

# Chambers

GLOBAL PRACTICE GUIDES

---

Definitive global law guides offering  
comparative analysis from top-ranked lawyers

# Anti-Corruption

**Canada: Trends & Developments**

Stéphane Eljarrat, Malcolm Aboud and

Sarah Firestone

Osler, Hoskin & Harcourt LLP

[practiceguides.chambers.com](https://practiceguides.chambers.com)

# 2021

## Trends and Developments

*Contributed by:*

*Stéphane Eljarrat, Malcolm Aboud and Sarah Firestone  
Osler, Hoskin & Harcourt LLP see p.5*

### **Background to Canadian Anti-corruption Law and Enforcement**

Corruption in Canada is regulated extra-territorially under the Corruption of Foreign Public Officials Act (the CFPOA), and domestically under the Criminal Code. The CFPOA, brought into force in 1998 further to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), prohibits bribery of foreign public officials (section 3) as well as keeping improper books and records for the purpose of bribing a foreign public official or hiding that bribery (section 4). Pursuant to section 5 of the CFPOA, any Canadian citizen, permanent resident or company incorporated or organised under the laws of Canada is criminally liable for offences committed outside Canada under the Act. This is in addition to those situations meeting the “real and substantial connection” test for criminal liability.

The Criminal Code creates a number of corruption offences domestically, including for bribery of judicial officers (section 119), bribery of officers including police (section 120), frauds on the government (section 121), breach of trust by a public officer (section 122), municipal corruption (section 123), selling or purchasing office (section 124), influencing or negotiating appointments or dealing in offices (section 125), and secret commissions (section 426). Canadian authorities may also rely on Criminal Code provisions governing fraud (section 380) and/or conspiracy for charges in connection with corrupt behaviour.

Unlike in several other jurisdictions such as the US, bribery and corruption are treated as purely criminal matters under Canadian law. Both the CFPOA and the Criminal Code are federal statutes enforced by the police as a matter of criminal law, with the CFPOA enforced exclusively by the Royal Canadian Mounted Police (the RCMP) and Criminal Code provisions enforced by both the RCMP and provincial law-enforcement agencies. To date, Quebec’s *Unité permanente anticorruption* (UPAC) remains the only provincial authority dedicated solely to anti-corruption detection and enforcement.

### **Enforcement of Corruption Offences**

#### *Enforcement activity*

Following a trend in recent years, there has been little enforcement activity of anti-corruption legislation in Canada in 2020.

Canada has faced certain international criticism in recent years for lack of anti-corruption enforcement, in particular under the CFPOA. To date, approximately only four companies and eight individuals have been convicted under the CFPOA. Notably, the most recent corporate conviction under the Act came in 2013 in *R. v Griffiths Energy International*. Since that time, the only notable enforcement activity against a company under the CFPOA has been against SNC-Lavalin Inc, in which the company was charged with one count of bribing a foreign official under section 3(1)(b) of the CFPOA and one count of fraud under s. 380(1) of the Criminal Code in connection with payments allegedly made to Saadi Gaddafi, the son of Muammar Gaddafi, to secure contracts in Libya. In late 2019, a plea bargain was reached whereby a division of SNC-Lavalin pleaded guilty to fraud, but the CFPOA bribery charge was dismissed. The settlement included a negotiated penalty of CAD280 million in fines and three years’ probation, resolving the criminal case against the Montreal-based engineering firm. Since resolution of these charges, there have been no convictions under the CFPOA.

Unlike corporate convictions, there have been a number of individual convictions under the CFPOA in recent years. Most recently, former SNC-Lavalin executive Sami Bebawi was convicted by jury on 15 December 2019 of five separate counts relating to fraud, corruption of foreign officials, and laundering the proceeds of crime. On 10 January 2020, Mr Bebawi was sentenced to a total of eight and a half years in prison: four and a half for bribery under the CFPOA, and 45 months for each of the other charges. Mr Bebawi’s conviction followed similar convictions of former SNC-Lavalin CEO Pierre Duhaime, Vice-President Riadh Ben Aissa, and ex-hospital manager Yanai Elbaz in connection with fraud in relation to the McGill University Health Centre super-hospital, as well as Robert Barra and Shailesh Govindia in connection with the bribery of Air India officials. Unlike corporate convictions, there have been a number of individual convictions under the CFPOA in recent years. On 12 November 2020, the Royal Canadian Mounted Police charged Damodar Arapakota, a former executive of IMEX Systems Inc, under section 3(1) of the CFPOA for allegedly bribing a public official from Botswana, following self-reporting of the allegations by the company.

