

**THE CORRUPTION OF
FOREIGN PUBLIC OFFICIALS
ACT**

A GUIDE

May 1999

Canadian Cataloguing in Publication Data

Main entry under title:

The Corruption of Foreign Public Officials Act: a Guide

Text in English and French on inverted pages.

Title on added t.p.: La Loi sur la corruption d'agents publics étrangers, un guide.

Also issued in electronic format on the Internet.

Includes bibliographical references.

ISBN 0-662-64278-3

Cat. no. J2-161/1999

1. Canadians -- Foreign countries -- Politics and government -- 20th century.

2. Civil service -- Corrupt practices.

3. Foreign trade regulations -- Canada.

I. Canada. Dept. of Justice.

JF1525.C66C66 1999

345.71'02323

C99-98205-4E

This document provides background information about the *Corruption of Foreign Public Officials Act*. It is not meant to replace legal advice.

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Background

Within Canada, the federal government seeks to prevent and prohibit potential domestic corruption by a combination of federal statutes, parliamentary rules and administrative provisions. The *Criminal Code* includes offences which prohibit bribery, frauds on the government and influence peddling, fraud or a breach of trust in connection with duties of office, municipal corruption, selling or purchasing office, influencing or negotiating appointments or dealing in offices, possession of property or proceeds obtained by crime, fraud, laundering proceeds of crime and secret commissions.

Internationally, Canada has actively participated in anti-corruption initiatives in various international forums, including the Organisation for Economic Co-operation and Development (OECD), the Organization of American States, the Council of Europe, the United Nations, the Commonwealth and within the G-8.

The OECD Convention

In May 1997, the OECD Ministerial meeting called for the negotiation of a binding convention to address the bribery of foreign public officials by the end of 1997, and recommended that Member States submit legislative proposals to their national legislatures to criminalize such bribery and seek their enactment by the end of 1998. On June 21, 1997, leaders of the G-7 countries (including Prime Minister Chrétien) issued a statement in Denver endorsing this approach and timetable for the OECD.

Negotiations of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the OECD Convention) concluded on November 21, 1997, and Canada signed the Convention in Paris on December 17, 1997.

In the Final Communiqué of the G-8 Birmingham Summit, dated May 17, 1998, Heads of State or Government pledged to make every effort to ratify the OECD Convention by the end of 1998.

Canada's response

Bill S-21, *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*, was introduced in the Senate on December 1, 1998, and received Royal Assent on December 10 (as S.C. 1998, c. 34). Canada ratified the OECD Convention on December 17, 1998, and the *Corruption of Foreign Public Officials Act* entered into force on February 14, 1999.

For the OECD Convention to come into force, it needed to be ratified by five of the ten countries with the largest share of OECD exports, representing among them at least 60 percent of the combined total exports of the ten. Canada's ratification triggered the Convention's entry into force on February 15, 1999, 60 days after the deposit of Canada's instrument of ratification.¹

¹ See Article 15.1 of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

The New Act

The *Corruption of Foreign Public Officials Act* features three offences: bribing a foreign public official, laundering property and proceeds, and possession of property and proceeds. In addition, the Act would make it possible to prosecute, for example, a conspiracy or an attempt to commit the offences. It would also cover aiding and abetting in committing these offences, an intention in common to commit them, and counselling others to commit the offences.

1. Bribing a Foreign Public Official

The offence

The offence of bribing a foreign public official is dealt with in subsection 3(1) of the Act. This offence is the centrepiece of the Act and represents Canada's legislative contribution to the international effort to criminalize this conduct.

No particular mental element (*mens rea*) is expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability. The courts will be expected to read in the *mens rea* of intention and knowledge.

The conduct element (*actus reus*), however, is more complicated. The offence reads as follows:

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

(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 organization for which the official performs duties or functions.

Some of the specific wording used here deserves more detailed explanation.

every person commits an offence who

This offence is intended to apply to every person, whether Canadian or not, and within the full meaning of "person" as defined in section 2 of the *Criminal Code*, which states:

"every one", "person", "owner" and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.²

Therefore, for the purposes of the offences under this Act, the potential accused are not limited to individuals, but may also include corporations; and under common law, corporations can be prosecuted for offences. The use of the *Criminal Code* definition of "person" means that the same principles of corporate criminal liability will apply under the new Act as apply to *Criminal Code* offences.

