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# LEGISLATIVE SUMMARY



## **Bill S-14: An Act to amend the Corruption of Foreign Public Officials Act**

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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*Legislative Summary of Bill S-14*  
(Legislative Summary)

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# LEGISLATIVE SUMMARY OF BILL S-14: AN ACT TO AMEND THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT

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## 1 BACKGROUND

Bill S-14, An Act to amend the Corruption of Foreign Public Officials Act (short title: Fighting Foreign Corruption Act), was introduced in the Senate on 5 February 2013 by the Honourable Marjory LeBreton, Leader of the Government in the Senate. According to its summary, the bill amends the *Corruption of Foreign Public Officials Act* to increase the maximum sentence of imprisonment applicable to the offence of bribing a foreign public official; eliminate the facilitation payments exception to that offence; create a new offence relating to books and records and the bribing of a foreign public official or the hiding of that bribery; and establish nationality jurisdiction that would apply to all of the offences under the Act. **The bill was passed by the Senate without amendment on 26 March 2013.**

### 1.1 THE *CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT*

In Canada, the legislation designed to combat the bribery of foreign officials is the *Corruption of Foreign Public Officials Act* (CFPOA).<sup>1</sup> This statute came into force on 14 February 1999, in order to meet Canada's obligations under the Organisation for Economic Co-operation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Convention).<sup>2</sup> The OECD Convention is aimed at removing bribery as a non-tariff barrier to trade; it seeks to help produce a "level playing field" in international business.

The CFPOA also responds to Canada's anti-corruption obligations under the *United Nations Convention against Corruption*<sup>3</sup> and the *Inter-American Convention against Corruption*.<sup>4</sup> The Act makes it a criminal offence in Canada for persons or companies to bribe a foreign public official to obtain or retain an advantage in the course of business.

#### 1.1.1 JURISDICTION

Canada currently asserts jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part within its territory. Under Canadian law, to be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada.<sup>5</sup> There is, however, a sufficient basis for jurisdiction where there is a "real and substantial link" between the offence and Canada.<sup>6</sup> This means that at least a portion of the illegal activities comprising the offence must have been committed in Canada or have had a significant impact on Canadians. To establish this link, the court must consider all relevant activities that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must determine whether there is anything in those activities that offends international comity. Comity is a form

of legal reciprocity in which one country will generally recognize the validity of another's laws.<sup>7</sup> The CFPOA, unlike similar legislation in the United States and the United Kingdom, does not clearly indicate that Canadian authorities have jurisdiction to prosecute Canadian companies in connection with allegedly corrupt activities that take place in foreign countries.

### 1.1.2 THE OFFENCE

The offence of bribing a foreign public official is dealt with in section 3(1) of the CFPOA. The offence reads as follows:

3(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or

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

## 1.2 ENFORCEMENT OF THE *CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT*

Current RCMP policy specifically identifies the CFPOA as a responsibility of the Commercial Crime Branch. In 2008, the RCMP established the International Anti-Corruption Unit (IACU), comprised of two seven-person teams based in Ottawa and Calgary, respectively. The IACU focuses on detecting, investigating and preventing international corruption such as bribery, embezzlement and money laundering. The main goal of the IACU is to target public sector corruption, including bribery of Canadian and foreign public officials and related laundering of the proceeds of crime. The unit also deals with requests for international assistance.<sup>8</sup> The RCMP provides functional oversight of the unit and anti-corruption enforcement activities through a commissioned officer at RCMP National Headquarters.

Before RCMP liaison officers depart for overseas assignments, the RCMP trains them on the issue of foreign bribery in general and the CFPOA in particular.<sup>9</sup> Specific reference to the corruption of foreign public officials in the Commercial Crime Program mandate is intended to raise awareness of this responsibility among investigators. To this end, the IACU has participated in numerous anti-corruption awareness programs and training. It works with the Public Prosecution Service of Canada (PPSC), which prosecutes criminal offences under federal statutes, including the CFPOA. Training on the CFPOA has been provided to designated people – generally senior prosecutors – in each of the PPSC's regional offices. They act as local points of contact and coordinators on CFPOA matters as they arise for prosecution.<sup>10</sup>

To date, there have been three convictions under the CFPOA:

- Griffiths Energy International Inc.

