- Debarment (as detailed below).

The rules for debarment (i.e. from contracting with the federal government) are as follows:

- Those convicted under the bribery provisions in section 121 of the *Criminal Code* are also subject to **automatic debarment** (subject to a review process) under section 750(3) of the *Criminal Code* in relation to contracting with the federal government and are not eligible for the reduction or non-application described below with respect to other *Criminal Code* corruption offences;
- Other offences under the *Criminal Code* (such as secret commissions) and offences under the CFPOA are subject to a **10-year federal government debarment period** as set out in the *Ineligibility and Suspension Policy* under the federal government's Integrity Regime, which may be reduced by up to 5 years in certain circumstances. Also, in some cases, the federal government may decide not to apply the *Ineligibility and Suspension Policy* if such is considered to be in the public interest (e.g., where there is no other person capable of performing the contract).

In most circumstances, the provision of token gifts of modest value such as pens, golf balls, T-shirt, etc., or customary and modest business hospitality such as a restaurant meal will not rise to the level of an offence, provided that it is clearly not done as consideration for an act or omission.

## Exemptions

Under the CFPOA, a safe harbour exemption exists if the benefit provided was permitted or required under the laws of the foreign state where the foreign official performs his or her duties or functions. Another exemption exists where officials are reimbursed for reasonable expenses incurred in good faith by or on behalf of the public official that are directly related to the promotion, demonstration or explanation of the payor's products or services, or the execution or performance of a contract between the payor and the foreign state, for which the official has performed duties.

## ESTMA

The *Extractive Sector Transparency Measures Act* deters corruption in the mining and oil and gas sectors. Under this regime, extractive entities operating in Canada must publicly disclose certain types of payments (e.g., royalty payments, certain taxes, fees, production entitlements, bonuses, dividends, and infrastructure improvement payments) made to governments in Canada and foreign governments. Businesses subject to the ESTMA must publish annual reports disclosing such payments made during that year no later than 150 days after the end of the financial year. Reports must be made available to the public for at least five years. An entity that fails to comply with these reporting requirements is guilty of an offence punishable on summary conviction, and liable to a fine of up to C\$250,000.

## Remediation Agreements

The *Criminal Code* now includes a remediation agreement regime for businesses that is analogous to the U.S. deferred prosecution agreement process. This regime provides a potential path to resolution of a criminal matter without a trial or a potential conviction.

In deciding whether to offer to negotiate a remediation agreement, the prosecutor must form the opinion that:

- There is a reasonable prospect of conviction with respect to the offence;
- The act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed in association with a criminal organization or terrorist group; and
- Negotiating a remediation agreement would be in the public interest and appropriate in the circumstances.

In relation to the public interest test, the prosecutor must consider:

- How the circumstances were brought to the attention of law enforcement;
- The nature and gravity of the act or omission and its impact on any victim;
- The degree of involvement of senior officers of an organization in an offence and any disciplinary actions taken;
- Any reparations or other measures taken to remedy the harm and to prevent the commission of similar acts;
- Whether the organization is willing to identify other persons involved in wrongdoing related to the act or omission in question;
- Previous convictions or sanctions for similar acts or omissions; and
- Whether the organization is alleged to have committed any other offence.

If the matter relates to a potential violation of the CFPOA, the prosecutor is prohibited from considering the national economic interest, the potential effect on relations with a foreign state, or the identity of the organization or individual involved.

Remediation agreements must contain specified provisions, including:

- A statement of facts related to the offence;
- An admission of responsibility;
- A reference to the obligation to provide further information to identify other persons involved in the offence and otherwise cooperate with investigations;
- Forfeiture of property, if any, identified in the agreement as obtained from the offence;
- A financial penalty; and
- Reparations where appropriate.

Ultimately, for a remediation agreement to be finalized, it must be approved by a court in Canada.

### **Enforcement Activity**

There are an increasing number of enforcement proceedings that demonstrate that foreign anti-corruption enforcement is a priority for the Royal Canadian Mounted Police (RCMP), which is specifically charged with CFPOA enforcement in Canada. Prosecutions under the *Criminal Code* for domestic corruption are relatively rare. The federal government's annual CFPOA report, which is required to be laid before Parliament each year, states that as of August 2022 there have been eight convictions under the CFPOA, two of which are matters that are still before the courts. Notable anti-corruption matters under both the CFPOA and the *Criminal Code* include:

