

International Anti-Corruption Day: 9 December

December 8, 2017

By Kayla Theeuwen

International Anti-Corruption Day has been recognized on an annual basis since the passage of the United Nations Convention against Corruption – which Canada has ratified – in 2003. This year, International Anti-Corruption Day falls on 9 December 2017.

A number of judicial and legislative developments over the last six months demonstrate that Canada remains committed to eradicating corruption both domestically and abroad, in accordance with its international commitments. We examine three of these developments below.

Facilitation Payments are now a Criminal Offence

Canada's *Corruption of Foreign Public Officials Act*, SC 1998, c 34 ("**CFPOA**"), which deals exclusively with foreign corruption, makes bribing a foreign public official a criminal offence (see s. 3(1)).

When it was enacted in 1998, s. 3(4) of the *CFPOA* excluded facilitation payments from the general bribery offence. A facilitation payment – colloquially known as a "grease payment" – is a payment made to a foreign official to expedite or secure the performance by that official of any act of a routine nature that is part of the official's duties or functions, such as processing official documents (i.e., visas and work permits).

In 2011, the Organization for Economic Co-Operation and Development (OECD) published a report that concluded that Canada was not doing enough to prosecute bribery. In response to this report, the federal government announced that it would take additional steps to combat bribery and corruption, and in February 2013, the Senate introduced Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act*.

One of the amendments set out in Bill S-14 involved the repeal of the facilitation payment exclusion in s. 3(4) of the *CFPOA*. The repeal of s. 3(4) was not proclaimed in force until 31 October 2017. From this date forward, facilitation payments are considered a bribery offence under the *CFPOA*. A conviction under the bribery offence attracts a prison term of up to 14 years for an individual.

Given the serious consequences associated with offences under the *CFPOA*, and this recent development regarding facilitation payments, Canadian businesses are encouraged to revisit their anti-corruption compliance policies, and update them accordingly.

Sergei Magnitsky Law

On 18 October 2017, Bill S-226[1] received Royal Assent, and Canada's *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, SC 2017, c 21 ("**Magnitsky Act**") entered into force.

The *Magnitsky Act* enables the Governor in Council to make targeted orders and regulations to restrict dealings in property and

freeze the assets of foreign nationals who are responsible for or complicit in ordering, controlling or otherwise directing acts of corruption — including bribery, the misappropriation of private or public assets for personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources.

Bill S-226 and the *Magnitsky Act* were borne out of the story of Sergei Magnitsky, a Russian lawyer who died in a Russian prison in 2009. Magnitsky acted for Hermitage Capital Management Ltd ("**Hermitage**"), an investment fund with significant ties to Russia. In 2008, Magnitsky uncovered a fraud orchestrated by Russian law enforcement officials, which resulted in the embezzlement of \$230 million in taxes that Hermitage paid to the Russian government.

After Magnitsky testified about the fraud, Russian officials began a criminal "investigation" into Magnitsky and his participation in an alleged tax fraud. Magnitsky was arrested for a fraud he did not commit, held without bail, and tortured by police to withdraw his testimony against the Russian law enforcement officials. He refused to withdraw his testimony. Continued torture by Russian public officials, poor prison conditions, and a lack of medical attention while in prison resulted in Magnitsky's death in November 2009.

Following the death of his friend and colleague, Bill Browder, the CEO and co-founder of Hermitage, lobbied for the United States Congress to pass the "Magnitsky Act". The goal of the proposed American Magnitsky Act was to punish Russian human rights violators seeking to do business in the US. The American Magnitsky Act was signed into law by President Barack Obama in December 2012.

The Canadian version of the American Magnitsky Act is yet another response by the federal government to acts of foreign corruption and gross violations of internationally-recognized human rights.

Last month, Canada made use of the *Magnitsky Act* to send a strong message to foreign nationals engaged in foreign corruption. On 3 November 2017, regulations were enacted under the Act, pursuant to which Canada imposed sanctions against 52 foreign nationals, including 30 Russian nationals. These regulations were enacted in response to various incidents related to the Sergei Magnitsky case, and incidents of corruption and human rights violations in South Sudan.

A Conviction under the CFPOA

In 2014, Nazir Karigar was convicted on a single count indictment of offering a bribe to a foreign public official contrary to s. 3(1) of the *CFPOA*, and sentenced to three years in prison. Karigar's conviction was Canada's first court-imposed conviction under the *CFPOA* since its enactment in 1998.

As an agent or employee of Cryptometrics Canada, a Canadian subsidiary of an American company, Karigar agreed with other employees and agents of Cryptometrics to bribe public officials in India in order to secure a multi-million dollar contract with Air India. The trial judge was satisfied beyond a reasonable doubt that Karigar was involved in a conspiracy to offer bribes to Air India officials to secure the contract for Cryptometrics.

The trial judge held that the offence of "agreeing" to give or offer a benefit to a foreign public official in s. 3 of the *CFPOA* does not require the Crown to prove an agreement with or payment to a particular public official. In this case, Karigar's conspiracy with employees and agents of Cryptometrics was a contravention of the *CFPOA* in and of itself.

In July of this year, the Ontario Court of Appeal upheld Karigar's conviction, breathing life into the *CFPOA*, and signalling a commitment by the judiciary to prosecute corrupt activity. The decision highlights the need for companies and individuals to tread carefully when dealing with foreign public officials.

WeirFoulds' lawyers advise clients on the interpretation and application of the CFPOA, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and related legislation, and assist clients with preparing, reviewing and implementing effective anti-corruption, anti-money laundering and anti-fraud compliance policies. To learn more, contact WeirFoulds' Anti-Corruption, Anti-Money Laundering & Regulatory Compliance Group.

[1] An Act to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights and to make related amendments to the Special Economic Measures Act and the Immigration and Refugee Protection Act. Bill S-226 was introduced in the Senate in May 2016.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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