Griffiths Energy International Inc., based in Calgary, Alberta, pleaded guilty on January 22, 2013, to a charge under the CFPOA related to securing an oil and gas contract in Chad. Griffiths will pay a total penalty of \$10.35 million. **Additional information can be found in the Agreed Statement of Facts filed with the Court of Queen's Bench of Alberta.**

- Niko Resources Ltd.

Niko Resources Ltd. is a publicly traded company based in Calgary, Alberta. On June 24, 2011, the company entered a guilty plea for one count of bribery. The company admitted that, through its subsidiary Niko Bangladesh, it provided the use of a vehicle (valued at \$190,984) in May 2005 to AKM Mosharraf Hossain, then the Bangladeshi State Minister for Energy and Mineral Resources, in order to influence the minister in his dealings with Niko Bangladesh. In June 2005, Niko Resources Ltd. paid travel and accommodation expenses for the same minister to travel from Bangladesh to Calgary to attend the GO EXPO oil and gas exposition, and paid approximately \$5,000 for the minister to travel to New York and Chicago to visit his family. As a result of the conviction, Niko Resources Ltd. was fined \$9.5 million and placed under a probation order, which puts the company under the court's supervision for three years to ensure that audits are completed to examine the company's compliance with the CFPOA. The Canadian Trade Commissioner Service has placed a hold on providing services to Niko during the period of court supervision.

- Hydro-Kleen Group Inc.

Hydro-Kleen Group Inc., based out of Red Deer, Alberta, entered a guilty plea on 10 January, 2005, to one count of bribery and was ordered to pay a fine of \$25,000. Along with its president and an employee, the company had been charged with two counts of bribing a U.S. immigration officer who worked at the Calgary International Airport. The charges against the director and the officer of the company were stayed. The U.S. immigration officer pleaded guilty in July 2002 to accepting secret commissions. He received a six-month sentence and was subsequently deported to the United States.<sup>11</sup>

### 1.3 ASSESSMENTS OF CANADA'S IMPLEMENTATION OF THE *CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT*

In March 2011, Canada and the CFPOA were reviewed by members of the OECD Working Group on Bribery, as the OECD Convention provides for mutual evaluation by members of this group. The OECD welcomed Canada's efforts to enforce the provisions of the CFPOA, largely attributable to the efforts of the IACU.<sup>12</sup>

Along with this positive development, the OECD review raised objections to the limits placed on the CFPOA's jurisdictional reach, the insufficient numbers of investigators working to uncover bribery of foreign public officials and the lax penalties that would be imposed if there were a conviction. The report made recommendations, including these, to bring Canada into compliance with a number of articles in the OECD Convention:

## LEGISLATIVE SUMMARY OF BILL S-14

1. The Working Group recommends that Canada amend the offence of bribing a foreign public official in the CFPOA so that it is clear that it applies to bribery in the conduct of all international business, not just business “for profit.” (Convention, Article 1)
2. The Working Group recommends that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with the Government or receive any benefit under such a contract, consistent with the domestic bribery offence in the Criminal Code. (Convention, Article 3)
3. The Working Group recommends that Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad. (Convention, Article 4.2)
4. The Working Group recommends that Canada
  - d) take appropriate measures to encourage provincial securities commissions to sanction books and records and other securities violations associated with CFPOA misconduct, and share with the RCMP and other relevant investigative authorities expertise and information about potential CFPOA violations (Convention, Article 8.2)
  - e) in consultation with the provinces in an effort to ensure consistency of standards throughout Canada: (i) prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include “bribing foreign public officials or of hiding such bribery”; (ii) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement; (iii) consider broadening the prohibitions for participating in audits in order to improve auditor independence; and (iv) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities (Convention, Article 8).<sup>13</sup>

In September 2012, the non-governmental organization Transparency International released its eighth annual progress report on the enforcement of the OECD Convention in a number of countries, including Canada.<sup>14</sup> Transparency International classified countries in four enforcement categories: Active, Moderate, Little, and No Enforcement. In the 2012 report, Canada was moved up to the Moderate Enforcement category. In the view of Transparency International, only Active Enforcement provides an effective deterrent to foreign bribery and only seven of the 39 signatories to the OECD Convention attain this level.

