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## Canada's Corruption of Foreign Public Officials Act and Secret Commissions Offense

Stuart H. Deming

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# CANADA’S CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT AND SECRET COMMISSIONS OFFENSE

STUART H. DEMING\*

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## I. INTRODUCTION

By its enactment of the Foreign Corrupt Practices Act (“FCPA”) in 1977,<sup>1</sup> the United States became the first country to prohibit the bribery of foreign public officials.<sup>2</sup> For many years thereafter, the United States remained the only country to have implemented and enforced such a prohibition. A series of significant international developments in the 1990s and the early part of this century have dramatically changed the landscape.<sup>3</sup>

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1–78dd-3, 78ff (2013)).

2. E.g., Alan L. Monk, *The Cost of Doing Business? Laws Against Bribery of Foreign Public Officials in International Business Transactions*, FRASER MILNER CASGRAIN LLP (revised Jan. 13, 2012), available at <http://www.jdsupra.com/legalnews/the-cost-of-doing-business-laws-against-35536/>.

3. Org. for Econ. Co-operation and Dev., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999); *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status as of 20 November 2012*, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf> (last visited Sept. 28, 2013) [hereinafter *Convention on Combating Bribery Status*]; Org. of Am. States, Inter-American Convention Against Corruption, 35 I.L.M. 724 (1996) (entered into force on Mar. 6, 1997); OAS, *Signatories and Ratifications: B-58: Inter-American Convention Against Corruption, Signatories and Ratifications* (1996), available at <http://www.oas.org/juridico/english/Sigs/b-58.html> [hereinafter *Inter-American Convention Signatories*]; Council of Europe, Criminal Law Convention on Corruption, January 1, 1999, 38 I.L.M. 505 (entered into force July 1, 2002); *Criminal Law Convention on Corruption Status as of 7/6/2009*, Council of Europe, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=7/6/2009&CL=ENG> (last visited Sept. 29, 2013) [hereinafter *Status of Parties to CoE Criminal Law Convention*]; African Union Convention on Preventing and Combating Corruption, 43 I.L.M. 1 (2004) (entered into force Aug. 5, 2006), available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>; *List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption*, AFRICAN UNION, <http://www.au.int/en/sites/default/files/Corruption.pdf> (last visited Sept. 28, 2013) [hereinafter *African Union Convention List of Signatories*]; United Nations Convention against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (2003) (entered into force December 14, 2005); *Chapter XVIII Penal Matters, 14, United Nations Convention Against Corruption*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-14.en.pdf> (last visited Sept. 29,

Today most developed countries have implemented, and increasingly enforce, domestic legislation prohibiting the bribery of foreign public officials.<sup>4</sup> Virtually all other countries are parties to international conventions prohibiting the bribery of foreign public officials.<sup>5</sup> It is only a matter of time before most of the world will have adopted domestic legislation prohibiting the bribery of foreign public officials. The enforcement of the FCPA by the United States and the adoption by the United Kingdom of its Bribery Act 2010 (“UK Bribery Act”)<sup>6</sup> have both received considerable attention. But the recent adoption of critical amendments by Canada to its Corruption of Foreign Public Officials Act (“CFPOA”)<sup>7</sup> signals the need for increased attention to be given to Canadian law with respect to foreign bribery.

## II. CANADA’S CORRUPTION OF FOREIGN PUBLIC OFFICIAL’S ACT

On December 7, 1998, Canada adopted the CFPOA<sup>8</sup> in conjunction with its ratification of the Organisation for Economic

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2013) [hereinafter *Status of Parties to U.N. Convention Against Corruption*]. Additionally, the World Bank and the regional development banks, including the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank, began to seriously address the issue of corruption and its relationship to development in their procurement practices. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 347 (2010) (explaining that because multilateral lending institutions have so much leverage over borrower governments, the institutions have implemented procurement policies that “seek to eliminate opportunities for corruption associated with their operations and to tie lending to progress in combating corruption”).

4. *Convention on Combating Bribery Status*, *supra* note 3 (listing forty countries, including Canada, which, as of November 20, 2012, deposited instruments of ratification or accession to the OECD Convention).

5. See *Inter-American Convention Signatories*, *supra* note 3 (listing thirty-three countries, including Canada, that have deposited instruments of ratification or accession); *Status of Parties to U.N. Convention Against Corruption*, *supra* note 3 (listing ratification status of 167 parties, including Canada); *Status of Parties to CoE Criminal Law Convention*, *supra* note 3 (listing forty-one countries that had ratified or acceded to it, including Canada); *African Union Convention List of Signatories*, *supra* note 3 (listing thirty-one countries that ratified the AU Convention).

6. Bribery Act 2010 (“UK Bribery Act”), c. 23 (U.K.).

7. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.).

8. *Id.*

Co-operation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”).<sup>9</sup> The CFPOA was Canada’s OECD Convention implementing legislation, and the law became effective on February 14, 1999.<sup>10</sup>

In adopting the CFPOA, Canada created an act separate from its Criminal Code. The CFPOA combines the OECD Convention’s language and requirements with language already in Canada’s Criminal Code.<sup>11</sup> By its terms, the CFPOA is designed to accommodate additional international conventions relating to the corruption of foreign public officials.<sup>12</sup> This now includes Canada’s

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9. *Convention on Combating Bribery Status*, *supra* note 3. After being an original signatory to the OECD Convention on December 17, 1997, Canada deposited its instrument of ratification on December 17, 1998. *Canada Review of Implementation of the Convention and 1997 Recommendation*, ORG. FOR ECON. CO-OPERATION & DEV. 1, <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/2385703.pdf> (last visited Sept. 28, 2013) [hereinafter *Canada Review of Implementation and 1997 Recommendation*]; *Convention on Combating Bribery Status*, *supra* note 3.

10. Corruption of Foreign Public Officials Act, § 13.

11. *Compare id.* § 3(1) (“Every person commits an offence 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 . . . as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions.”), *with* Canada Criminal Code, R.S.C. 1985, c. C-46, § 121(1) (Can.) (outlining the definition of frauds committed on the government by any individual who “directly or indirectly gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official . . . a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission.”) *and* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 3, art. 1 (mandating that each Party make it a criminal offense “under its law for any person to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to retain business or other improper advantage in the conduct of international business”).

12. The long title of the CFPOA is “An Act Respecting the Corruption of Foreign Public Officials and the Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to Make Related Amendments to Other Acts.” Corruption of Foreign Public Officials Act (Can.) § 3; *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. A (stating that “by using the term ‘Corruption’ in the Act’s title,

ratification of the Inter-American Convention Against Corruption (“Inter-American Convention”), which became effective on January 6, 2000,<sup>13</sup> and its ratification of the United Nations Convention against Corruption (“UN Convention”), which became effective on October 2, 2007.<sup>14</sup>

More recently, Canada amended the CFPOA to broaden its jurisdictional reach and the breadth of its prohibitions.<sup>15</sup> These amendments were, in large part, prompted by criticism of the OECD Working Group on Bribery in International Transactions (“OECD Working Group”).<sup>16</sup> The amendments coincide with considerable efforts by Canadian authorities to establish and train special units of the Royal Canadian Mounted Police devoted to enforcement of the CFPOA.<sup>17</sup> Canadian authorities have also sought to ensure the

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there is room for the Act to grow to accommodate new legislative provisions falling under this heading should Canada, in the future, undertake to sign and ratify additional international conventions dealing with such matters”).

