Anti-corruption (joint ventures) Q&A: Canada

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This Q&A provides country-specific commentary on *Practice note, Anti-corruption due diligence (joint ventures): Cross-border*, and forms part of *Cross-border joint ventures*.

Anti-corruption

1. What are the main legislation and regulatory provisions relevant to bribery and corruption? Is the applicable legislation extraterritorial

The primary legislation against bribery and corruption is found in the:

- Canadian Criminal Code, RSC, 1985, c C-46 (Criminal Code).
- Corruption of Foreign Public Officials Act, SC 1998, c 34 (CFPOA).

The Criminal Code governs matters of domestic bribery of Canadian officials (*sections 118-125*) and commercial bribery (*section 426*). The Criminal Code also contains the mechanism that results in corporate criminal liability for offences committed by senior officers and representatives of a corporate entity or other organisation, including bribery and corruption-related offences (*section 22.2*).

The CFPOA prohibits bribery by Canadians abroad and persons in Canada of foreign public officials, as well as accounting activities undertaken for the purposes of bribing foreign public officials or hiding such bribery.

Violations of both the CFPOA and the Criminal Code provisions result in the commission of an "offence" as defined under the Criminal Code. Possession of any proceeds or property derived from the commission of an offence is in and of itself an offence (*section 354, Criminal Code*). Similarly, converting or concealing such proceeds or property is subject to the prohibitions on money laundering (*section 462.31, Criminal Code*).

Further, section 376 of the Extractive Sector Transparency Measures Act, SC 2014, c. 39, creates a framework for companies involved in the commercial development of oil, gas or minerals, or those that control such companies, to report all payments made to governments or government officials. This applies to both legitimate and corrupt payments, and failure to properly report legitimate payments may result in large monetary fines.

Additionally, the federal, provincial, and many local municipal governments have codes of conduct and ethical rules on the giving and receiving of gifts. These codes typically only bind those who receive gifts, but providing them may cause reputational harm, or liability under the anti-bribery and corruption statutes of other jurisdictions. The federal government and provinces also maintain lobbying rules and regulations that must be adhered to, and contravention of those lobbying rules can result in fines, imprisonment, and debarment from public contracts.

2. What international anti-corruption conventions apply in your jurisdiction?

The following international anti-corruption conventions apply:

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
- The United Nations Convention Against Corruption.
- The Inter-American Convention Against Corruption.

3. What are the specific bribery and corruption offences in your jurisdiction? Can both individuals and (incorporated or unincorporated) entities be held liable for criminal offences? At what level of management will an (incorporated or unincorporated) entity be responsible for the actions of its employees?

There are a number of offences under the Criminal Code.

Bribery of judicial officials, peace officers, and members of parliament

Section 119 and 120 of the Criminal Code prohibit bribery of judicial officers, members of Parliament, and peace officers. It is an offence for anyone (directly or indirectly) to corruptly give or offer to such a person any money, valuable consideration, office, or employment in respect of that official's duties or to interfere with the administration of justice.

Sections 119 and 120 are indictable offences, the most severe class of offence in Canadian law. Offenders are subject to a term of imprisonment not to exceed 14 years.

Bribery of government officials and municipal officials

Sections 121 and 123 of the Criminal Code prohibit bribery of domestic Canadian government officials and municipal officials, respectively. Municipal officials are also considered government officials in the context of domestic bribery, and therefore the prohibitions under both sections apply to them.

There are numerous prohibitions under section 121. These offences relate to gifts to "officials". The term official is broadly defined under the Criminal Code, and likely includes not just public office holders. Based upon the statute and current case law, the best interpretation at present is that it covers anyone who is appointed by, works for, or is paid by any level of Canadian government. The principal offences for a person or entity in the context of corruption are:

- Directly or indirectly giving, offering, or agreeing to give or offer to an official or to a member of their family or to any one for the benefit of an official any loan, reward, advantage or benefit of any kind as consideration for co-operation, assistance, exercise of influence or an act or omission in connection with the transaction of business with or any matter of business relating to the government, or any claim against Her Majesty or any benefit that Her Majesty is authorised or is entitled to bestow.
- Making or offering a commission, reward, or benefit of any kind to an employee or official of the government with whom the offeror or payor has dealings that is with respect to those dealings. This includes offering anything of value to the official's family, or to anyone for the benefit of the official. There is an exemption if the payor or offeror has the written consent of the head of the branch of government with whom their dealings take place.