In its review of Canada’s efforts to enforce the CFPOA, Transparency International noted with approval the sharp rise in the number of investigations then under way (34). The main recommendation for Canada in the 2012 report was to introduce nationality jurisdiction (jurisdiction over Canadians anywhere in the world, not just on Canadian soil), because establishing that the facts disclose a “real and substantial connection” with Canada consumed too much of the Crown’s time and resources. Transparency International also urged that the recommendations of other reviews be implemented. This included the recommendation that Canada review its allowance of facilitation payments, found in the March 2011 review by a committee of the

Organization for American States of Canada's compliance with the *Inter-American Convention against Corruption*.<sup>15</sup>

Generally speaking, the *Criminal Code* deals with offences that take place in Canada.<sup>16</sup> This concept is referred to as territorial jurisdiction: "the state in whose territory a crime was committed has jurisdiction over the offence."<sup>17</sup> The *Criminal Code*, though, does establish jurisdiction over certain offences, including treason, terrorism, and certain sexual offences against children, committed by Canadian citizens abroad.<sup>18</sup> Jurisdiction on the basis of the nationality of the offender is referred to as the nationality principle.<sup>19</sup>

Article 4.2 of the OECD Convention requires that States Parties with jurisdiction to prosecute nationals for offences committed outside their territory apply the same principles to the offence of bribery of a foreign public official. Since Canada has established jurisdiction over certain offences committed by nationals abroad, there is no reason, in principle, that it could not extend this jurisdiction to the offence of bribing a foreign public official.

Under the current version of the CFPOA, though, Canada only exercises territorial jurisdiction, which allows Canada to prosecute the foreign bribery offence when it is committed in whole or in part in Canada. There must be a "real and substantial link" between the offence and Canada.<sup>20</sup> The fact that Canada does not exercise nationality jurisdiction in order to prosecute a Canadian for bribing a foreign public official without needing to provide evidence of a link to Canada has been the subject of negative commentary by Transparency International and by the OECD in its Phase 3 Evaluation Report. Both bodies have recommended that Canada amend its laws to exercise nationality jurisdiction over the foreign bribery offence to promote prosecution of cases under the CFPOA.

Because, with the implementation of this recommendation in Bill S-14, offences committed outside Canada are deemed to have been committed in Canada, proceedings can be commenced in any territorial division in Canada, and the provisions of the *Criminal Code* that relate to the appearance of the accused during those proceedings apply. The new provisions also provide safeguards, subject to certain exceptions, for a person who has already been tried and dealt with outside Canada for an act or omission that is deemed to have been committed inside Canada under the CFPOA. This addresses the concern that someone could be tried twice for the same offence, once by a court exercising jurisdiction on the basis of territory and once by a court exercising jurisdiction on the basis of nationality. Similar safeguards are already in place in the *Criminal Code*.<sup>21</sup>

## 2 DESCRIPTION AND ANALYSIS

Bill S-14 consists of five clauses. The following description highlights selected aspects of the bill; it does not review every clause.



## 2.1 DEFINITION OF “BUSINESS” (CLAUSE 2)

The current definition of the term “business” in the CFPOA is “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit.” This definition does not apply to non-profit organizations or charities. The amendment in clause 2 provides a new definition of “business” that removes the words “for profit.” This ensures that the Act applies to all businesses, regardless of whether they are profit-seeking. This will bring the Act into conformity with the OECD Convention, which does not draw a distinction between transactions that are “for profit” and “not for profit.”

