



# Canada - Global bribery offenses guide

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By: Tudor Carsten

## 1. What is the legal framework governing bribery in Canada?

The Criminal Code and the Corruption of Foreign Public Officials Act (the CFPOA) are the primary pieces of legislation governing bribery in Canada. The Criminal Code sets out various offences related to domestic bribery. The CFPOA prohibits bribes to foreign public officials, and is the Canadian legislation pursuant to which Canada implements its obligations under the United Nations Convention against Corruption.

The Quebec Anti-Corruption Act is the only broad sub-federal anti-corruption legislation in Canada. The Anti-Corruption Act deals with corruption, breach of trust, malfeasance, collusion, fraud and influence peddling in the public sector, as well as misuse of public funds or public property or gross mismanagement of contracts within the public sector. The Anti-Corruption Act creates a local provincial authority that investigates allegations of corruption in violation of existing anti-corruption legislation. The Anti-Corruption Act does not create any specific bribery offences, but does significantly empower policing authorities to investigate allegations of corruption within Quebec.

The Conflict of Interest Act applies specifically to federal public office holders. The Conflict of Interest Act prohibits public office holders, and members of their families, from accepting “any gift or other advantage... that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.” In addition to the federal Conflict of Interest Act, there are various provincial acts that address conflicts of interest in provincial government.

The Canada Elections Act creates a prohibition against offering or accepting bribes, gifts or other advantages that might reasonably be seen to have been given to influence the election-related choices made by individuals, whether those are the candidates or the electors themselves, during an election period.

Canadian companies that conduct business in the extraction industry must also comply with the reporting requirements set forth in the Extractive Sector Transparency Measures Act (the ESTMA). The ESTMA imposes additional reporting obligations on mining, oil, and gas companies for payments made to foreign and domestic governments (and government officials), this includes indigenous governments.

## 2. What constitutes a bribe?

The Criminal Code prohibits anyone from directly or indirectly giving or offering a loan, reward, advantage or benefit of any kind to a federal or provincial government official in Canada as consideration for cooperation, assistance, exercise of influence, or an act or omission in connection with any government business. Additionally, under certain circumstances, the Criminal Code prohibits individuals from giving or receiving a bribe in private business.

The CFPOA similarly prohibits the direct or indirect giving of any loan, reward, advantage or benefit of any kind to a foreign public official. The language of the CFPOA extends the prohibitions to benefits granted to members of the official's

family or to other persons for the official's benefit. Additionally, the offence may be committed even if the official is not in fact able to provide the requested assistance or cooperation.

The Conflict of Interest Act prohibits any benefits, gifts or advantages that might reasonably be seen to have been given to influence the public office holder, thereby creating a conflict of interest. This is a broader prohibition than one directed solely at bribes. The Conflict of Interest Act defines a gift or other advantage as (i) an amount of money if there is no obligation to repay it, and (ii) a service or property, or the use of property or money provided without charge or at less than its commercial value. Additionally, the Conflict of Interest Act creates a prohibition on benefiting from any corporation, contract or employment relationship, except in specific circumstances. Finally, the Conflict of Interest Act creates a prohibition against accepting travel on non-commercial chartered or private aircraft, except in specific circumstances.

The Canada Elections Act does not define a bribe. However, a gift or advantage is defined as (i) an amount of money if there is no obligation to repay it; and (ii) a service or property, or the use of property or money, that is provided without charge or at less than its commercial value. Therefore, we can safely use this language when determining what kind of benefits would constitute a bribe for the purpose of the Canada Elections Act.

The ESTMA does not specifically address bribes. However, the ESTMA requires that every payment, regardless of the intention behind it, be reported to the appropriate body. Payments are defined as any payment, whether monetary or in kind, that is made to a payee in relation to the commercial development of oil gas or minerals.

The Anti-Corruption Act deals broadly with corruption, breach of trust, malfeasance, collusion, fraud and influence peddling, in the public sector as well as misuse of public funds or public property or gross mismanagement of contracts within the public sector. The Anti-Corruption act uses the language of a wrongdoing and includes any contravention of a federal law that pertains to corruption as a wrongdoing. Therefore, the definitions established by the Criminal Code and the CFPOA, in relation to the corruption offences, would constitute a wrongdoing under the Anti-Corruption Act.