In each case the prohibition is broad in scope, as it applies to a benefit of any kind, which can include gifts of comparatively small value. In addition, it should be noted that these gifts need not be monetary. Social or political benefits extended to an official or their family are sufficient to violate the prohibition.

These prohibitions also do not require that an actual gift or payment be made, agreeing to make or offer a gift or payment is sufficient.

Section 123 of the Criminal Code imposes further prohibitions on payments or gifts to municipal officials. A "municipal official" is a municipal council member or person who holds an office of a municipal government. This therefore likely includes everyone who is a municipal employee. No one may attempt to sway a municipal official to abstain from voting at a meeting of the council or committee of the council, vote in favour of or against any measure, motion or resolution, aid in preventing or adopting a measure, motion or resolution, or fail to perform, or to perform, any official act by:

- Gifts or offers of gifts, loans, or benefits of any kind to or for the benefit of a municipal official.
- Threats or deceit.
- Any unlawful means.

As with the prohibitions on bribery of a government official, there is no principle that the gift must be executed, simply agreeing to make the gift or offer is sufficient to create liability. Similarly, "benefit of any kind" includes non-monetary benefits, such as social or political benefits promised in exchange for undertaking a prohibited action.

Both sections 121 and 123 are indictable offences. The maximum punishment for an individual is five years' imprisonment.

Breach of trust

In addition to an offence for bribery, the Criminal Code also criminalises so-called "breach of trust" under section 122. This provision technically only applies to officials, and makes it an indictable offence for the official to commit fraud of a breach of trust even if the behaviour would not be criminal for a private person. This provision has been used in the context of bribery to sentence officials that receive bribes or inducements in the course of their duties.

Importantly, this provision also covers First Nations, Inuit, and Metis band leaders or other officials. While these officials are "officials" within the context of the Criminal Code, a First Nations band is not a "government", as such the prohibitions in section 121 likely do not apply. This provision, and the party offences that would apply to any individuals that induced the breach of trust, effectively cover this gap in the law.

Commercial bribery

Section 426 of the Criminal Code prohibits private commercial bribery (though it would be applicable to public officials as well) or "secret commissions". Offering, giving, or agreeing to offer or give a benefit of any kind to an agent as consideration for doing or not doing something relating to the affairs or business of the agent's principal, is prohibited. This agent/principal relationship includes the employee/employer relationship.

There is a requirement that this be done "corruptly"; however, Canadian courts have identified this to mean "without the knowledge of the principal/employer" or "secretive" (*R. v. Kelly, [1992] 2 S.C.R. 170; R. v. Arnold, [1992] 2 S.C.R. 208*). There is no need that the bargain itself be identified as particularly corrupt.

As such, commercial bribery may be vitiated if the recipient agent provides their principal or employer with full and prompt disclosure of any benefit received. Such disclosure must be specific to each instance of benefit received, must be made promptly after receiving or agreeing to receive the benefit, and must be made directly to the principal. It is not sufficient for a principal to have general knowledge of some relationship between the agent and the payor (*R. v. Kelly, [1992] 2 S.C.R. 170; R. v. Arnold, [1992] 2 S.C.R. 208*).

The commercial bribery prohibitions apply regardless of whether the employee given the benefit is a government official. The offence also does not require actual payment or completion of any gift, simply making the offer is sufficient to conclude the offence has been committed.

A person who commits this offence is punishable by indictment and liable to imprisonment for not more than five years.

Corruption of Foreign Public Officials Act

The CFPOA prohibits bribery of officials of a foreign state. A "foreign state" captures all levels of government in foreign countries. It means not only the foreign countries themselves, but also political subdivisions of that country (for example, provinces or counties), the governments and branches of foreign countries and their subdivisions, and any agency of a foreign country or one of their political subdivisions (*section 2, CFPOA*).