13. *Inter-American Convention Signatories*, *supra* note 3, at 5 (demonstrating that no reservations or declarations were asserted by Canada with respect to Article VIII, relating to transnational bribery, which is the provision that corresponds to the CFPOA).

14. *Status of Parties to U.N. Convention Against Corruption*, *supra* note 3 (including no reservations or declarations were asserted by Canada with respect to Article 16, the provision of the UN Convention that corresponds with the CFPOA).

15. Act to Amend the Corruption of Foreign Public Officials Act, Bill S-14, § 5, 41st Parliament (1st Sess. 2013) (enacted) (Can.), *available at* [http://laws-lois.justice.gc.ca/PDF/2013\\_26.pdf](http://laws-lois.justice.gc.ca/PDF/2013_26.pdf).

16. See ROBIN MACKAY, BILL S-14: AN ACT TO AMEND THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT, LEGISLATIVE SUMMARY, § 1.3 (May 28, 2013) (Can.), *available at* <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/s14-e.pdf> (explaining that the OECD Working Group objected to the CFPOA’s limited jurisdictional reach, the dearth of Canadian investigators “working to uncover bribery among foreign public officials,” and the weakness of penalties for violating the Act); *see also Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, ORG. FOR ECON. CO-OPERATION & DEV. WORKING GRP. ON BRIBERY ¶¶ 15–24, 121, 133–35 (Mar. 2011), *available at* [http://www.oecd.org/document/46/0,3746,en\\_2649\\_34859\\_44572654\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/46/0,3746,en_2649_34859_44572654_1_1_1_1,00.html) [hereinafter *Canada Phase 3 Report*] (outlining concerns that (1) the foreign bribery offense under the CFPOA applies solely to bribes for the purpose of obtaining or retaining an advantage in the course of “business for profit,” (2) Canada should amend the CFPOA to introduce nationality jurisdiction over the foreign bribery offense, and (3) Canada should amend the CFPOA to “expressly prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation”).

17. *See Canada: Follow-up to the Phase 3 Report & Recommendations*, ORG. FOR ECON. CO-OPERATION & DEV. WORKING GRP. ON BRIBERY 8 (May 2013),

availability of prosecutors with the requisite level of expertise.<sup>18</sup> Numerous cases are currently under investigation and a further increase in enforcement is generally anticipated.<sup>19</sup>

#### A. THE ANTI-BRIBERY LEGISLATION

The CFPOA provides, in pertinent part, as follows:

Every person commits an offence 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 decisions of the foreign state or public international organisation for which the official performs duties or functions.<sup>20</sup>

#### B. JURISDICTION

With the recent amendments to the CFPOA,<sup>21</sup> conduct that may

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<http://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf> [hereinafter *Canada Follow-up to the Phase 3 Report*] (noting that, as of the date of the follow-up report, fifteen full-time CFPOA enforcement positions within the Royal Canadian Mounted Police were funded and that "the actual number of investigators working on CFPOA investigations between Ottawa and Calgary is significantly greater than fifteen, having drawn additional resources to assist with large investigations").

18. *See id.* at 9 (highlighting the creation of a "senior cadre of prosecutors, with expertise of the highest level" that will act as a national resource for complex and high-profile CFPOA prosecutions).

19. *See, e.g., id.* (recommending that more Canadian prosecutorial resources be dedicated to the Public Prosecution Service of Canada for the "soon expected . . . case-load of potentially more than 20 cases"); MACKAY, *supra* note 16, § 1.3 (calling attention to Transparency International's 2012 progress report that highlighted the thirty-four Canadian CFPOA investigations that were then underway).

20. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 3(1) (Can.). This article will use English spellings customary in the United States, except for quoted language using Canadian spellings.

21. Act to Amend the Corruption of Foreign Public Officials Act, Bill S-14, § 5, 41st Parliament (1st Sess. 2013) (enacted) (Can.), available at [http://laws-lois.justice.gc.ca/PDF/2013\\_26.pdf](http://laws-lois.justice.gc.ca/PDF/2013_26.pdf).



otherwise violate the CFPOA is now subject to both territorial and nationality jurisdiction.

### *I. Territorial Jurisdiction*

Jurisdiction over the bribery of a foreign public official is established in Canada when the offense is committed in whole or in part within its territory. Canada's territorial jurisdiction can extend to conduct taking place on aircraft registered with Canadian authorities,<sup>22</sup> on aircraft that terminate in Canada,<sup>23</sup> and on any aircraft where the person committing the offense on the aircraft is later present in Canada.<sup>24</sup>

An extensive physical connection between the offense and Canada is not required. The leading case in Canada on territorial jurisdiction is the Supreme Court's decision in *R. v. Libman*,<sup>25</sup> which established that an offense is "subject to the jurisdiction of [Canadian] courts [when] a significant portion of the activities constituting that offence took place in Canada . . . . [I]t is sufficient that there be a 'real and substantial link' between an offence and [Canada]."<sup>26</sup> What constitutes a "significant portion" or a "real and substantial link" to establish territorial jurisdiction is a factual inquiry that courts make on a case-by-case basis.<sup>27</sup> Of significance with respect to the

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22. Can. Crim. Code, R.S.C. 1985, c. C-46, § 7(1)(a) (Can.).

23. *Id.* § 7(1)(b).

24. *Id.* § 7(2).

25. *R. v. Libman*, [1985] 2 S.C.R. 178, 214 (Can.) (upholding a trial court's finding that where a defendant sold fraudulent shares of mining companies to U.S. residents from an office in Canada but received the money in either Costa Rica or Panama, the fraud could properly be prosecuted in Canada).

26. *Id.* at 213.

27. In *R. v. Niko Resources Ltd.*, a publicly traded company headquartered in Calgary, Canada, pled guilty to a violation of the CFPOA with respect to its indirect foreign subsidiary, Niko Bangladesh. *R. v. Niko Resources Ltd.*, [2011] 101 W.C.B. (2d) 118 (Can. Alta. Q.B.), Agreed Statement of Facts, ¶¶ 1, 55. In 2005 Niko Bangladesh purchased and provided the use of a vehicle, valued at \$190,984, to a Bangladeshi State Minister for Energy and Mineral Resources. *Id.* ¶ 4. Later, Niko Resources paid travel and accommodation expenses for the minister to travel from Bangladesh to Calgary to attend an oil and gas exposition. *Id.* ¶¶ 5, 35–37. Niko Resources also improperly paid approximately \$5,000 for the minister's non-business travel to New York. *Id.* ¶¶ 5, 37. Even though Niko Bangladesh was a Barbados corporation wholly owned by Niko Cayman, which, in turn, was a wholly owned foreign subsidiary of Niko Resources, the latter ultimately agreed that it had a real and substantial link to what took place in

CFPOA, the Supreme Court in *Libman* noted that Canada “should not be indifferent to the protection of the public in other countries.”<sup>28</sup>