#### *Increasing fines and sentences*

Notwithstanding the apparent lack of enforcement activity, the past year has shown a significant increase in the fines issued against corporations and prison sentences pronounced against

individuals convicted of corruption offences. The fine issued against SNC-Lavalin represents the highest fine awarded to date to a company in Canada for similar types of offences, whether domestic or extra-territorial. The highest corporate fine resulting from a conviction under the CFPOA is the agreed-upon fine of CAD10.35 million in Griffiths. In that case, a guilty plea was entered in relation to CFPOA charges in respect of payments to a foreign official.

Similarly, the eight and a half-year prison sentence pronounced against Mr Bebawi – as well as the four and a half years representing the CFPOA portion of that sentence – represent a significant increase from previous convictions for individuals in Canada. Generally speaking, sentences for similar offences – including those awarded in the Elbaz, Barra, Govindia and Karigar convictions – have been in the order of approximately three years.

As such, a trend appears to be emerging toward higher sentences than in previous convictions. Regarding convictions for individuals, this appears to be attributable in part to amendments to the CFPOA in 2013, which increased the maximum sentence for offences thereunder from five to 14 years. For corporations, it remains to be seen whether the above-noted fines should be viewed as a move toward the larger quantum of fines experienced in jurisdictions such as the US, which have routinely reached the hundreds of millions of dollars.

### **Criticism of Canadian enforcement**

As previously noted, Canada has faced certain criticism for its lack of anti-corruption enforcement in recent years, and particularly in relation to the CFPOA. In keeping with the OECD Convention's directive that member countries "should provide adequate resources to law-enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials," international organisations have taken note that there have been fewer prosecutions and convictions under the CFPOA than in certain other jurisdictions subject to the Convention.

Most recently, Transparency International's (TI) "Exporting Corruption" report released on 13 October 2020 maintained that Canada has retained its reputation of possessing a level of "limited enforcement" in regard to penalising bribery of foreign public officials while operating abroad. TI had made similar findings in its 2018 version of the same report. Similarly, Canada dropped from eighth to twelfth in TI's annual ranking of perceived public-sector corruption in its Corruption Perceptions Index. This represents the first time Canada has dropped from the top ten in the report since 2005.

### **New enforcement mechanisms**

Recent legislative and enforcement developments have arguably provided authorities with greater tools to investigate and prosecute corruption in Canada. In September 2018, Canada implemented its much-awaited deferred prosecution agreement (DPA) regime, referred to under Canadian legislation as "remediation agreements". Remediation agreements in Canada are described in further detail below. In addition, in 2019, Ontario established its Serious Frauds Office (the SFO) to investigate and prosecute complex financial crime.

As discussed above, corruption in Canada is a matter of federal criminal law enforced by the police. Notwithstanding this, appropriate provincial authorities have jurisdiction to investigate and bring charges under relevant legislation. In 2019, Ontario established its SFO, modelled after that in the United Kingdom. The Ontario SFO is a combined taskforce of specialised Crown prosecutors and investigators, focused on situations involving complex fraud, bribery and corruption, and has the ability to seek criminal penalties.

The SFO's establishment last year – although not limited to corruption – represents a heightened-focus enforcement of financial crime in the province and provides another avenue for investigation and prosecution of corruption offences. On 12 September 2020, an individual was for the first time arrested and charged with corruption offences following an SFO investigation, with Charles Debono charged with bribery and fraud among several other Criminal Code offences in connection with an alleged CAD56 million ponzi scheme originating in 2012. The investigation is ongoing. It remains to be seen whether other provinces will follow suit with dedicated corruption or financial crime enforcement authorities.

### **Status of Remediation Agreements**

As previously noted, in September 2018 Canada implemented its much-awaited DPA regime, referred to in Canada as "remediation agreements". Notwithstanding this, no remediation agreements have been announced to date, either in relation to corruption offences or otherwise.