A "foreign public official" is broadly defined and captures all persons holding a legislative, administrative or judicial position in a foreign state. It also includes anyone who performs public duties or functions in those foreign states; this should be thought to include all government employees and those employed in government boards, commissions, and state-owned enterprises (*section 2, CFPOA*).

Finally, "foreign public official" also includes all officials and agents of international organisations, such as the International Monetary Fund, World Bank, or United Nations. This applies to all organisations formed by two or more states or governments.

Prohibitions under the CFPOA

Section 3 of the CFPOA prohibits anyone from giving, offering, or agreeing to give or offer, directly or indirectly, 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 either:

- As consideration for an act or omission by that official in connection with the performance of that official's duties or function (for example, for a tax collector agreeing to not collect taxes).
- As an inducement for the official to use their position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions (for example, to induce a government minister to introduce new regulations or legislation).

This only applies where the consideration was offered to obtain or retain an advantage in the course of business. However, while this must be done in the course of business, it need not be done in the pursuit of profit. This was intended to expand the scope of the CFPOA to include loss-making enterprises which operate ancillary to another and allow the other to be profitable. However, this also expands the scope of the CFPOA to apply to not-for-profit entities.

In addition, in October 2017 the CFPOA was amended to remove the exemption for so-called "Facilitation Payments". These were 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, such as issuance of a permit, processing of documents, and so on. Such payments are now prohibited under the CFPOA. This brings the CFPOA into alignment with the UK Bribery Act 2010.

There is also a books and records offence in the CFPOA contained in section 4. This criminalises establishing accounts or modifying accounts and records (including deleting transactions or creating false transactions), using false records, or intentionally destroying accounts earlier than permitted by law, for the purpose of bribing an official or hiding that bribery.

All Canadians and Canadian entities (such as corporations established under the laws of Canada or any Canadian province) are deemed to be within the jurisdiction of Canada for charges related to the CFPOA. Section 5 of the CFPOA also deems the actions taken by such a person in a foreign state to have been done in Canada. This greatly expands the jurisdiction of the Canadian authorities in pursuing charges under the CFPOA.

A breach of the CFPOA is punishable by indictment to a term of imprisonment not to exceed 14 years.

Criminal liability of organisations

Organisations (including corporations, societies, firms, partnerships, trade unions, and any other association of person that is created for a common purpose, has an operational structure, and holds itself out to the public as an

association of persons) may be held liable for criminal acts, including violations of both the Criminal Code and the CFPOA if one of their senior officers does any of the following:

- Acting within the scope of their authority, is a party to the offence.
- 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.
- 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.

(*Section 22.2, Criminal Code.*)

The latter two provisions ensure that there are no loopholes in the liability of the organisation simply because the actual criminal acts are carried out by the subordinates of a senior officer or third party representatives of the company, so long as that senior officer either ordered the act to be done or simply turns a blind eye to the act. There are two critical points for organisations to bear in mind:

- The term "representative" is expansive and includes all directors, partners, employees, members, agents or contractors of an organisation. As such, even the actions of an independent third party can create organisational liability, which reinforces the need for proper diligence in retaining such agents.
- The term "senior officer" is not exclusively reserved for top level executives of a company. The term includes all representatives who play an important role in establishing an organisation's policies or managing an important aspect of the organisation's activities. While this certainly includes directors, chief executive officers, and chief financial officers, its scope can be read broadly to include regional managers, operational managers on the ground in certain locations and the like. Even if a representative does not have policy or managerial roles in the broader company, their regional power and influence can make them a senior officer for organisational liability purposes.

Extractive Sector Transparency Measures Act

Section 9 of the Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, s. 376 (ESTMA) requires entities (corporations, trusts, partnerships, or unincorporated organisations) that are engaged in the commercial development of oil, gas or minerals in Canada or elsewhere, or that control such an entity, to report certain payments made to designated payees over a certain threshold.

Section 2 of ESTMA defines payees to include:

- Any government in Canada or in a foreign state (including First Nations bands).
- Any bodies established by two or more governments.
- Any trust, board, commission, corporation or body established to perform any duty or function of a government for a government.