The relationship between territorial jurisdiction and Canadian law on conspiracy also bears on the CFPOA's jurisdictional reach. Territorial jurisdiction is established in Canada when a person conspires in Canada to commit an act in another country that is an offense under the laws of that country and that would also be an offense if committed in Canada.<sup>29</sup> Alternatively, jurisdiction is established if a person conspires in another country to commit an offense in Canada.<sup>30</sup> “If an offence under the [CFPOA] was or would have been committed by conspirators outside of Canada, then the conspiracy to commit that offence is deemed to have taken place within Canada.”<sup>31</sup> “It is not necessary that the offence intended by the conspirators be completed.”<sup>32</sup>

## 2. Nationality Jurisdiction

The CFPOA is now subject to nationality jurisdiction.<sup>33</sup> Regardless of whether the individual or entity may be subject to Canada's

Bangladesh. *Id.* ¶ 10. Niko Bangladesh, including the acquisition of the vehicle, was fully funded by Niko Resources. *Id.* ¶¶ 11, 39. The CEO of Niko Resources was on Niko Bangladesh's board of directors. *Id.* ¶¶ 11, 15. Niko Resources closely monitored the activities of Niko Bangladesh, including the flow of money from Niko Resources to Niko Bangladesh, even small transactions and accounting practices. *Id.* ¶¶ 15, 17, 19. Niko Resources was also aware of a letter on Niko Bangladesh stationery confirming delivery of the vehicle for the minister's use. *Id.* ¶¶ 33, 34.

28. *Libman*, 2 S.C.R. at 214. In *Canada (Human Rights Commission) v. Canadian Liberty Net* [1998] 1 S.C.R. 626 (Can.), a private organization changed its message to refer callers to a phone number in the United States to hear racist messages. Citing *Libman*, the Supreme Court of Canada found that the facts of the case “[did] not even test the outer limits of [the] principle” as the advertisement for the racist messages was made in Canada on the same phone line where the original messages had been available. *Id.* at 671. In *R. v. Hammerbeck*, 1993 CanLII 613, ¶ 26 (Can. B.C.A.C.), the accused took his daughter to the United States and kept her there for three weeks in violation of a child custody order. The British Columbia Court of Appeal held that Canadian courts had jurisdiction over the father's prosecution because the abduction started in Canada.

29. Can. Crim. Code, R.S.C. 1985, c. C-46, § 465(3) (Can.).

30. *Id.* § 465(4).

31. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 4.1.

32. *Id.*

33. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 5 (Can.).

territorial jurisdiction, the CFPOA applies to Canadian citizens,<sup>34</sup> “permanent resident[s],”<sup>35</sup> and any “public body” or entity formed “under the laws of Canada or a province.”<sup>36</sup> “[P]ermanent resident” is “a person who has acquired permanent resident status and has not subsequently lost that status.”<sup>37</sup>

### C. ELEMENTS OF THE OFFENSE

#### 1. Any Person

The CFPOA offense is intended to apply to “every person.”<sup>38</sup>

##### a. Juridical Entities

In addition to a natural person, a “person” includes an organization,<sup>39</sup> which can include “a public body, body corporate, society, company, firm, partnership, trade union or municipality,” or an association of persons created for a common purpose with an operational structure that holds itself out to the public as an association of persons.<sup>40</sup>

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34. *Id.* § 5(a).

35. *Id.* § 5(b).

36. *Id.* § 5(c).

37. Immigration and Refugee Protection Act, R.S.C. 2001, c. 27, § 2(1); *see also id.* § 27(1) (noting that a permanent resident in Canada is a person who is not a Canadian citizen but who has been granted permission to live and work in Canada without any time limit on his or her stay); *id.* § 28(1) (“A permanent resident must comply with a residency obligation with respect to every five-year period.”); *id.* § 28(2)(a) (including “with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are (i) physically present in Canada, (ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent, (iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, (iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or (v) referred to in regulations providing for other means of compliance”).

38. Corruption of Foreign Public Officials Act (Can.) § 3(1).

39. *Id.* § 2; Can. Crim. Code, R.S.C. 1985, c. C-46, § 2 (Can.).

40. Can. Crim. Code § 2 (“organisation”). The first prosecution and plea under the CFPOA was against a corporate entity, Hydro Kleen Systems Inc. *R. v. Watts*, [2005] A.J. No. 568; 2005 AB.C. LEXIS 613, ¶ 140 (Can. Alta. Q.B.) (stating that the sentencing principles to be considered should be those “under section 426, the

*b. Standard of Liability for Juridical Entities*

Canada no longer relies on the “identification theory” under the common law, having codified a standard for organizational liability. An organization is a party to an offense if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their 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
- (c) knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.<sup>41</sup>

A “*senior officer*” is “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 and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.”<sup>42</sup>

*2. Intentionally*

Though the CFPOA does not refer to intent,<sup>43</sup> under Canada’s Criminal Code, criminal offenses are presumed to require proof of *mens rea* “unless there is a clear indication to the contrary.”<sup>44</sup> The intention and knowledge elements of *mens rea* also include willful blindness,<sup>45</sup> but they do not include a “should have known” standard.<sup>46</sup> The involvement of an intermediary does not alter the

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secret commissions under the Criminal Code”).

41. Can. Crim. Code § 22.2.

42. *Id.* § 2.

43. Corruption of Foreign Public Officials Act (Can.) § 3(1); *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.2.

44. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.2 (citing *R. v. Cogger* (1997), 214 N.R. 64 3d 322 (Can); *R. v. Cooper*, [1978] 1 S.C.R. 860 (Can)).

45. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.2.

46. *Id.* (stating that the “should have known” standard amounts to negligence or lack of due diligence).

nature of the *mens rea* requirement.<sup>47</sup>

It is not an offense simply to give something of value to a foreign public official with no expectation of anything in return. The phrase “in order to” in the definition of the offense implies a purpose underlying the act of giving of a benefit.<sup>48</sup> In essence, the phrase “in order to” imparts a *quid pro quo* element to the offense.<sup>49</sup> The “benefit” is given or offered to the official in order to induce the official to use his or her official position to the business advantage of the person making the bribe.

### 3. Offer, Promise, or Give

The CFPOA uses the terms “gives, offers or agrees to give or offer.”<sup>50</sup> This is identical to the language used in the Criminal Code for improper inducements to public officials in Canada.<sup>51</sup>

#### a. Indirectly or Through Intermediaries

Although the CFPOA does not make specific reference to the application of the offense to bribes given through intermediaries,<sup>52</sup> the words “directly or indirectly” cover bribes given through intermediaries.<sup>53</sup> Depending upon their degree of knowledge,

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47. *Id.* pt. 1.1.5; see discussion, *infra* Part II.C.3.

48. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.2.

49. *Id.*

50. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 3(1) (Can.).