## 2.2 INCREASE IN THE MAXIMUM PENALTY (CLAUSE 3)

Under the CFPOA, the foreign bribery offence is currently punishable by a maximum of five years’ imprisonment and unlimited fines. The amendment in clause 3 increases the maximum jail term to 14 years. By comparison, the maximum penalty under the *Criminal Code* for forms of domestic corruption ranges from five years’ imprisonment for frauds on the government (*Criminal Code*, section 121), to 14 years’ imprisonment for the bribery of judicial officers (*Criminal Code*, section 119). The 14-year maximum penalty means that both a discharge (*Criminal Code*, section 730) and a conditional sentence (*Criminal Code*, section 742.1) will not be eligible sentences for the offence of bribing a foreign public official.

## 2.3 ELIMINATION OF “FACILITATION PAYMENTS” (CLAUSE 3)

“Facilitation payments” are made to expedite or secure performance by a foreign public official of any “act of a routine nature” that is part of the foreign public official’s duties or functions. An “act of a routine nature” does not include a decision to award new business or to continue business with a particular party. Facilitation payments are not considered bribes under the current CFPOA, but clause 3 of the bill eliminates the exception for facilitation payments. Clause 5 of the bill, however, indicates that the elimination of facilitation payments will not come into force on Royal Assent like the rest of the bill but, rather, on a day to be fixed by order of the Governor in Council.

## 2.4 BOOKS AND RECORDS OFFENCE (CLAUSE 4)

The amendment in clause 4 of the bill will add a new section 4 to the CFPOA to implement a new books and records of account offence that flows from Canada’s commitment under article 8 of the OECD Convention. This new offence prohibits certain bookkeeping practices and types of transactions for the purpose of bribing foreign public officials or hiding such bribery. This offence will now be punishable by a maximum of 14 years’ imprisonment and unlimited fines.

Clause 4 is intended to implement article 8 of the OECD Convention, which requires that each State Party “provide effective, proportionate and dissuasive civil, administrative or criminal penalties” for omissions and falsifications of the books, records, accounts and financial statements of companies done “for the purpose of

bribing foreign public officials or of hiding such bribery.” The States Parties to the OECD Convention are urged, in relation to the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, where this is done for the purpose of bribing foreign public officials or of hiding such bribery.

Where instances of false accounting are alleged, other provisions of Canadian law may also apply, such as section 155 of the *Canada Business Corporations Act*<sup>22</sup> (financial disclosure) as well as *Criminal Code* sections 361 (false pretences), 380 (fraud), and 397 (falsification of books and documents).

## 2.5 JURISDICTION (CLAUSE 4)

Clause 4 of Bill S-14 adds a new section 5 to the CFPOA to allow Canada to prosecute Canadian companies, Canadian citizens, and permanent residents present in Canada after they have committed the offence of bribing a foreign public official, without having to provide evidence of a link between Canada and the offence. In other words, the new section will allow the Government of Canada to exercise jurisdiction over all persons or companies that have Canadian nationality, regardless of where the alleged bribery has taken place. This extension of jurisdiction is similar to the provisions in section 7 of the *Criminal Code* over such things as terrorism offences (Part II.1 of the *Criminal Code*), where the assertion of nationality jurisdiction is part of the effort to fulfill Canada’s obligations under international treaties aimed at the prosecution of certain types of offences. In the case of Bill S-14, the extension of jurisdiction can be seen as part of Canada’s efforts to fulfill its obligations under the OECD Convention and the other treaties it has ratified to suppress bribery and corruption.

## 2.6 EXCLUSIVE ABILITY TO LAY CHARGES (CLAUSES 2 AND 4)

Clause 2 of the bill removes the definition of “peace officer” in the current CFPOA, which incorporates the definition from section 2 of the *Criminal Code*. That definition is quite broad, including such persons as mayors, sheriffs, and bailiffs, in addition to police officers. Clause 4 of the bill restricts the term “peace officer” to those so designated by the Commissioner of the Royal Canadian Mounted Police under section 7(1)(d) of the *Royal Canadian Mounted Police Act*.<sup>23</sup>

Clause 4, through the addition of a new section 6 to the CFPOA, provides exclusive authority to the RCMP to lay charges under the Act.