Payments is a term also defined broadly in section 2, and includes taxes, royalties, fees, bonuses, dividends and infrastructure improvement payments. Each entity must report its annual payments in each category where those payments to a payee aggregate to more than CAD100,000. Any payments made to a representative of a payee are deemed to be made to that payee under section 3 of ESTMA.

This is not directly an anti-corruption statute, as ESTMA requires disclosure of legitimate payments (such as taxes). However, it has a great deal of overlap with corruption compliance, especially in light of the bookkeeping obligations under both ESTMA and CFPOA.

4. Can associated persons (such as spouses and close relatives) and agents be liable for bribery and corruption offences and in what circumstances?

No, unless the associated person or agent is involved in the offence or is themselves a party to the offence, they may not be found guilty simply by association with the party to the offence.

5. What are the potential penalties (for example, criminal, regulatory or administrative) for participating in bribery and corruption? Can matters be resolved by a deferred prosecution agreement (or similar alternative to formal prosecution) or civil settlement?

Penalties
A breach of any CFPOA offence is punishable by up to 14 years' imprisonment for any individual convicted of the offence. Violation of any of the Criminal Code bribery offences is punishable by up to five years' imprisonment for any individual convicted of the offence. Any individuals convicted of such offences may also be fined at the discretion of the court either in lieu of or in addition to their term of imprisonment (*section 734, Criminal Code*).

Any entity convicted of an offence is subject to a potentially unlimited fine. The only limitation on the size of the fine is the discretion of the judge ruling on the case (*section 735, Criminal Code*).

In addition, any property or proceeds derived as a result of the criminal actions are subject to seizure or forfeiture. If the assets have already been disposed of, a fine in the amount of the value of that property may be issued against the individual or entity guilty of the offence (*section 462.37, Criminal Code*). Many provinces maintain their own civil forfeiture provisions for property derived from criminal acts.

Finally, individuals and companies found guilty of a breach of either a CFPOA provision or any of the bribery-related Criminal Code provisions are subject to debarment from public procurement work under the integrity regime of the government department Public Services and Procurement Canada (PSPC) (*www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html*).

Those convicted under sections 121 of the Criminal Code are subject to debarment with no possibility of a reduction in the term of the ineligibility until they have obtained a full record suspension. Those convicted under the other offences may be debarred for ten years (which may be reduced by up to five years at the discretion of PSPC if the bidder enters into an administrative arrangement with PSPC).

In each of these cases, including debarment, the liability is considered criminal in nature, and will continue to lie with the company even if it is acquired by another entity. Debarment in particular can result in an entity being debarred itself after purchasing a debarred entity.

Breaches of ESTMA are subject to fines of up to CAD250,000 under section 24 of ESTMA. However, this fine is per act (so if a company does not declare multiple violations, each may be totalled separately), and it is open to the government to argue that each day that passes in which a declaration is not made (or not corrected) represents a new act subject to its own CAD250,000 fine. As such, the monetary fines involved can quickly spiral upwards.

Deferred prosecution agreements: Remediation Agreements

Canada has recently implemented a deferred prosecution agreement system known as "Remediation Agreements". Remediation Agreements are subject to stringent legislative requirements for both qualification for a Remediation Agreement and the contents of the same. These requirements are set out in Part XXII.1 of the Criminal Code. Key factors to be considered in whether to grant a Remediation Agreement include the gravity of the offence, the degree of involvement of officers of an organisation in an offence, any reparations from the organisation, and whether the organisation came forward voluntarily.

A Remediation Agreement **must** include a statement of facts in which the organsation admits to wrongdoing, a commitment to cooperate with investigators, a fine plus further restitution to victims, and reporting obligations for the performance of the events and an agreement that charges can be recommenced if the Remediation Agreement is breached. In addition, the eventual Remediation Agreement is subject to judicial approval.

6. What defences, safe harbours or exemptions are available (if any) and who can qualify? Are there any specific examples of payments being permitted by law, for example facilitation payments?