51. Can. Crim. Code, R.S.C. 1985, c. C-46, §§ 121(1), 123(1) (Can.).

52. Corruption of Foreign Public Officials Act (Can.) § 3(1).

53. *Id.* As part of the plea agreement entered into by Griffiths Energy International Inc. (“GEI”), the Agreed Statement of Facts refers to a situation whereby a foreign official may have benefitted in a number of indirect ways. *R. v. Griffiths Energy Int’l Inc.*, Agreed Statement of Facts, ¶¶ 2, 39, 55, 412, Jan. 14, 2013 (Can. Alta. Q.B.), available at [http://www.cba.org/CBA/advocacy/PDF/Griffiths\\_Amended\\_Statement\\_of\\_Facts.pdf](http://www.cba.org/CBA/advocacy/PDF/Griffiths_Amended_Statement_of_Facts.pdf) [hereinafter *R. v. GEI*, Agreed Statement of Facts]. In particular, a consulting firm owned by the wife of Chad’s Ambassador to the United States and Canada was the recipient of a major payment from GEI. *Id.* ¶¶ 20, 22, 38. The consulting agreement was essentially identical to the consulting agreement that had been previously proposed with an entity owned by the Ambassador. *Id.* ¶¶ 20, 34. In addition, the Deputy Chief of the Chadian Embassy in Washington, D.C. directed where the funds to the consulting firm owned by the Ambassador’s wife were to be deposited. *Id.* ¶ 38. There was also an arrangement whereby the Ambassador’s wife purchased founders shares in GEI. *Id.* ¶ 23. The wife of the Deputy Chief of the Chadian Embassy was also allowed

intermediaries can also be prosecuted as being complicit parties to the offense.<sup>54</sup>

*b. Attempt*

Liability exists for attempting to commit an offense regardless of whether it was, in fact, possible to commit the offense so long as the accused intends to commit the offense and “does or omits to do anything for the purpose of carrying out the intention.”<sup>55</sup> The penalty is imprisonment for a term that is one-half of the longest term to which a person who is guilty of the offense is liable.<sup>56</sup> No “general criterion” has been established to articulate a clear line between preparation and attempt.<sup>57</sup> A determination must be made on a “case-by-case basis, having regard to the relationship between the nature and quality of the act in question and the nature of the complete offence, as well as the relative proximity of the act in question to what would have been the completed offence.”<sup>58</sup> “[W]here an accused’s intention is otherwise proven, acts, which are on their face equivocal in nature, may nevertheless be sufficiently proximate so as to constitute an attempt.”<sup>59</sup>

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to purchase founders shares as was an individual by the name of Adoum Hassan. *Id.* ¶ 24. The Ambassador’s wife subsequently took steps to have Mr. Hassan’s shares transferred to her consulting firm and then her personal account by using a power of attorney granted by Mr. Hassan to the Ambassador giving the latter authority over Mr. Hassan’s shares. *Id.*

54. See discussion, *supra* Part II.C.3.c.

55. Can. Crim. Code § 24(1). The provisions of the Criminal Code “relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.” Interpretation Act, R.S.C. 1985, c. I-21, § 34(2) (Can.).

56. Can. Crim. Code § 463 (applying to situations where the violation of the underlying indictable offense is for a term of imprisonment of fourteen years or less).

57. *R. v. Deutsch*, [1986] 2 S.C.R. 2, 3-4 (Can.) (describing the difference between preparation and attempt as “essentially a qualitative one”).

58. *Id.*

59. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.3(2); see *R. v. Sorrell*, 1978 CarswellOnt 1205, ¶ 23 (Can. Ont. Ca.) (WL) (noting that where the defendants donned balaclavas, carried a loaded gun, and knocked on a store window, but abandoned their robbery plans after being told the store was closed, the defendants had still attempted robbery since “acts which on their face are equivocal, may, nonetheless, be sufficiently proximate to constitute

*c. Complicity*

Given the application of Canada's Criminal Code with respect to complicity to all indictable offenses,<sup>60</sup> a violation of the CFPOA may fall within the ambit of its provisions. A person who aids and abets the offense of bribing a foreign public official would be guilty of an indictable offense and liable for the same punishment as for the normal offense.<sup>61</sup> Canada's Criminal Code states that where two or more persons "form an intention in common to carry out an unlawful purpose and to assist each other," and one of them carries out the common purpose, committing an offense, each would be culpable for that offense.<sup>62</sup>

In addition, where a person counsels another person to be a party to the offense and that other person is afterwards a party to that offense, the person who counseled is a party to that offense and subject to the same penalty as the offense that was committed,<sup>63</sup> regardless of whether "the offence was committed in a way different from that which was counselled."<sup>64</sup> Moreover, the person who counseled is "a party to every offence that the other commits in consequence of the counseling."<sup>65</sup> The term "counsel" also includes the acts of procuring, soliciting or inciting another to commit an offense.<sup>66</sup>

*d. Conspiracy*

Any person who conspires with another to commit an indictable offense is guilty of that offense and is liable to the same punishment "as that to which an accused who is guilty of the offense would, on conviction, be liable."<sup>67</sup> This includes conspiring in Canada to do

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an attempt").

60. Interpretation Act (Can.) § 34(2) (applying all provisions of the Criminal Code relating to indictable offenses to any enactment that creates an indictable offense); Can. Crim. Code § 21 (designating parties to an offense as those who actually commit the offense, do or omit to do anything for the purpose of aiding another to commit the offense, or abet another in committing the offense).

61. Can. Crim. Code § 21.

62. *Id.* § 21(2).

63. *Id.* § 464(a).

64. *Id.* § 22(1).

65. *Id.* § 22(2).

66. *Id.* § 22(3).

67. *Id.* § 465(1)(c).

anything abroad that would be an offense under the laws of the foreign jurisdiction.<sup>68</sup> It is also an offense to conspire outside Canada to do anything prohibited in Canada.<sup>69</sup> As a result of the CFPOA's status as an indictable offense, conspiring to violate the CFPOA would also be an indictable offense.

#### 4. Any Undue Pecuniary or Other Advantage

The CFPOA prohibits the giving or offering of a "loan, reward, advantage or benefit of any kind" to a foreign public official.<sup>70</sup> "Benefits of any kind" covers diverse forms of benefits,<sup>71</sup> including intangible benefits.<sup>72</sup> The ability to confer a benefit upon a third party "would be some benefit to the foreign public official."<sup>73</sup>

#### 5. Foreign Official

A "foreign public official" under Canadian law includes a number of categories of foreign public officials.<sup>74</sup> One category includes "a person who holds a legislative, administrative or judicial position of

68. *Id.* § 465(3)(1).

69. *Id.* § 465(4).

70. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 3(1) (Can.). The word "undue" was not used "because it is the giving of the loan, etc., in the context of the offence . . . that renders the loan, etc., 'undue.'" *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.4.

71. *R. v. Hinchey*, [1996] 3 S.C.R. 1128, 1130 (Can.).

72. *See Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.7 (citing *R. v. Hinchey*, 3 S.C.R. at 1128).

73. *Id.* "[T]he wording 'to a foreign public official or to any person for the benefit of the foreign public official' is derived from [section] 121(1)(a)(i) of the *Criminal Code*." *Id.* (citing Canadian authorities). "It is designed to cover the situation where a foreign public official might not receive the bribe himself or herself, but instead direct that the benefit be given to another person." *Id.* One example might be "favourable publicity and indirect pecuniary benefits such as reduced tuition expenses arising from scholarships paid directly to a school or an adult child." *Id.*; *see, e.g.*, *R. v. Griffiths Energy Int'l*, [2013] A.J. No. 412 ¶¶ 20, 39 (Can. Alta. Q.B.) (holding that GEI violated § 3(1)(b) when it provided a cash incentive to a company wholly owned by the Chadian ambassador's wife to help GEI secure an oil and gas rights from the Chadian government and then paid the company \$2,000,000 when GEI secured the rights).