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**NOTES**

1. [Corruption of Foreign Public Officials Act](#), S.C. 1998, c. 34.
2. The [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) was signed by Canada and other members of the Organisation for Economic Co-Operation and Development [OECD] on 17 December 1997. Canada ratified the Convention on 17 December 1998.
3. The [United Nations Convention against Corruption](#) was signed by Canada on 21 May 2004 and ratified on 2 October 2007. Part of the Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some cases, states are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with.  
  
(United Nations Office on Drugs and Crime, "[Background of the United Nations Convention against Corruption](#)," *United Nations Convention against Corruption*.)
4. Canada signed the [Inter-American Convention against Corruption](#) on 7 June 1999 and ratified it on 1 June 2000. Article VII of the Convention requires that States Parties that have not yet done so adopt the necessary legislative or other measures to establish as criminal offences under their domestic law the acts of corruption described in Article VI(1), which includes:  
  
The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions.
5. [Bill C-31, An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act](#), which was introduced in the 2<sup>nd</sup> Session, 40<sup>th</sup> Parliament, would have added provisions to the CFPOA based on the nationality principle, so that, in certain cases, offences committed outside Canada would be deemed to have been committed in Canada. The new provisions also provided safeguards for a person who had already been tried and dealt with outside Canada for an act or omission that is deemed to have been committed inside Canada. This addressed the concern that someone could be tried twice for the same offence, once by a court exercising jurisdiction on the basis of territory and once by a court exercising jurisdiction on the basis of nationality. Bill C-31 died on the *Order Paper*.
6. [Libman v. The Queen](#), [1985] 2 S.C.R. 178:  
  
All that is necessary to make an offence subject to the jurisdiction of [Canadian] courts is that a significant portion of the activities constituting that offence took place in Canada. It is sufficient that there be a "real and substantial link" between an offence and Canada.  
  
For example, a Canadian corporation may be liable for the actions of an overseas subsidiary if the Canadian corporation directed the subsidiary to make illegal payments.

This might establish the “real and substantial link” between the offence that occurred overseas and the Canadian corporation.

7. Ibid. International comity refers to legal reciprocity – the principle that one jurisdiction will extend certain courtesies to other nations (or other jurisdictions within the same nation), particularly by recognizing the validity and effect of their executive, legislative and judicial acts.
8. The Department of Foreign Affairs and International Trade [DFAIT] produces an annual report to Parliament, which was most recently entitled [Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act \(September 2011–August 2012\)](#).
9. Ibid.
10. Ibid.
11. DFAIT, “[Strengthening Canada’s Fight Against Foreign Bribery](#),” News release, 5 February 2013, **modified 14 May 2013**.
12. OECD, Working Group on Bribery, [Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada](#), March 2011.
13. Ibid., pp. 59–60.
14. Transparency International, [Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention. Progress Report 2012](#), 6 September 2012.
15. Organization of American States, [Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption: Canada – Final Report](#), 25 March 2011, para. 106.
16. See [Criminal Code](#), R.S.C., 1985, c. C-46, s. 6(2): “Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.”
17. Hugh M. Kindred et al., *International Law, Chiefly as Interpreted and Applied in Canada*, 7<sup>th</sup> ed., Emond Montgomery, Toronto, 2006, p. 556.
18. Respectively, ss. 46(3), 7(3.74) and 7(4.1) of the *Criminal Code*.
19. Kindred et al. (2006), p. 557.
20. *Libman*.
21. *Criminal Code*, s. 7(6).
22. [Canada Business Corporations Act](#), R.S.C., 1985, c. C-44.
23. [Royal Canadian Mounted Police Act](#), R.S.C., 1985, c. R-10. Under the terms of section 7(1)(d), the Commissioner of the RCMP may designate any member, any supernumerary special constable appointed under this subsection or any temporary employee employed under subsection 10(2) as a peace officer.