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EXPECT THE BEST

Canada Introduces Amendments to the Corruption of Foreign Public Officials Act

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Introduction

As a member of the Organization for Economic Co-operation and Development ("OECD"), Canada signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the "OECD Convention") on December 17, 1997. To satisfy its obligations under the OECD convention, the Government of Canada implemented the *Corruption of Foreign Public Officials Act*[1] ("CFPOA"), which came into force on February 14, 1999. The purpose of the CFPOA is to discourage Canadian companies from utilizing corrupt practices abroad.

On March 18, 2011, the OECD Working Group on Bribery completed its report (the "2011 OECD Report") on Canada's enforcement of the OECD Convention.[2] Although it acknowledged Canada's recent enforcement efforts, it stated that several recommendations contained in its June 2006 report had still not been implemented.

On February 5, 2013, the Government of Canada introduced Bill S-14[3], also known as the *Fighting Foreign Corruption Act*, in the Senate. Bill S-14 attempts to address at least some of the recommendations described in the 2011 OECD Report. A brief discussion of Bill S-14 appears below.

Maximum Penalty Increased

Bill S-14 will increase the maximum penalty to imprisonment for a term of up to fourteen years. The current maximum penalty under the CFPOA is five years.

The Addition of Accounting Provisions

Unlike the *U.S. Foreign Corrupt Practices Act of 1977* (the "FCPA")[4], the CFPOA does not currently contain any provisions that prohibit off-the-books accounting practices. Bill S-14 will create an offence under the CFPOA for any person who engages in improper accounting practices in order to commit an offence under the CFPOA or to conceal such a violation; this implements one of the recommendations described in the 2011 OECD Report. The following accounting practices will be prohibited, if they are employed for the purposes of committing an offense under the CFPOA or concealing such a violation:

a) Establishing or maintaining accounts that do not appear in any required books and records;

b) Making transactions that are either not recorded in required books and records or are not adequately identified in those books or records;

c) Recording non-existence expenditures in required books and records;

d) Entering liabilities in required books and records bearing an incorrect identification of their object;

[1] S.C. 1998, c. 34.
[2] See http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/Canadaphase3reportEN.pdf.
[3] See http://www.parl.gc.ca/content/hoc/Bills/411/Government/S-14/S-14_1/S-14_1.pdf.
[4] 15 U.S.C. §§78dd-1, et seq.

e) Knowingly using false documents; or

f) Intentionally destroying required books and records earlier than permitted by law.

The maximum penalty for this offence will be imprisonment for a term of up to fourteen years.

Expansion of Jurisdiction to Include Offences Committed Outside Canada

The Canadian legal system applies a territory-based principle when determining whether it will extend criminal jurisdiction to offences that take place outside of Canada.[5] As violations of the CFPOA result in criminal penalties, it is necessary to demonstrate a real and substantial link between Canada and the act of bribing a foreign public official abroad; this requirement can make prosecutions under the CFPOA difficult.

In the United States, the FCPA applies to acts committed outside the United States. According to the FCPA, a "domestic concern" includes any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or it states, territories, possessions, or commonwealths or that has a principal place of business in the United States.[6]

The current CFPOA does not clearly extend its jurisdiction beyond Canadian territory. However, if Bill S-14 is enacted, an act or omission that would constitute an offence under the CFPOA will be deemed to have occurred in Canada if the person is:

a) A Canadian citizen;

b) A permanent resident of Canada who, after the commission of the act or omission, is present in Canada; or

c) Any public body, corporation, society, company, firm, or partnership that is incorporated, formed, or otherwise organized under the laws of Canada or a province.

This amendment implements one of the recommendations described in the 2011 OECD Report.

Elimination of the Facilitation Payments Exception

According to the current CFPOA, a facilitation payment is permitted if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including:

a) The Issuance of a permit, licence, or other document to qualify a person to do business;

b) The processing of official documents, such as visas and work permits;

c) The provision of services normally offered to the public, such as mail pick-up and delivery, telecommunications services, and power and water supply; and

d) The provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration, or the scheduling of inspections related to contract performance or transit of goods.

According to Subsection 3(5), an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision. The U.S. FCPA contains virtually identical language relating to permissible facilitation payments.

Bill S-14 will delete the facilitation payments exception from the CFPOA. As a result, Canada appears to be following the zero tolerance policy adopted by the United Kingdom, which makes facilitation payments illegal under the *Bribery Act 2010*.[7]

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[5] See *R. v. Libman*, [1985] 2 S.C.R. 178.
[6] 15 U.S.C. §78dd-2(h)(1).
[7] 2010 c. 23.

Elimination of the Requirement that Conduct be for Profit

The CFPOA prohibits the bribery of a foreign public official in order to obtain or retain an advantage in the course of business. The term "business" is currently defined in the CFPOA as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*."

Canada is the only party to the OECD Convention to have included a "for profit" requirement in its anti-corruption legislation. Once enacted, Bill S-14 will delete the reference to profit from the definition of "business" to clarify that the CFPOA applies to the conduct of all business, not just business "for profit"; this will implement one of the recommendations described in the 2011 OECD Report.

RCMP Given Exclusive Authority to Lay Charges

Bill S-14 clarifies that criminal charges for a violation of the CFPOA may only be laid by an officer of the Royal Canadian Mounted Police or any person designated as a peace officer under the *Royal Canadian Mounted Police Act*.

Conclusion

Once enacted, Bill S-14 should improve the ability of the Royal Canadian Mounted Police to prosecute Canadian entities under the CFPOA. Despite the fact that Bill S-14 did not address all of the outstanding recommendations contained in the 2011 OECD Report, it represents significant step in improving anti-corruption laws in Canada. ■