74. Corruption of Foreign Public Officials Act (Can.) § 2 (defining foreign state as "a country other than Canada" including: "(a) any political subdivision of that country; (b) the government, and any department or branch, of that country or of a political subdivision of that country; and (c) any agency of that country or of a political subdivision of that country").



a foreign state,<sup>75</sup> which includes “a political subdivision” of the state.<sup>76</sup> The definition of “foreign public official” does not expressly apply “whether elected or appointed,” but by implication, the terminology incorporates both elected and appointed officials.<sup>77</sup>

*a. Parastatals*<sup>78</sup>

A foreign public official also includes a person exercising a public function for a “public agency” of a “foreign state,” which includes “an agency of that country or of a political subdivision of that country.”<sup>79</sup> A number of enterprises fall within this definition, including boards, commissions, corporations, or other bodies or authorities “established to perform a duty or function on behalf of the foreign state, or performing such a duty or function.”<sup>80</sup>

*b. Public International Organizations*

The CFPOA definition of public foreign official in relation to public international organizations closely follows the definition in the OECD Convention.<sup>81</sup> It applies to “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.”<sup>82</sup>

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75. *Id.* (defining “foreign public official,” under subsection (a), as including “a person who performs public duties or functions for a foreign state” and “an official or agent of a public international organisation that is formed by two or more such public international organisations”).

76. *Id.* (referring to the definition of “foreign state” in subsection (b)).

77. See *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.6 (explaining that in Canada’s view, using the phrase “whether elected or appointed” was not necessary since the CFPOA definition section already extends the law to any person holding a legislative, administrative, or judicial position in a foreign state).

78. A “parastatal” is a government-owned or government-controlled entity. *Parastatal*, CAMBRIDGE DICTIONARIES ONLINE, <http://dictionary.cambridge.org/dictionary/business-english/parastatal?q=parastatal> (last visited Oct. 4, 2013).

79. Corruption of Foreign Public Officials Act (Can.) § 2 (referring to the definition of “foreign public official” in subsection (c)).

80. *Id.* (referring to the definition of “foreign public official” in subsection (b)).

81. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.6.

82. Corruption of Foreign Public Officials Act (Can.) § 2 (defining “foreign public official” in subsection (c)).

*c. Political Party, Political Party Official, or Candidate for Office*

The Canadian definition of a foreign public official under the CFPOA does not include a political party, political party official, or candidate for public office.

*6. In Order that the Official Act or Refrain from Acting in Relation to the Performance of Official Duties*

This offense criminalizes “the giving of an advantage” or other acts as consideration “for an act or omission by the official in connection with the performance of the official’s duties or functions.”<sup>83</sup> The CFPOA does not state that the offense applies to acts or omissions irrespective of whether they are within the official’s authorized competence; however, Section 3(1)(b) is designed to apply to the situation in which the bribe is given, “not for the purpose of having the foreign public official act or omit to act in areas over which the official is authorised to act, but to influence others within the foreign state or public international organisation.”<sup>84</sup>

*7. To Obtain or Retain Business or Other Improper Advantage*

The CFPOA applies to “a loan, reward, advantage or benefit of any kind” to a foreign public official to “obtain or retain an advantage in the course of business.”<sup>85</sup> The provision is not limited to the obtaining or retaining of “business or other improper advantage.”<sup>86</sup> The language would extend to “efforts to secure improper advantages in the course of business as well as other advantages which would otherwise be proper but for the bribery.”<sup>87</sup>

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83. *Canada Review of Implementation and 1997 Recommendation, supra* note 9, pt. 1.1.8 (citing Corruption of Foreign Public Officials Act (Can.) § 3(1)(a)).

84. *Id.* There is also no requirement that the foreign public official be actually influenced for there to be a violation of the CFCPA. *See, e.g., R. v. GEI, Agreed Statement of Facts, supra* note 53, ¶¶ 31, 50 (emphasizing that even though the Ambassador ultimately may not have influenced Chad’s granting of oil and gas rights to GEI, GEI still violated the CFPOA).

85. Corruption of Foreign Public Officials Act (Can.) § 3(1).

86. *Canada Review of Implementation and 1997 Recommendation, supra* note 9, pt. 1.1.9. (explaining that the language in subsection 3(1) is intentionally broad so as to encompass the Convention’s “business or other improper advantage” notion).

87. *Id.* (“For example, it would be an offence within the meaning of subsection

The CFPOA prohibits improper advantages “because securing an improper advantage” does not fall within the purview of a foreign public official’s duties or functions.<sup>88</sup>

Under the CFPOA, “business” refers to “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.”<sup>89</sup> With the removal of “for profit” from the definition in the recent amendments to the CFPOA,<sup>90</sup> non-profit entities are clearly intended to fall within the ambit of the prohibitions of the CFPOA.<sup>91</sup>

#### D. EXCEPTIONS AND AFFIRMATIVE DEFENSES

What might be termed exceptions and affirmative defenses under the CFPOA are largely based on the FCPA.<sup>92</sup>

##### 1. *Statute of Limitations*

Since it is an indictable offense, no limitation period exists in Canada concerning the investigation and prosecution of the bribery of foreign officials under the CFPOA.<sup>93</sup>

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3(1) to bribe in order to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.”).

88. *Id.*

89. Corruption of Foreign Public Officials Act (Can.) § 2 (“business”).

90. See Act to Amend the Corruption of Foreign Public Officials Act, Bill S-14, ch. 26, § 2(3), 41st Parliament (1st Sess. 2013) (enacted) (Can.), available at [http://laws-lois.justice.gc.ca/PDF/2013\\_26.pdf](http://laws-lois.justice.gc.ca/PDF/2013_26.pdf).

91. MACKAY, *supra* note 16, § 2.1; *Canada Follow-up to the Phase 3 Report*, *supra* note 17, at 6. Previously, Canada explained to the OECD Working Group that non-profit entities would not be exempted from the purview of the offense on the basis that they were captured by the definition of “person” under the Criminal Code. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.10 (citing Canada Criminal Code, R.S.C. 1985, c. C-46, § 15(2) (Can.) (“person”). Nevertheless, the OECD Working Group has consistently raised concerns as to the need for legislation clarifying this provision. *Canada Phase 3 Report*, *supra* note 16, ¶¶ 15–24.

92. See *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. A. (noting that the exceptions and defenses stem from policy considerations in other foreign anti-corruption legislation).

93. *Id.* pt. 6.

## 2. Local Law

An exception is provided for a “loan, reward, advantage or benefit” that is “permitted or required under the laws of the relevant foreign state or public international organisation.”<sup>94</sup> The exception is “intended to encompass all laws, regardless if they are written, as well as regulations.”<sup>95</sup> Where an official of a public international organization is involved, “the laws of the public international organization itself,” not those of the “country within which the organisation is situated, are relevant to the exception.”<sup>96</sup>

## 3. Reasonable and Bona Fide Business Expenses

Reasonable business expenses are excluded from the offense of bribery of foreign officials. The loan, reward, advantage or benefit must be a reasonable expense

incurred in good faith, made by or on behalf of the foreign public official and be directly related to . . . the promotion, demonstration or explanation of the person's products or services, or . . . the execution or performance of a contract between the person and the foreign state for which the individual performs duties or functions.<sup>97</sup>

Alternatively, the loan, reward, or benefit must be either permitted or required according to the laws of the foreign state or the public international organization for which the foreign public official performs duties or functions.<sup>98</sup>

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94. Corruption of Foreign Public Officials Act (Can.) § 3(3)(a).