Criminal Code

There are no codified safe harbours or exemptions for the Criminal Code bribery and corruption offences. However, Canadian courts have generally interpreted "benefit of any kind" to require something beyond a nominal benefit (*R. v. Hinchey (1996), 111 C.C.C. (3d) 353 (S.C.C.)*). The term nominal is intentionally flexible, but examples that would generally be considered nominal are branded merchandise, simple meals or refreshments in the course of a meeting or official business function, or something similar.

CFPOA

The CFPOA contains several potential safe harbours and exemptions (at sub-section 3(3)). There is no liability for the payment of a benefit if:

- The benefit is permitted or required under the laws of the foreign state or public international organisation for which the foreign official performs duties or functions.
- It is paid for reasonable expenses, incurred in good faith by or on behalf of the foreign official, that are directly related to the promotion, demonstration or explanation of the payor's products and services.
- It is paid for reasonable expenses, incurred in good faith by or on behalf of the foreign official, that are directly related to the execution or performance of a contract between the payor and the foreign state for which the official performs duties or functions.

It is important to note that the benefits extended to the foreign official must fit entirely under one of these categories. For example, if the law of a foreign state allows for payments of CAD100 per diem to its officials, and a company makes a per diem payment of CAD500, it would not benefit from the exemption.

The CFPOA used to include an exemption for "facilitation payments", which are small payments made to expedite or secure the performance by an official for a routine act that is part of that official's duty. For example, a payment to an official to process an official document such as a work permit, payment for the provision of mail pick-up and delivery services, or payment for loading and unloading of cargo would have fallen within this exemption. As of 31 October 2017, the facilitation payment exemption was repealed, so that these payments, assuming they do not fall within other exemptions or defences under the CFPOA, are now illegal.

7. What do companies usually do to mitigate their anti-corruption risk in your jurisdiction (for example, do they implement anti-corruption policies and procedures and roll-out training programmes for employees)?

Companies usually implement anti-corruption policies and procedures to mitigate such risks. The first significant prosecution under the CFPOA was that of Niko Resources Limited (Niko) in June 2011. The probation order in that case imposed a number of continuing obligations on Niko regarding disclosure and reporting to the Royal Canadian Mounted Police (RCMP), assistance to Canadian and US law enforcement authorities, strengthening of internal compliance controls, and conducting of independent compliance audits (to be paid for by Niko).

The internal controls and policies specified in the probation order are particularly instructive as a list of compliance measures expected to be implemented by Canadian companies, and include the following:

- Establishing internal accounting controls for maintaining fair and accurate books and records.
- Establishing a rigorous anti-corruption compliance code designed to detect and deter violations of CFPOA and other anti-corruption laws, which includes:
    - a clearly articulated written policy against violations of the CFPOA and other anti-bribery laws;
    - strong, explicit and visible support from senior management;

    - compliance standards and procedures that apply to all directors, officers, employees, and outside parties acting on behalf of the company; and
    - policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorship, facilitation payments and solicitation and extortion.

- Conducting risk assessments in order to develop these standards and procedures, based on specific bribery risks facing the company and taking into account a number of specified factors, including the company's geographical organisation, interactions with various types and levels of government officials, industrial sectors of operation, and involvement in joint venture agreements.
- Reviewing and updating anti-corruption compliance measures at least annually.
- Assigning anti-corruption compliance responsibility to senior corporate executive(s) with direct reporting to independent monitoring bodies, such as internal audit or the board of directors.
- Establishing a system of financial and accounting procedures designed to ensure that books and records are fair and accurate, and that they cannot be used to effect or conceal bribery.
- Periodic training and annual certification of directors, offices employees, agents and business partners.
- Establishing systems for providing anti-corruption guidance and advice within the company and to business partners, confidential reporting of possible contraventions, protection against retaliation, and responding to reports and taking appropriate action.
- Creating disciplinary procedures for violations of anti-corruption laws and policies.
- Setting out due diligence and compliance requirements for the retention and oversight of agents and business partners, including the documentation of such due diligence, ensuring they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments.
- Including standard provisions in agreements with agents and business partners to prevent anti-corruption violations, including:
    - representations and undertakings;
    - the right to audit books and records of agents and business partners; and
    - termination rights in the event of any breach of anti-corruption law or policy.