² R.S.C. 1985, c. C-46.

in order to obtain or retain an advantage in the course of business

By using the broad words “in order to obtain or retain an advantage in the course of business,” the Act seeks to prohibit payments made to obtain or retain business or other improper advantage. This wording is intended to cover bribes to secure business or improper advantages in the course of business.

The word “business” is defined in section 2 as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit.” The Act targets the bribery by any person of a foreign public official when the transaction is for profit.

Although the offence of bribery of foreign public officials in the OECD Convention refers to the conduct of “international” business, Canada’s Act speaks of bribing a foreign public official “in the course of business.” The offence therefore need not in every instance involve crossing actual borders. For example, it would be illegal to bribe a foreign public official in Canada to obtain a business contract to build a new wing on an embassy in Canada.

directly or indirectly gives, offers, or agrees to give or offer a loan, reward, advantage or benefit of any kind

This offence would cover bribes given directly or indirectly, including bribes that were given through a third party (e.g. agents). The wording used in the section 3 offence is drawn from subparagraph 121(1)(a)(i) of the *Criminal Code*.

to a foreign public official

The term “foreign public official,” defined in section 2 of the Act, would include, for example, an elected representative or a government official of a foreign state, as well as an official or agent of a public international organization, such as the United Nations. The definition of “foreign state” makes it clear that the official may work for all levels and subdivisions of government, from national to local.

or to any person for the benefit of a foreign public official

This wording is derived from subparagraph 121(1)(a)(i) of the *Criminal Code*. It is intended to cover the situation where a foreign public official might not receive the benefit himself or herself, but instead direct that the benefit be given to a family member, to a political party association, or to any other person for the benefit of the official.

as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions

These words address Article 1.1 of the OECD Convention, which requires Member States (and other States Party to the Convention) to make it a criminal offence to bribe a foreign public official “in order that the official act or refrain from acting in relation to the performance of official duties.”

or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

These words reflect the sense of Article 1.4.c of the OECD Convention, which indicates that to act or refrain from acting in relation to the performance of official duties “includes any use of the

public official's position, whether or not within the official's authorised competence."

Jurisdiction

Canada has jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part in its territory. To be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. There is a sufficient basis for jurisdiction where there is a real and substantial link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must then determine whether there is anything in those facts that offends international comity. (See *R. v. Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.))

Penalties

The five-year maximum term of imprisonment for the offence of bribing a foreign public official ensures that this is an extraditable offence. Corporations, of course, cannot be subject to imprisonment, but they can be fined. The amount of any fine would be at the discretion of the judge, and there is no maximum. Moreover, because this is an indictable offence, no limitation period would apply. The penalty is comparable to the maximum penalty for domestic bribery in sections 121 and 123 of the *Criminal Code*.

Exception and defences

Facilitation payments

Under subsections 3(4) and 3(5), not all payments would amount to bribing a foreign public official. The Act allows for "facilitation payments," which are 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. Examples of such

payments are provided in subsection 3(4), but this is not an all-inclusive list.

Subsection 3(5) emphasizes that 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. In addition, a payment to obtain or retain an improper advantage could not be characterized as a facilitation payment, because such a payment would not relate to an act of a routine nature that is part of the foreign public official's duties or functions.

Defences

Paragraph 3(3)(a) sets out a lawful exception that an accused could use as a defence, namely, that the payment was lawful in the foreign state or public international organization for which the foreign public official performs duties or functions. If successful, this would be a full defence to the offence in subsection 3(1).

Paragraph 3(3)(b) sets out an additional defence. To use this defence, the accused must show that the loan, reward, advantage or benefit was:

- a reasonable expense,
- incurred in good faith,
- made by or on behalf of the foreign public official, and
- *directly related* to the promotion, demonstration or explanation of the person's products and services or to the execution or performance of a contract between the person and the foreign State for which the official performs duties or functions.

This defence is virtually identical to a defence in the U.S. *Foreign Corrupt Practices Act*.³

³ See the *Foreign Corrupt Practices Act* of 1977, as amended, 15 U.S.C. 78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2).