95. *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.4 (citing Canadian authorities).

96. *Id.* (citing Canadian authorities).

97. Corruption of Foreign Public Officials Act (Can.) § 3(3)(b). With respect to reasonable and *bona fide* business expenses, the CFPOA “reflects a policy concern that is also reflected in a similar provision in the [FCPA].” *Canada Review of Implementation and 1997 Recommendation*, *supra* note 9, pt. 1.1.4 (citing Canadian authorities). In interpreting this exception, “Canadian courts could well examine U.S. texts, commentaries and case law on the U.S. defence, although Canadian courts may choose not to follow the U.S. approach.” *Id.* However, unlike the FCPA, where reasonable and *bona fide* business expenses are an affirmative defense, and not an exception, the burden under the CFPOA is on the prosecution, and not the defendant, to prove “beyond a reasonable doubt that the defence does not apply.” *Canada Phase 3 Report*, *supra* note 16, ¶ 25.

98. Corruption of Foreign Public Officials Act (Can.) § 3(3)(a).

#### 4. *Facilitation Payments*

Upon the entry of an order of the Governor in Council,<sup>99</sup> the CFPOA will no longer provide an exception for facilitation payments.<sup>100</sup> Prior to the recent amendments to the CFPOA, facilitation payments were permitted.<sup>101</sup> However, at least in the near term, they will continue to be permitted. Ultimately, under the terms of the recent amendments to the CFPOA, they will be prohibited.<sup>102</sup>

#### 5. *Duress*

A person who commits an offense may be excused from committing that offense if he or she acted “under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed.”<sup>103</sup> The person who commits the offense must believe that the threats against his or her life will be carried out, and he or she must not be subject to compulsion as a party to a conspiracy or association.<sup>104</sup>

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99. Act to Amend the Corruption of Foreign Public Officials Act, Bill S-14, § 26(5), 41st Parliament (1st Sess. 2013) (enacted) (Can.), *available at* [http://laws-lois.justice.gc.ca/PDF/2013\\_26.pdf](http://laws-lois.justice.gc.ca/PDF/2013_26.pdf).

100. *Id.* § 3(2).

101. Facilitation payments are considered payments 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.” Corruption of Foreign Public Officials Act (Can.) § 3(4). “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.” *Id.* § 3(5). These facilitation payments include: “(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, telecommunication 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.” *Id.* § 3(4).

102. MACKAY, *supra* note 16, § 2.3 (“[T]he elimination of facilitation payments will not come into force on Royal Assent like the rest of the bill but, rather, on a day to be fixed by order of the Governor in Council.”). In Canada, the Governor in Council is the Governor General acting on the advice of the federal cabinet. *See Role and Responsibilities, THE GOVERNOR GENERAL OF CANADA*, <http://www.gg.ca/document.aspx?id=3> (last modified Feb. 19, 2013).

103. Can. Crim. Code, R.S.C. 1985, c. C-46, § 17 (Can.).

104. *Id.*

In addition, any common law rule and principle specifying that certain circumstances in the commission of an offense constitute “a justification or excuse for an act or a defence to a charge” may also apply.<sup>105</sup> In this regard, the defense of necessity is also available, though it applies only in circumstances of imminent risk where an act was taken on an involuntary basis “to avoid a direct and immediate peril.” The act was involuntary if it was inevitable and unavoidable and if the party that undertook the act did not have a reasonable opportunity to take an alternative course of action that would not have involved a violation of the law.<sup>106</sup> The harm resulting from the “violation of the law must be less than the harm the accused sought to avoid.”<sup>107</sup>

#### E. THE CFPOA RECORD-KEEPING OFFENSE

The CFPOA was recently amended to include an offense for inaccurate record-keeping or destroying records for the purpose of bribing a foreign public official or for the purpose of hiding that bribery.<sup>108</sup> In conjunction with such conduct, the prohibition applies

105. *Id.* § 8(3).

106. *Perka v. The Queen*, [1984] 2 S.C.R. 232, 233 (Can.).

107. *Id.* (“Where it was contemplated or ought to have been contemplated by the accused that his actions would likely give rise to an emergency requiring the breach of the law, it may not be open to him to claim his response was involuntary; mere negligence or involvement in criminal or immoral activity when the emergency arose, however, will not disentitle an accused from relying upon the defence.”).

108. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 4(1) (Can.). In addition to the new record-keeping offense, various forms of falsification of books and records can be subject to criminal prosecution in Canada where there is also an intent to deceive or induce others to rely on the inaccurate books and records. These offenses can include crimes involving false pretenses, forgery, trafficking or possessing a forged document, fraud affecting the market relating to securities, falsification of books and documents, and a false prospectus. Can. Crim. Code §§ 361–62, 366–67, 368, 380, 397. However, in the absence of evidence of intent to deceive or defraud, there may be limitations on the applications of these provisions. *See Canada Phase 3 Report, supra* note 16, ¶ 133. In addition, provincial securities commissions can “bring cases for books and records violations, either in the form of injunctive actions or cease-and-desist proceedings.” *Id.* ¶ 136. Similarly, financial disclosure violations may also be implicated. Business Corporations Act, R.S.C. 1985, c-I21, § 155 (requiring the annual disclosure by companies to shareholders of financial statements, reports of auditor, and other financial information required by their governing documents, such as by-laws). *See generally* MACKAY, *supra* note 16, § 2.4 (noting that in the

to anyone who

- (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with the applicable accounting and auditing standards;
- (b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
- (c) records non-existent expenditures in those books and records;
- (d) enters liabilities with incorrect identification of their object in those books and records;
- (e) knowingly uses false documents; or
- (f) intentionally destroys accounting books and records earlier than permitted by law.<sup>109</sup>

### III. CANADA'S SECRET COMMISSIONS OFFENSE

Though not part of the CFPOA, Canada's secret commissions offense may supplement the CFPOA in certain situations to the degree that conduct commonly referred to as private or commercial bribery is involved and is subject to Canadian jurisdiction.<sup>110</sup> Unlike the CFPOA, whether the intended recipient is a foreign public official is not relevant to a violation. At its core, the secret commissions offense is premised on "the importance of the agency relationship and the necessity of preserving the integrity of that relationship."<sup>111</sup> For this reason, it may be used in conjunction with the CFPOA particularly in situations where it is unclear whether an entity is a parastatal.<sup>112</sup>

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case of false books and records violations, Canada's Business Corporations Act may be implicated).

109. Corruption of Foreign Public Officials Act (Can.) §§ 4(a)–(f).

110. Can. Crim. Code § 426.

111. *R. v. Kelly*, [1992] 2 S.C.R. 170, 185 (Can.). "The legislative history of [the secret commissions offence] demonstrates that the purpose and intent of it is to criminalize an agent's or employee's act of accepting 'secret commissions' for showing favour or disfavor to any person with relation to the affairs or business of his principal." *Id.* at 186 (quoting *R. v. Morris* (1988), 64 Sask. R. 98, 116 (Sask. C.A. Can.)).