### 3. What are the principal offences under this legal framework?

- Under the Criminal Code:
  - bribery of judicial officers (section 119);
  - bribery of officers (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);
  - fraud (section 380);
    - It is an offence for anyone to defraud the public or any person, of any property, money, valuable security, or service, by deceit, falsehood, or other fraudulent means. The Supreme Court of Canada has determined that “other fraudulent means” is extremely broad, and covers almost any form of dishonesty. Therefore, the general Criminal Code provisions on fraud could apply in the context of bribery.
  - Secret Commissions (section 426);
    - The Criminal Code prohibits corruptly giving, or offering to give, an agent a reward or benefit for doing or omitting to do anything relating to the affairs or business of the agent's principal, or for showing favor or disfavoring any person with relation to the affairs or business of the agent's principal. A bribe for the purpose of this section is defined as a reward, advantage, or benefit of any kind. Accordingly, individuals and companies may be held criminally liable for receiving or causing to be transferred certain benefits, even when a government official is not involved. Agent is a very broad term that includes employees.
- Under the CFPOA:
  - bribing a foreign public official (section 3);
  - falsifying accounts for the purpose of bribing or concealing the bribing of a foreign public official (section 4);
- Under the Conflicts of Interest Act:
  - gifts and other advantages (section 11);
  - travel on non-commercial chartered or private aircraft (section 12);

- contracts with public sector entities or private entities contracting with public sector entities (section 13);
- contracting with a spouse, common-law partner, child, sibling or parent (section 14);
- various employment-related prohibited activities (section 15);
- fundraising that places the public office holder in a conflict of interest (section 16);
- Under the Canada Elections Act:
  - offering a bribe (section 282.7(1));
  - accepting a bribe (section 282.7(2));
  - prohibition against accepting gifts and other advantages (section 477.9(1)); and
- Under the ESTMA:
  - failure to comply with the reporting, or any other, requirements of the Act (section 24(1)).
- There are no specific offences created by the Anti-Corruption Act relating to bribery or corruption. However, the Act does create a number of offences in relation to hindering investigations authorized by the Act:
  - hindering an audit or investigation (section 14.1);
  - taking reprisal against a person who has disclosed a wrongdoing or cooperated with an investigation into wrongdoings (section 32); and
  - hindering the work of the committee (section 35.7).

#### 4. What is the jurisdictional reach of the legal framework?

An individual or corporation will be found to be subject to the Criminal Code as long as a significant portion of the activities constituting the offence took place in Canada, even if parts of the offense occurred outside Canada. Furthermore, to the extent that a corporation is incorporated or continued by or under the laws of Canada or a province of Canada, the Criminal Code would also apply to designated offences that occur elsewhere but would have constituted a designated offence in Canada.

The CFPOA's jurisdiction exists to the extent that a significant portion of the activities (bribery of foreign officials) takes place in Canada. The CFPOA will also apply to offences committed outside Canada by Canadian citizens, permanent residents and corporations. Effectively, Canadian citizens and entities are subject to worldwide regulation under the CFPOA. The CFPOA may also apply to offences committed outside Canada by a foreign accused. The offence must have a "real and substantial" link to Canada, and Canadian authorities must have some means by which to "lay hands" on the foreign accused, usually either through extradition treaties or through that foreign accused's entry into Canada.

The Conflicts of Interest Act applies to all federal public office holders in Canada. Each province will also have its own provincial legislation dealing with local provincial legislatures.

The Canada Elections Act applies to all individuals nominated for election to the House of Commons. Each province will also have its own provincial legislation dealing with local provincial elections.

The ESTMA applies to (i) to an entity that is listed on a stock exchange in Canada; or (ii) an entity that has a place of business in Canada, does business in Canada or has assets in Canada and that meets certain financial thresholds; and (iii) any other prescribed entity.

The Anti-Corruption Act applies to entities involved in the bribery of public officials in the Province of Quebec.

#### 5. Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

Private individuals, public officials and legal entities can be prosecuted for bribery offences under the Criminal Code. Companies will be held liable where the act was committed with the knowledge of a senior officer, as defined under the Criminal Code.

- A senior officer is a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer. Recent case law indicates that even middle management may qualify as senior officers, under certain circumstances.

- The relevant provisions impute liability upon anyone who “directly or indirectly” commits an offence contrary to the Act. Therefore, utilizing a third party or agent may impute liability upon an individual or legal entity.

Private individuals, public officials and legal entities can be prosecuted for bribery offences under the CFPOA. The CFPOA refers to the broad language of the Criminal Code in determining who can be held liable for bribery offences contrary to the Act.

The Conflicts of Interest Act only applies to federal public office holders.

The Canada Elections Act only applies to those individuals running for election to the House of Commons.

The ESTMA does not specifically address bribery; however, any person or entity that fails to comply with any of the mandatory provisions therein will be liable under the Act. Furthermore, if a person or entity commits an offence under the Act, any officer, director or agent of the person or entity who directed or participated in the commission of the offence is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence.

Private individuals, public officials and legal entities can be investigated under the Anti-Corruption Act, pursuant to its enforcement of the relevant bribery provisions of the Criminal Code and the CFPOA.