2. Possession or Laundering of Property and Proceeds

The offences

Sections 4 and 5 of the Act describe offences concerning the property and proceeds obtained or derived from bribing a foreign public official. In addition, section 7 applies to the Act the *Criminal Code* provisions that are related to the search, seizure and detention of proceeds of crime (sections 462.3 and 462.32 to 462.5). If an investigation leading to a special search or restraint of property or to a prosecution under this Act is conducted on behalf of the Attorney General of Canada, the management of seized properties would follow the *Seized Property Management Act*.⁴

Section 5 prohibits the laundering of property or proceeds of any property obtained or derived from bribery of a foreign public official, in Canada or offshore. Section 4 specifies that possession in Canada of property or proceeds, whether from bribery or laundering, is an offence.

Under either offence, these proceeds of crime could be seized, restrained or forfeited. Moreover, the federal government may be able to share the forfeited proceeds of crime resulting from convictions or *in rem* forfeiture applications with other countries that assisted in the Canadian federal prosecution leading to the forfeiture. Canada may only do so, however, with countries that have signed a reciprocal sharing agreement with Canada under the provisions of section 11 of the *Seized Property Management Act*.

The maximum penalty for these offences when prosecuted by indictment would be ten years' imprisonment for an individual; corporations would face fines with no set maximum limit. If prosecuted by summary conviction, the offences would have a maximum penalty of a fine of not more than \$50,000 or imprisonment for a term not exceeding six months, or both.

⁴ S.C. 1993, c. 37, as amended.

Exception for peace officers

Section 6 of the Act provides an exemption from criminal liability under sections 4 or 5 for a peace officer or a person acting under the direction of a peace officer for conduct undertaken for the purposes of an investigation or the performance of other duties. The *Criminal Code* definition of “peace officer” is incorporated into section 2 of this Act.

This section is intended to ensure that police agencies can effectively investigate possession and laundering of proceeds of bribery of foreign public officials by posing as offenders themselves.

3. Application

Enforcement

Both the federal government and the provinces would be able to prosecute all three offences under the *Corruption of Foreign Public Officials Act*. The addition of sections 3, 4 and 5 of the Act to the list of offences under section 183 of the *Criminal Code* will make it possible for police to gather evidence through the lawful use of a wiretap and other electronic surveillance in cases involving the bribery of foreign public officials and in the possession and laundering of proceeds from these cases.

Moreover, since the offences in the Act are criminal offences, they fall under the *Mutual Legal Assistance in Criminal Matters Act*.⁵ The penalties for each of these offences are sufficient to justify extradition.

⁵ R.S.C. 1985, c. 30 (4th Supp.), as amended

Annual report

The Act requires the Ministers of Foreign Affairs, Justice, and International Trade, to prepare an annual report on the implementation of the OECD Convention and on the enforcement of this Act. The report is to be presented to Parliament by the Minister of Foreign Affairs.

Other federal laws

The Corruption of Foreign Public Officials Act came into force as part of a government bill (S-21) which also amended other federal laws to combat corruption, notably the *Income Tax Act* and the *Criminal Code*.

The offence of bribing a foreign public official is added to the list of offences found in subsection 67.5(1) of the *Income Tax Act*⁶ to deny claiming bribe payments as a deduction. Similarly, all the offences in the *Corruption of Foreign Public Officials Act* are defined as an “enterprise crime offence” in the *Criminal Code*. The following sections of the Code are also added to the definition of an “enterprise crime offence”: section 123, on municipal corruption; section 124, on selling or purchasing office; and section 125, on influencing or negotiating appointments or dealing in offices.

⁶ R.S.C. 1985, c. 1 (5th Supp.), as amended by S.C. 1994, c.7, Sched. II, s. 46 (1).

Reference

The *Corruption of Foreign Public Officials Act*, is available under “Government Bills” on Parliament’s Internet site at:

http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/S-21/S-21_4/S-21_cover-E.html

Further information on Bill S-21 and on the Act is available on the Department of Justice Canada Internet site:

<http://canada.justice.gc.ca>

It may also be found on the Department of Foreign Affairs and International Trade Internet site:

<http://www.dfait-maeci.gc.ca>

The OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, along with related information, may be found on the Internet at the following address:

<http://www.oecd.org/daf/nocorruption/index.htm>