112. For example, in the sentencing associated with the first prosecution brought

### A. THE STATUTORY LANGUAGE

The secret commissions offense provides, in pertinent part, as follows: Every one commits an offence who

(a) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person — 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 with relation to the affairs or business of the agent's principal.<sup>113</sup>

### B. TERRITORIAL JURISDICTION

The same principles of territorial jurisdiction apply to the secret commissions offense as they do to a violation of the CFPOA.<sup>114</sup> However, principles of nationality jurisdiction do not apply to a violation of the secret commissions offense.<sup>115</sup>

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under the CFPOA, *R. v. Watts*, [2005] A.J. No. 568 (Can. Alta. Q.B.), the Crown made specific reference to the similarities between the CFPOA and the secret commissions offense. *Id.* ¶ 140 (“[T]he sentencing principles to be considered [under the CFPOA] are akin to those under the [secret commissions offence].”).

113. Can. Crim. Code § 426(1)(b) (including an alternative provision, not related to the CFPOA, but concerning every person who “with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account or other writing (i) in which the principal has an interest, (ii) that contains any statement that is false or erroneous or defective in any material particular, and (iii) that is intended to mislead the principal”).

114. See discussion, *supra* Part II.B.1.

115. See Neil Campbell, et al., *Foreign Corrupt Practices: The Growth and Limitations of Canadian Enforcement Activity*, 23 *IND. INT'L & COMP. L. REV.* 35, 43–46 (2013) (discussing the CFPOA's jurisdictional limitations when compared with the United States' Foreign Corrupt Practices Act and the United Kingdom's Bribery Act 2010, noting that the Supreme Court of Canada has interpreted “territorial jurisdiction” to “encompass activity that has a real and substantial connection to Canadian territory,” and clarifying that Canada does exercise nationality jurisdiction in exceptional circumstances).



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### C. ELEMENTS OF THE OFFENSE

#### 1. *Any Person*

Like the CFPOA, the secret commissions offense is also intended to apply to “every person.”<sup>116</sup> The secret commissions offense applies to both individuals and entities in the same manner as a violation of the CFPOA.<sup>117</sup>

#### 2. *Intentionally*

For a violation of the secret commissions offense, while there must be proof that the person to whom the benefit was offered was an agent, the agent need not have a specific principal when the offer was made or intend to carry out the purpose for which the offer was made.<sup>118</sup> The “gravamen” of the offense or the part of the offense that weighs more heavily against the accused is “the offer to the agent and the corrupt intention accompanying the offer.”<sup>119</sup> An offer is corrupt even though the agent may not intend to carry out the act.<sup>120</sup>

Under the secret commissions offense, there must be proof of “corrupt intent” on the part of the person seeking to improperly induce an agent.<sup>121</sup> In the particular context of the offense, the term “‘corruptly’ . . . designates secrecy as the corrupting element of the offence.”<sup>122</sup> The failure to disclose the inducement of an agent makes

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116. See Can. Crim. Code § 426(1), (4) (explaining that, under the secret commissions offense, “‘agent’ includes an employee, and ‘principal’ includes an employer”).

117. Compare *id.* § 2 (defining the term “every one,” giving the same meaning to the terms “every one,” “person,” and “owner,” and explaining that those terms include “an organization”), with *id.* § 426 (employing the term “every one” when specifying who may commit the offense) and Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 2 (Can.) (stating that “person” means a person as defined in § 2 of the Canada Criminal Code).

118. *R. v. Wile*, [1990] 74 O.R. (2d) 289, 297 (Can. Ont. C.A.).

119. *Id.*; see *R. v. Reid*, [1969] 1 O.R. 158, 168 (Can. Ont. C.A.) (Laskin, J.A., concurring) (asserting that the deciding factor in whether an act of giving was corrupt was “the purpose of the accused to influence such a result or reward such a result”).

120. *Wile* 74 O.R. (2d) at 297; see *Reid*, 1 O.R. at 168 (“[T]here may be a corrupt giving within . . . even though it turns out that the receiving agent did nothing untoward but merely acted in the ordinary course.”).

121. *R. v. Kelly*, [1992] 2 S.C.R. 170 (Can.).

122. *Id.* at 188.

the agent's receipt of the commission or reward corrupt because, as a result, the principal is unable to determine whether to act upon the advice of the agent or accept the actions of the agent.<sup>123</sup>

### 3. Offer, Promise, or Give

The secret commissions offense includes similar language to the CFPOA: "gives, offers or agrees to give or offer."<sup>124</sup> Like the language used in the CFPOA, it captures a broad range of conduct that may constitute an inducement.<sup>125</sup> This includes the authorization of such conduct.<sup>126</sup>

#### a. Indirectly or Through Intermediaries

Like the CFPOA, the secret commissions offense includes identical language, "directly or indirectly," in referring to the manner in which a violation may occur.<sup>127</sup> The use of intermediaries would thereby be incorporated within the scope of the prohibitions of the secret commissions offense. Indeed, the secret commissions offense is specifically applicable to anyone "who is knowingly privy to the commission of" the secret commissions offense.<sup>128</sup>

#### b. Attempt, Complicity, and Conspiracy

The principles that apply to attempt, complicit conduct, and

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123. *Id.* at 188–89.

124. Can. Crim. Code, R.S.C. 1985, c. C-46, § 426 (Can.).

125. *Compare id.* § 426(1)(a) ("Every one commits an offence who directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent—or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person—any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or 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 with relation to the affairs or business of the agent's principal."), with Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 3(1) (Can.) (providing that the offense of bribing a foreign public official may include that of "offer[ing] or agree[ing] 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").

126. *See* Can. Crim. Code § 426(1)(a) (using the language "directly or indirectly gives" to describe conduct that constitutes an inducement).

127. *Id.*

128. *Id.* § 426(2).

conspiracy with respect to a violation of the CFPOA also apply to violations of the secret commissions offense.<sup>129</sup>

#### 4. Agency Relationship

The secret commissions offense seeks to address improper inducements “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 with relation to the affairs or business of the agent’s principal.”<sup>130</sup> In essence, the inducement seeks to cause an agent to breach his or her fiduciary relationship with the principal.

The secret commissions offense is designed to protect the integrity of the fiduciary relationship between a principal and agent.<sup>131</sup> Whether the intended recipient of the improper inducement is a foreign public official is not relevant to a violation. The critical factor is whether the intended recipient of the improper inducement is an agent.<sup>132</sup> In this regard, “[t]he simple, unrestricted language used in the [secret commissions statute] was intended . . . to capture a broad array of relationships predicated on a relationship of trust between agent and principal, including the basic employee/employer relationship.”<sup>133</sup>

As a result, in some situations, the secret commissions may be used as an alternative offense to a violation of the CFPOA when it is unclear whether the intended recipient is an employee or agent of a

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129. See Interpretation Act, R.S.C. 1985, c. I-21, § 34(2) (Can.) (specifying that “[a]ll provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment . . . except to the extent that the enactment otherwise provides”).

130. Can. Crim. Code § 426(1)(a).

131. See *R. v. Kelly*, [1992] 2 S.C.R. 170, 183 (Can.) (affirming the importance of the agency relationship in modern society and that Canada Criminal Code § 426 “acknowledges both the importance of the agency relationship and the necessity of preserving the integrity of that relationship”).

132. See *id.* (discussing the manner in which Section 426 of the Canada Criminal Code protects the fiduciary relationship between agent and principle while giving no indication that the agent’s status as a foreign public official or lack thereof has any bearing on determining whether an offense has been committed under the section).