## 6. Can a parent company be liable for its subsidiary's involvement in bribery?

Yes, the relevant provisions of the Criminal Code and the CFPOA impute liability in most instances upon anyone who “directly or indirectly” commits an offence contrary to the Act. The court may find that a parent company has indirectly committed an offence if its subsidiary is involved in bribery. This will be decided on a case-by-case basis. A parent company could also be found liable for aiding and abetting or counseling an offence committed by a subsidiary under the Criminal Code.

If a subsidiary corporation does not fall under the jurisdiction of the ESTMA, but the parent company that controls it does, then the controlling entity would be liable for not reporting any payments made by its subsidiary to any government or government officials.

## 7. Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

Yes, with certain exceptions, the Criminal Code and the CFPOA make no distinction between facilitation payments and any other kind of bribe.

## 8. Does the legal framework restrict political and charitable contributions?

Neither the Criminal Code nor the CFPOA make express reference to political and charitable contributions in the context of bribery. A political or charitable contribution could be considered a bribe if it is given or received corruptly with the intention of inducing a person to do or omit to do anything in their official capacity.

- Under the Criminal Code, a political contribution to a public official or to a charitable institution that the public official is related to will generally be considered a bribe if the contribution is made as consideration for an act or omission by the official in performance of their official functions. The primary consideration under the Criminal Code is whether the benefit given, was given corruptly. There is no definition for corruptly in the Criminal Code; however, Canadian courts have stated that it refers to an act done *mala fide* not *bona fide*, designed to bring about an effect forbidden by the offence.
- Under the CFPOA, a political contribution to a foreign official or to a charitable institution that the official is related to will be considered a bribe if the contribution is made to obtain or retain a business advantage and granted (i) as consideration for an act or omission by the official in performance of their official functions; or (ii) to induce the official to use their position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties.

Similarly, under the Conflicts of Interest Act and the Canada Elections Act, there is no specific prohibition or guidance on political and charitable contributions. However, the same analysis would apply.

- Under the Conflicts of Interest Act if a gift or other advantage is given to a public office holder, or their family, that might reasonably be seen to have been given to influence the public office holder, then it will be prohibited. The broad language of a “gift or other advantage” could very conceivably include a political or charitable contribution.
- Under the Canada Elections Act if a bribe, gift or other advantage is given to a candidate or elector that might reasonably be seen to have been given to influence the election-related choices made by individuals, then it will be prohibited. The broad language of a “gift or other advantage” could very conceivably include a political or charitable contribution.

## 9. Does the legal framework place restrictions on corporate hospitality?

Neither the Criminal Code nor the CFPOA provide specific guidance with regard to corporate hospitality. Therefore, under these Acts a hospitality gift would be assessed by reference to the relevant corruption provisions.

- Under the Criminal Code a hospitality gift will generally be considered a bribe if the gift is made as consideration for an act or omission by the official in performance of their official functions. The primary consideration under the Criminal Code is whether the benefit given, was given corruptly. There is no definition for corruptly in the Criminal Code; however, Canadian courts have stated that it refers to an act done *mala fide* not *bona fide*, designed to bring about an effect forbidden by the offence.
- Under the CFPOA a hospitality gift will be considered a bribe if the hospitality gift is made to obtain or retain a business advantage and granted (i) as consideration for an act or omission by the official in performance of their official functions; or (ii) to induce the official to use their position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.
- The language of “reward, advantage or benefit of any kind” seen in the relevant provisions of both Acts is broad and allows the possibility that the courts could interpret even trivial gifts as bribes.

At issue will be the intention behind the hospitality gift. A hospitality gift that is provided to obtain a business advantage and with the expectation of a quid pro quo is likely to be considered a bribe. Furthermore, the value of the hospitality gift is a significant determinant as to how the courts will view the matter. Small token gifts are unlikely to be considered bribes. However, if the value of the gift could affect, or reasonably be perceived to affect, an individual’s conduct, it likely will be unlawful.

As discussed below, there are two statutory exceptions to bribery charges in the CFPOA, one of these exceptions could apply to allow certain hospitality gifts. Under section 3(3)(b), gifts will not constitute a bribe where the gift was made to pay the reasonable expenses incurred in good faith on behalf of the foreign public official, where the expenses are directly related to (i) the promotion, demonstration or explanation of the offeror’s products and services; or (ii) the execution or performance of a contract between the offeror and the foreign state. This second exception would include instances of corporate hospitality where meals, or even flights, are paid for as long as these expenses are directly related to the two instances above.

The Conflicts of Interest Act prohibits public office holders or members of their family from accepting any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function. However, a public office holder or a member of their family may accept a gift or other advantage (i) that is permitted under the Canada Elections Act; or (ii) that is given by a relative or friend; or (iii) that is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public office holder’s position.

- No specific rules exist as to which type of gifts are prohibited. Nor is there a prohibited value. What is important is who is offering the gift and why it is being offered.
- Similar rules apply to public servants under the Federal Policy on Conflicts of Interest and Post-Employment. Public servants may accept “gifts, hospitality and other benefits [...] if they are infrequent and of minimal value, within the normal standards of courtesy or protocol, arise out of activities or events related to the official duties of the public servant concerned, and do not compromise or appear to compromise the integrity of the public servant concerned or his or her organization.”