A DPA/remediation agreement is an agreement entered into between a company alleged to have engaged in economic crimes and a prosecutor, whereby prosecution is suspended while the organisation undertakes to fulfil various conditions. Such conditions may include fines, remediation measures, enhanced reporting requirements or allowing third-party oversight on compliance. When these undertakings are fulfilled, the charges are dropped. Prosecutors in Canada may enter into negotiations for a remediation agreement if the following conditions are met:

# CANADA TRENDS AND DEVELOPMENTS

*Contributed by: Stéphane Eljarrat, Malcolm Aboud and Sarah Firestone, Osler, Hoskin & Harcourt LLP*

- there is a reasonable prospect of conviction with respect to the offence;
- the impugned conduct did not cause serious bodily harm or death or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organisation or terrorist group;
- negotiating the agreement must be in the public interest and appropriate in the circumstances; and
- the Attorney General must consent to negotiation of the agreement.

Factors to be considered when deciding whether to negotiate a remediation agreement include the circumstances in which the offence was brought to the attention of authorities (including whether the company self-reported the conduct), the nature and gravity of the offence, and the degree of involvement of senior management, among others.

Remediation agreements are seen as an effective enforcement tool which has been used with significant success in other jurisdictions such as the US and UK, and as such are expected to be an important mechanism for Canadian authorities to investigate and enforce corruption offences. As previously discussed, to date no remediation agreements have been announced since coming into force in Canada. Notably, a highly publicised matter that involved attempts to enter into a remediation agreement by a company charged with anti-corruption offences was ultimately unsuccessful. Notwithstanding this, remediation agreements are likely to become an important tool for authorities for anti-corruption enforcement in Canada, going forward.

## Money Laundering

Public focus on corruption issues in Canada has focused significantly on money laundering in recent years, continuing through 2020. One of the main reasons cited for Canada's diminished standing in TI's Corruption Perceptions Index was the perceived prevalence of money laundering in the country. In particular, the report cited two different government-commissioned reports in British Columbia (the 2019 Maloney Report and the 2018 German Report) detailing the extent of money laundering in real estate, casinos and luxury goods.

As a result of the underlying perception that Canada is an easy place to launder money, and in response to the above-mentioned provincially commissioned reports, British Columbia proceeded in 2020 with its Commission of Inquiry into Money Laundering in British Columbia (the Cullen Commission). The Cullen Commission's mandate is to inquire and provide recommendations surrounding money laundering in British Columbia. The Commission has been conducting hearings in order to make findings of fact specifically regarding money laundering in the gaming and

horse racing, real estate, financial institution and money services, corporate (including shell companies and financial instruments for the purposes of money laundering), luxury goods and professional services sections. The Commission is ongoing, and scheduled hearings have been conducted by video-conference due to the COVID-19 pandemic. Canada can anticipate potential changes to its anti-money laundering laws, regulations and enforcement arising from recommendations of the Cullen Commission.

## Impact of COVID-19 and Expectations for Enforcement

The COVID-19 pandemic has created significant business disruptions for Canadian companies, in their operations both domestically and overseas. Companies have faced new challenges in oversight over employees working from home, have faced disrupted supply chains, have had to reach out to new and different suppliers overseas, including government-controlled entities, and have been forced to work in new jurisdictions in which they may have little familiarity. All of this contributes to increased risk of corruption. At the same time, while certain regulatory requirements have been eased as a result of the pandemic, law-enforcement authorities continue to investigate and enforce corrupt behaviour.

The foregoing business disruptions, combined with challenges in oversight during the pandemic, appear to have had a significant impact on global white-collar crime, including corruption. For instance, a recent TI report indicates that over USD1 billion in losses have occurred as a result of corruption and malfeasance since the onset of the pandemic, including from embezzlement, procurement failures, healthcare corruption and bribery of civil servants. Canada is not immune to these issues, particularly in the context of the COVID-19 pandemic, and both Canadian businesses and those operating in Canada can expect increased risk and enforcement activity as a result of the pandemic.