- Periodically reviewing and testing anti-corruption compliance systems.

8. Which authorities have the powers of investigation, prosecution and enforcement in cases of bribery and corruption? What are these powers and what are the consequences of non-compliance? What are the possible outcomes of any investigations, prosecutions and other forms of enforcement?

Relevant authorities

The following are the key relevant authorities.

Royal Canadian Mounted Police (RCMP). The RCMP provides subject matter expertise both nationally and internationally to Canadian authorities. It maintains a branch with expertise in corruption related matters. It has sole jurisdiction to investigate and lay charges relating to CFPOA violations and expects all Canadian law enforcement agencies and officials to report credible allegations of CFPOA violations. The RCMP investigates allegations that:

- Canadians and Canadian entities have bribed, offered or agreed to bribe foreign officials.
- Foreign persons have bribed Canadian public officials.
- Foreign public officials have secreted or laundered money in or through Canada.

Public Prosecution Service of Canada (PPSC). The PPSC prosecutes criminal offences under federal statutes such as the CFPOA. The PPSC has a subject-matter expert position in Ottawa dedicated to international corruption cases, and works closely with the RCMP in determining when charges are laid. It then takes the lead role on behalf of the federal Attorney General in prosecuting offenders.

Department of Justice (DOJ). The DOJ maintains the International Assistance Group which co-ordinates legal counsel and works closely with the PPSC and the RCMP. The DOJ is also the central authority for mutual legal assistance in criminal matters when co-ordinating with other countries' investigative, enforcement and prosecution services.

Provincial and Municipal Peace Officers (police). Some provinces and municipalities maintain their own police forces. The police have no jurisdiction to lay charges for violations of the CFPOA and are therefore not usually involved in investigations relating to that act. However, they are the primary government body for investigation and enforcement of offences under the Criminal Code.

Ministry of the Attorney General. The Ministry of the Attorney General for each province maintains a crown attorney's office. These crown attorneys bear primary responsibility for prosecuting all Criminal Code offences, including those relating to bribery and corruption.

Public Services and Procurement Canada (PSPC). While PSPC does not directly enforce or prosecute corruption-related offences, it has an indirect role. Individuals and companies that have been charged or convicted of bribery and corruption-related offences are subject to debarment from public procurement (see *Question 5*). In addition, PSPC officials are frequently in a position to be subject of attempts to illicitly influence government decision-making, and therefore have a role in reporting attempts at bribery or corruption.

Other government bodies. Numerous other government bodies have ancillary roles in Canadian anti-corruption law. For example, entities such as the Canadian Commercial Corporation, Global Affairs Canada and Export Development Canada have front line exposure to Canadian companies operating abroad and consider diligence in combating corruption to be a primary aim. If they have reasonable suspicions of corruption they are bound to inform the RCMP for further investigation.

Powers

Canada's police services, including the police and the RCMP, have broad investigative powers. These include the ability to execute searches and seizures, surveillance orders, asset freezes, and the power to arrest and lay charges against the accused. Before being executed, these powers must be specially authorised by having a warrant issued by a judicial authority with the power to do so (in most cases a judge or justice of the peace).

To obtain such a warrant, the RCMP or police must demonstrate reasonable and probable cause by having the investigating officer set out the details of the known facts of the case in an "Information", which is presented to the judicial official for approval. A failure to obtain such a warrant before a search or surveillance, or the use of a deficient Information, may result in the exclusion of evidence obtained through that search at trial (*section. 24(2), Constitution Act*).

Failure to comply

Failure to comply with a valid warrant may result in charges being laid for obstruction of justice (*sections 139 and 487-488, Criminal Code*).

Potential outcomes

The potential outcomes of an investigation are either a decision by the RCMP or police to not lay charges or to pursue a prosecution. If the RCMP or police chose to not lay charges, they may inform the potential accused of this fact; however, they are under no obligation to do so.

A trial may result in a finding of guilt or innocence by either a judge alone or by a jury (at the discretion of the accused). A guilty verdict may only be rendered if the accused is found to be guilty beyond a reasonable doubt (*R. v. Lifchus, [1997] 3 S.C.R. 320; see also R. v. Starr, [2000] S.C.R. 144 and R. v. W.(D.), [1991] 1 S.C.R. 742*).