133. *R. v. Saundercook-Menard*, 2007 CarswellOnt 28, ¶ 23 (Can. Ont. S.C.J.) (WL).

parastatal or even a public international organization.<sup>134</sup> The determining factor is whether an agency relationship exists and not whether the principal is a parastatal or foreign public official.

5. *Any Undue Pecuniary or Other Advantage*

Like the CFPOA, the secret commissions offense is similarly broad in terms of what might be considered a benefit. The statute specifically provides that “any reward, advantage or benefit of any kind” may constitute the improper inducement.<sup>135</sup>

6. *Affairs or Business of the Agent's Principal*

The secret commissions offense is not restricted to business activities. Nor is the offense limited to for-profit activities. Instead, it has a far broader application to the “affairs or business of the agent's principal.”<sup>136</sup>

D. EXCEPTIONS AND AFFIRMATIVE DEFENSES

The statutory exceptions to the CFPOA do not apply to the secret commissions offense.<sup>137</sup> Given the secret commissions offense's status as an indictable offense, no statute of limitations period applies. However, common law defenses like duress may be applicable.<sup>138</sup>

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134. Can. Crim. Code § 426(1)(a).

135. *Id.*

136. *Id.*; *see, e.g.*, R. v. Garcia, [2002] A.J. No. 1262 (Can. Alta. Prov. Ct.) (finding that a senior immigration inspector employed by the U.S. Immigration and Naturalization Service office in Alberta, Canada violated the secret commissions offense when he accepted payments in exchange for approval of U.S. work authorization applications for employees of the companies that paid him).

137. The statutory exceptions to the CFPOA include the local law defense, Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, § 3(3)(a) (Can.), and the reasonable business expense defense. *Id.* § 3(3)(b). Though not directly applicable to the secret commissions offense, the underlying considerations associated with the exceptions to the CFPOA may be a factor as to whether there may be a violation of the secret commissions offense. For example, the payment of reasonable expenses is less likely to be suggestive of corrupt intent or reflective of secretive behavior.

138. *See* discussion, *supra* Part II.D.5.

## IV. SANCTIONS

### A. CRIMINAL PENALTIES

For an individual, the maximum penalty for a violation of the CFPOA is a fourteen-year term of imprisonment.<sup>139</sup> This includes a violation of the new CFPOA record-keeping offense.<sup>140</sup> For a violation of the secret commissions offense, the maximum penalty is a five-year term of imprisonment.<sup>141</sup> A court has the discretion to also impose a fine on an individual and a legal entity with there being no upper limit on the amount of the fine.<sup>142</sup> For an individual, one consideration is whether the individual has the ability to pay the fine or discharge it.<sup>143</sup>

For an organization, a court has the discretion to prescribe conditions of probation which may include making restitution,<sup>144</sup> implementing compliance measures,<sup>145</sup> reporting to the court on the implementation of the compliance measures,<sup>146</sup> identifying an officer responsible for the implementation of the compliance measures,<sup>147</sup> requiring public disclosure regarding the conviction and compliance measures,<sup>148</sup> and ordering whatever other measures it deems necessary to prevent a recurrence.<sup>149</sup>

Proceeds of crime, including a violation of the CFPOA or secret commissions offense, may be forfeited.<sup>150</sup> The “proceeds” of crime are “calculated on the basis of the ‘benefit received’ from the unlawful activity, rather than the ‘net profit’ from the transaction.”<sup>151</sup>

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139. Corruption of Foreign Public Officials Act (Can.) § 3(2).

140. See Can. Crim. Code, R.S.C. 1985, c. C-46, § 4(1)–(2) (Can.).

141. *Id.* § 426(3).

142. See *id.* §§ 734, 735(1)(a); see, e.g., *R. v. Griffiths Energy Int'l*, [2013] A.J. No. 412 (Can. Alta. Q.B.); *R. v. GEI*, Agreed Statement of Facts, *supra* note 53, ¶¶ 15–16, 19, 21 (citing GEI’s self-disclosure, its level of cooperation, and its implementation of remedial measures as factors in reducing the level of the fine imposed).

143. Can. Crim. Code § 734(2).

144. *Id.* § 732(3.1)(a).

145. *Id.* § 732(3.1)(b).

146. *Id.* § 732(3.1)(d).

147. *Id.* § 732(3.1)(e).

148. *Id.* § 732(3.1)(f)(i)–(iii).

149. *Id.* § 732(3.1)(g).

150. *Id.* § 462.37(1).

151. *Canada Phase 3 Report*, *supra* note 16, ¶ 68.

Forfeiture is premised on the “balance of probabilities.”<sup>152</sup> Similarly, crime-related property is also subject to forfeiture.<sup>153</sup>

### B. CIVIL PENALTIES AND ADMINISTRATIVE SANCTIONS

Civil and administrative sanctions may follow from a conviction for a violation of the CFPOA. A permanent debarment now automatically follows from a conviction under the CFPOA.<sup>154</sup> Public Works and Government Services Canada will no longer enter into a contract or real property transaction, or accept bids from companies convicted of a violation of the CFPOA.<sup>155</sup>

### C. MONEY LAUNDERING

A violation of the CFPOA or the secret commissions offense is a “designated offence” fully subject to Canada’s money laundering statute.<sup>156</sup> The money laundering statute applies to every one

who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of [a violation of the CFPOA].<sup>157</sup>

A term of imprisonment of ten years can be imposed on an individual

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152. Can. Crim. Code § 462.37(1).

153. *Id.* § 490.1.

154. *Integrity Provisions*, PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107> (last modified Dec. 17, 2012).

155. *Id.*; see *Canada Follow-up to the Phase 3 Report*, *supra* note 17, at 7 (mandating that companies “provide consent stating that neither they, nor those on the Board of Governors for their company, nor any of their affiliates have ever committed certain acts or offences,” including bribery of a foreign public official, before receiving a Public Works and Government Services Contract). *But see id.* (providing an exception for anyone who has “received a pardon, or capacities restored by Governor-in-Council”).

156. See Can. Crim. Code § 462.3(1)(a) (defining “designated offence” as “any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation”); see also *id.* § 462.31 (laying out the elements of laundering proceeds of crime).

157. *Id.*

for a violation.<sup>158</sup>

In addition, it is also an indictable offense to knowingly possess property or the proceeds of property obtained or derived, either directly or indirectly, from a violation of the CFPOA or the secret commissions offense.<sup>159</sup> If the value of the property exceeds \$5,000, an individual would be subject to a term of imprisonment of ten years.<sup>160</sup>

## V. CONCLUSION

Combined with the secret commissions offense and the new amendments to the CFPOA, Canada's anti-bribery legal regime now resembles both the scope and reach of the FCPA and the UK Bribery Act. In addition to the expanded reach of its legal regime, Canadian authorities now have in place the necessary resources and requisite expertise to actively and effectively enforce the CFPOA. For these reasons, prudence dictates that entities engaged in international activities give particular attention to implementing and actively enforcing measures relevant to complying with the CFPOA in addition to the FCPA and the UK Bribery Act.

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158. *Id.* § 462.31(2)(a).

159. *Id.* § 354(1)(a).

160. *Id.* § 355.2 (clarifying that an individual would otherwise be subject to a term of imprisonment of two years or subject to being charged with a summary offense).