## Conclusion

Canada has received criticism in recent years for its perceived lack of anti-corruption enforcement activity, which has continued in 2020. Particularly in light of increased pressure on Canada to enforce its anti-corruption legislation, as well as its repeated commitment to do so, and buttressed by the effects of COVID-19, recent implementation of additional enforcement mechanisms and authorities, and increases in fines and sentences awarded to those convicted of corruption offences or related crimes, Canadian companies should expect increased risk and enforcement with respect to bribery and corruption, whether foreign or domestic. Given these added risks, combined with scrutiny of Canada's anti-corruption enforcement, effective anti-corruption compliance should be a priority for Canadian businesses and those operating in Canada.

# TRENDS AND DEVELOPMENTS CANADA

*Contributed by: Stéphane Eljarrat, Malcolm Aboud and Sarah Firestone, Osler, Hoskin & Harcourt LLP*

**Osler, Hoskin & Harcourt LLP** is a leading Canadian law firm with a singular focus: the client's business. From Toronto, Montreal, Calgary, Ottawa, Vancouver and New York, Osler advises its Canadian, US and international clients on an array of domestic and cross-border legal issues. Osler's collaborative "one firm" approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by the client's business needs. Osler is recognised for its extensive expertise in business law and is consistently ranked as one of Canada's top firms. The firm invests in building long-term relationships by focusing on understanding the

business, challenges, and the changing goals and strategies of its clients. For legal matters, the client wants to know how the law firm can solve its problem, and how much it will cost. Osler's way of working, which it calls Osler Works, delivers practical, cost-effective legal services using cutting-edge technology and predictable processes that serve the client's business, and its bottom line. By embracing transparent planning, ongoing communication and non-traditional approaches to law, Osler Works helps clients reduce the time, effort and costs of legal matters. This approach focuses on what is important to a client: law that works.

## Authors



**Stéphane Eljarrat** is a partner and leads the national white-collar defence practice at Osler. His practice encompasses a wide range of corporate criminal and regulatory matters at all stages from the early investigation phase up to trials and appeals. He also acts in cross-jurisdictional

and national security-related matters. Prior to joining Osler, he was a partner in another Canadian law firm. He also worked for the Canadian Department of Justice at the Royal Canadian Mounted Police Legal Services, the National Tax Litigation Section, as a Federal Prosecutor, in the Department of Legislation and Investigations of the Quebec Revenue Agency and for the Ministry of Public Safety.



**Malcolm Aboud** is an associate in the litigation group at Osler, Hoskin & Harcourt LLP. Malcolm has extensive experience in risk management and regulatory matters including internal investigations and regulatory and enforcement proceedings. He has provided

advice on a broad array of topics, including anti-corruption compliance, sanctions compliance, fraud, anti-money laundering and terrorist financing. His practice includes investigation planning, search-warrant response, privacy considerations, corporate due diligence, implementation of compliance policies, and risk assessment to remediate existing compliance issues. Malcolm has extensive experience advising Canadian companies in cross-border regulatory matters involving investigations by foreign regulatory authorities.



**Sarah Firestone** is an associate in the litigation group at Osler, Hoskin & Harcourt LLP. She has experience with domestic and international commercial arbitration, investment treaty arbitration and trade disputes, as well as risk management and crisis response, including

internal and regulatory investigations, securities litigation and enforcement issues. Sarah previously worked as a legal trainee in the International Arbitration Practice group of a major global firm in Paris, was seconded to the Enforcement Branch of the Ontario Securities Commission, and completed a summer clerkship at the Ontario Superior Court of Justice.

# CANADA TRENDS AND DEVELOPMENTS

---

*Contributed by: Stéphane Eljarrat, Malcolm Aboud and Sarah Firestone, Osler, Hoskin & Harcourt LLP*

## **Osler, Hoskin & Harcourt LLP**

100 King Street West  
1 First Canadian Place  
Suite 6200  
P.O. Box 50  
Toronto ON M5X 1B8  
Canada

Tel: +416 362 2111  
Fax: +416 862 6666  
Email: [seljarrat@osler.com](mailto:seljarrat@osler.com)  
Web: [www.osler.com/en/home](http://www.osler.com/en/home)

# OSLER

**Osler, Hoskin  
& Harcourt LLP**