The Canada Elections Act prohibits candidates from accepting any gift or other advantage that might reasonably be seen to have been given to influence them in the performance of their duties and functions as a member of the House of Commons if the candidate were to be elected. Furthermore, each candidate must provide to the Chief Electoral office a

statement disclosing all gifts received above CAD500, with minor exceptions.

- As with the other legislation discussed, it is important to determine the intention behind the gift. The higher the value of the gift, the more likely it is that it will be considered to be contrary to a prohibition on gifts or benefits.
- As an exception to the prohibitions above, a candidate may accept a gift or other advantage that is given by a relative or as a normal expression of courtesy or protocol.

## 10. Are there any defenses for bribery offences?

There are no specific statutory defenses to bribery charges under the Criminal Code.

Section 3(3) of the CFPOA contains two exceptions that can act as a defense to a bribery charge. Section 3(3)(a) grants an exception for payments that are legal or required in the jurisdiction in which they are made. Section 3(3)(b) grants an exception for payments made to officials to cover expenses incurred in good faith and directly related to (i) the promotion, demonstration or explanation of the offeror's products and services; or (ii) related to the execution or performance of a contract with the foreign state.

The common law defense of duress may be available where individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty.

## 11. What are the key regulatory or enforcement bodies with regard to bribery?

The Royal Canadian Mounted Police is the principle enforcement authority with regards to bribery under both the Criminal Code and the CFPOA.

The Public Prosecution Service of Canada, under the direction of the Director of Public Prosecutions, has carriage of prosecutions of CFPOA offences.

The Conflicts of Interest Act is administered by the Conflict of Interest and Ethics Commissioner and their office.

The Canada Elections Act is administered and enforced by the Office of the Chief Electoral Officer of Canada, also called Elections Canada. However, all prosecutions for violations of the Act are under the authority of the Director of Public Prosecutions, who will consult with the commissioner of Elections Canada.

The ESTMA is currently administered by the Minister of Natural Resources and their office.

The office of the Anti-Corruption commissioner administers the Anti-Corruption Act, whereas the *Unité permanente anticorruption* is the designated police force that investigates violations of various alleged corruption offences.

## 12. What are the legal consequences of being found guilty of bribery offences?

Criminal Code bribery offences are punishable by fines in the discretion of the court and maximum jail terms ranging between 5 to 14 years.

Offences under the CFPOA are subject to a fine in discretion of the court and imprisonment of up to 14 years.

Under the Conflicts of Interest Act gifts valued at over CAD1,000 will be forfeited to Her Majesty in Right of Canada. However, the potential for a public ethics inquiry arising out of an alleged violation the Act is the true penalty levied against public office holders.

Under the Canada Elections Act an individual found guilty of accepting a bribe is liable (i) on summary conviction, to a fine of not more than CAD20,000 or to imprisonment for a term of not more than one year, or to both; or (ii) on conviction on indictment, to a fine of not more than CAD50,000 or to imprisonment for a term of not more than five years, or to both. An individual found guilty of offering a bribe or of accepting a prohibited gift or other advantage will not be allowed to (i) be elected to or sit in the House of Commons; or (ii) hold any office in the nomination of the Crown or of the Governor in Council.

Under the ESTMA, every person or entity that fails to comply with the payment reporting requirements, the prohibition on proving misleading information, and the prohibition on avoidance, is guilty of an offence punishable on summary

conviction and liable to a fine of not more than CAD250,000.

There is also potential for civil action, forfeiture of property and parent company liability, as discussed. Additionally, companies convicted of bribery offences may face disqualification from public procurement contracts under the provincial Procurements Acts.

### 13. Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

Yes, DPAs have been available in Canada since September, 2018. The new DPA regime, labeled remediation agreements, allows prosecutors to enter into agreements with organizations, other than a public body, that have committed economic offences, such as bribery. These agreements will suspend prosecutions in return for specific undertakings that the company must fulfill to avoid criminal charges.

For the prosecutor to enter into DPA negotiations, certain conditions must be met: (i) there must be a reasonable prospect of conviction; (ii) the impugned conduct must not have caused serious bodily harm or death, or injury to national defense or national security and was not committed for the benefit of, or direction of, a criminal or terrorist organization; (iii) the Attorney General must consent; and (iv) negotiating the agreement must be in the public interest and appropriate in the circumstances. The prosecutor must then also consider numerous factors surrounding the alleged offences to determine whether to negotiate the remediation agreement.

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#### AUTHORS

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**Tudor Carsten**

Partner

Toronto | T: +1 416 365 3500

tudor.carsten@dlapiper.com

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