- In 2011, a Calgary-based oil and gas company pleaded guilty to a charge under the CFPOA for benefits given to the Minister of Energy of Bangladesh in connection with a gas pricing contract in 2011. The sentencing court imposed a C\$9.5 million fine and a probation order.
- In 2013, another company in the energy industry was fined C\$10.35 after pleading guilty to a charge under the CFPOA that it bribed Chadian officials in relation to oil and gas projects in that country. The charge related to a payment of US\$2 million under a consulting contract entered into by members of the company's senior management and a company owned by the wife of a leading Chadian diplomat. (Separately, in what was likely a demonstration of ongoing cooperation between Canadian and U.S. law enforcement, in 2021, the U.S. Department of Justice unsealed an indictment against the (now former) diplomat and a second member of the Chadian diplomatic corps for soliciting and accepting a US\$2 million bribe and conspiring to launder the bribe payment in order to conceal its true nature.)
- In 2013, an executive of a Canadian technology company was found guilty under the CFPOA and sentenced to 3 years' imprisonment for offering or agreeing to give or offer bribes to India's Minister of Civil Aviation and officials of a major airline in that country. This related to attempts to secure a major contract for the provision of facial recognition software and related equipment. In 2018, two business agents of the company were convicted for agreeing to bribe the Minister, but their 2½-year prison sentences were subsequently set aside on procedural grounds and all charges were stayed in 2021.
- In 2019, an international engineering firm pleaded guilty to committing an offence under section 380(1)(a) of the *Criminal Code* in connection with payments to secure construction contracts in Libya. A C\$280-million fine and a three-year probation order was imposed by the Court of Québec (Criminal and Penal Division).

- Also in 2019, a former executive of an entity in an international engineering firm's organization was convicted following a jury trial on five separate counts relating to fraud, corruption of foreign officials, laundering the proceeds of crime, and possession of stolen goods (in connection with a Libyan matter). In 2020, the Superior Court of Québec sentenced the former executive to 8½ years' imprisonment and ordered forfeiture of his assets, then worth over C\$4 million. He was also fined C\$24.6 million, in lieu of the seizure of additional proceeds of crime. If he failed to pay this amount within six months of sentencing, an additional 10-year prison sentence would be imposed. His conviction and sentence is currently under appeal.
- In 2020, a former executive of a technology company was charged under the CFPOA for bribing a public official from Botswana (specifically, for having allegedly provided a financial benefit for the public official and his family). This matter is ongoing.
- In 2022, two related engineering firms entered into Canada's first-ever remediation agreement, with the Province of Québec (negotiated by the Québec Crown Prosecutor's Office) in connection with the award of the Jacques Cartier Bridge refurbishment contract. Under this agreement, the two entities agreed to pay a C\$18.1 million penalty, a C\$2.5 million fine in lieu of the forfeiture of the proceeds of crime, C\$3.5 million to the victim corporation, as well as a C\$5.4 million victim surcharge fee, for a total payment of C\$29.6 million (all amounts approximate). The two entities were charged under the *Criminal Code* with the offences of fraud on the government, forgery, fraud, and conspiracy with respect to conduct entered into between 1997 and 2004.

## Compliance with Canada's Anti-Corruption Laws

To mitigate risks and potential exposure to anti-corruption law enforcement, businesses should consider updating or strengthening their compliance programs. The first step in assessing the sufficiency of a current compliance program is to conduct a risk assessment that takes into consideration the nature of the business, including (among other factors):

- whether it deals with governmental officials in any jurisdiction;
- whether it does business in high-risk jurisdictions;
- whether it uses agents; and
- any prior compliance issues.

Probation orders imposed by the courts can provide practical guidance about effective anti-corruption measures. For example, in one case the court order required the company to institute each of the following:

- A system of internal accounting controls designed to ensure that the business makes and keeps fair and accurate books, records and accounts;
- A rigorous anti-corruption compliance code and procedures designed to detect and deter violations of anti-corruption laws;
- A system of financial and accounting procedures including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records and accounts so that they cannot be used for the purpose of bribery or concealing bribery;
- Mechanisms designed to ensure that anti-corruption policies, standards and procedures are effectively communicated to all directors, officers, employees and, where appropriate, agents and business partners (including, e.g., periodic training for directors, officers and employees and annual certifications by such directors, officers and employees);

- An effective system for:
  - Providing guidance and advice to directors, officers, employees, and where appropriate agents and business partners, regarding compliance with anti-corruption compliance policies, standards and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction; and
  - Confidential reporting by employees, directors, officers, agents and business partners and protection against retaliation for reporting; and
- Oversight of all agents and business partners, including:
  - Properly documenting risk-based due diligence pertaining to the retention and appropriate and regular oversight of agents and business partners;
  - Informing agents and business partners of the business's commitment to abiding by anti-corruption laws and of the business's ethics and compliance policies and standards; and
  - Seeking compliance commitments from agents and business partners.

Businesses with “high risk” profiles may wish to increase the frequency of risk assessments of their activities and consider whether agents, and other persons acting on their behalf, are being adequately trained and vetted with respect to compliance with anti-corruption laws. In the case of foreign activities, particularly where an in-country agent is used, an on-the-ground visit to the country to assess compliance is often advisable. Third-party risk-assessment services may also be brought on board to assist in such evaluations.

## Conclusion

Recent Canadian enforcement activities demonstrate the importance for businesses to implement and strengthen anti-corruption compliance programs. To avoid significant financial, operational, and reputational consequences, any business that is considering opportunities in high-risk jurisdictions should exercise a high level of care in assessing anti-corruption compliance risks and ensure that it has a robust and up-to-date anti-corruption compliance program.

*Please do not hesitate to contact us if you have any questions about Canada's anti-corruption laws.*

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