In addition, an accused may plead guilty. This may be done on their own initiative, or, more usually, as part of a plea agreement with the crown attorney or the PPSC.

In addition, as discussed in Part 5 above, Canada has recently implemented a deferred prosecution system that allows for entities to come forward voluntarily to mitigate against potential punitive action. Remediation agreements will allow for companies to take remedial measures and curtail criminal liability without a guilty plea.

9. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?

Payment of bribes and fines associated with such payment are not tax-deductible. Similarly, any payments or outlays made for the purpose of doing anything in violation of the CFPOA or the anti-bribery or corruption offences under the Criminal Code are not tax-deductible as an expense. If the recipient is either a government official, or an agent or employee of another entity with whom the person making the payment is doing business, there is a risk that any extortion, ransom or blackmail payment may be non tax-deductible.

So long as it is not paid to an illegal recipient, such as a sanctioned entity or terrorist organisation, payment of ransom, to the degree it accords with generally accepted accounting principles (GAAP), is likely a tax-deductible business expense.

10. Is there any formal duty to report suspicions of bribery or corruption to the authorities under either criminal or regulatory law? What penalties are in place for a failure to report?

Neither the CFPOA nor the Criminal Code require any individuals to report violations of criminal or regulatory law. Proactive disclosure and reporting to the authorities would ordinarily be taken into account in determining penalties during sentencing or when formulating a plea bargain.

11. Are there any whistleblowing protections?

Protections will be available under the Criminal Code, but may also be available under internal policies and the employment contracts (see *Question 7*).

Provincial legislation (two provinces, Saskatchewan and New Brunswick) also include whistleblower protections in provincial employment standards legislation.

Section 425.1 of the Criminal Code prohibits any demotion, termination, or other disciplinary measures against any employee as a means to prevent whistleblowing, by:

- An employer.
- Someone working on the employer's behalf.
- Someone in a position of authority over an employee.

This includes both threats of such actions against employees to prevent whistleblowing, and retaliation after the fact against whistleblowers.

The acts reported must be something the employee believes to be either a crime or a regulatory offence committed by their employer or an officer, director, or employee of their employer. Even if it is determined that no wrongful act took place, the employee remains protected so long as they had an honest belief that the wrongful act had occurred.

However, there is one potential restriction: the section itself restricts this protection to individuals who report violations they believe took place to a provincial or federal regulatory or police body (for example, a report to the RCMP or the PPSC). "Up the ladder" internal reporting is not protected.

This is subject to some degree of doubt because of a recent court decision. The Federal Court of Appeal in *Anderson v IMTT-Québec Inc.* held that an employee who reported to an outside authority without first reporting "up the ladder" could not gain the protections of section 425.1 (*2013 CarswellNat 4073*). This interpretation basically robs an employee of any protection: if the employee reports internally, they are not protected except potentially under the umbrella of threats made by employers to prevent whistleblowing (and a termination may not constitute a threat), but they are terminated before actual reporting to the outside authority (and thus the termination cannot be seen as having been done in retaliation for whistleblowing, as it pre-dated it).

The Court of Appeal relied on an earlier Supreme Court case, *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, [2005] 3 S.C.R. 425*. However, it appears to have ignored careful distinctions the Supreme Court made between section 425.1 of the Criminal Code and the provincial statutes of Saskatchewan and New Brunswick. In *Merk*, the court determined "lawful authority" as including "up the ladder" reporting. However, the Supreme Court explicitly contrasted the term "lawful authority" in the provincial acts with the "more restrictive" language found in section 425.1 of the Criminal Code. The Federal Court of Appeal decision ignored this portion of the judgment in its entirety and (the authors would argue) is likely incorrect.

Employees in New Brunswick and Saskatchewan have the same protections as offered under the Criminal Code. However, such employees receive additional protection as "up the ladder" reporting internally is also protected.

In either case, the protections do not apply to independent contractors who do not have the status of employee with any employer. It is also uncertain whether these protections would shield in-house counsel from disciplinary action from the Law Society or their employer.

