THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill S-14 – *Fighting Foreign Corruption Act*

ANTI-CORRUPTION TEAM
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Anti-Corruption Team of the Canadian Bar Association, with assistance from the Charities and Not-for-Profit Law Section and the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Anti-Corruption Team of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's Anti-Corruption Team (CBA-ACT) is pleased to comment on Bill S-14, the *Fighting Foreign Corruption Act*, which amends the *Corruption of Foreign Public Officials Act* (CFPOA).

Building on over a decade of CBA's work in the area of anti-corruption and anti-bribery, CBA-ACT is comprised of lawyers in private practice and in-house counsel from the International and Business Law Sections, as well as Canadian Corporate Counsel Association (CCCA). CBA-ACT was established to monitor and respond to matters involving corrupt practices, and to provide a resource centre for Canadian lawyers to learn about anti-corruption legislation, case law and compliance requirements. The CBA-ACT takes a proactive advocacy role to support the implementation and enforcement of corruption legislation.

II. CBA-ACT SUPPORTS EXPANDING DEFINITION OF "BUSINESS"

CBA-ACT supports expanding the scope of the CFPOA by removing the "for profit" requirement from the definition of "business".

More broadly, consideration should be given to harmonizing the various definitions of "business" in federal legislation. A few examples of the disparate definitions of business in federal law are given below:

Act	*Definition of business*
CFPOA	"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.
Competition Act s. 2	business includes the business of (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and (b) acquiring, supplying and otherwise dealing in services. It also includes the raising of funds for charitable or other non-profit purposes. (enterprise)

Act	*Definition of business*
Employment Insurance Act s. 152.01	"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, and includes an adventure or concern in the nature of trade but does not include an office or employment.
Investment Canada Act, s. 3	"business" includes any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit

III. CBA-ACT SUPPORTS ASSUMING NATIONALITY JURISDICTION

One of the major weaknesses of the existing CFPOA is that, while it is designed to curb corruption outside of Canada, the lack of explicit nationality jurisdiction means that the territorial principle of criminal jurisdiction in subsection 6(2) of the *Criminal Code* applies to the Act. The application of the CFPOA to bribes arranged and paid entirely outside of Canada is uncertain, to say the least.

Providing express nationality jurisdiction removes this uncertainty and relieves the investigators and prosecution of the need to localize elements of the offence or conspiracy to commit the offence within Canada.

The international community has encouraged Canada for some time to enact nationality jurisdiction. The OECD, in particular, mentions this point in its Phase 1 Report (1999), Phase 2 Report (2004), and Phase 3 Report (2011).

That said, enacting nationality jurisdiction may have unexpected consequences.

First, it expands the scope of the CFPOA considerably. For instance, a Canadian executive working for a British company in Africa will now be subject to the CFPOA, even if the executive is no longer a resident of Canada. This effectively requires the British company to be aware of and comply with the CFPOA. More broadly, all businesses that hire Canadians will need to be aware of the CFPOA.

CBA-ACT is of the view that these potential issues are not a sufficient reason not to enact nationality jurisdiction. Provided the CFPOA remains substantially consistent with the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, this should not impose unreasonable compliance burdens on foreign firms.

Second, proposed new paragraph 5(1)(b) – the requirement that the permanent resident of Canada be present in Canada after the act or omission constituting the offence – results in a paradox: for a permanent resident, the act or omission constituting the offence will not be an offence deemed to have been committed in Canada at the time it was committed. Only afterwards, once the permanent resident returns to Canada, will the act or omission be deemed to have occurred in Canada. This could occur years afterward. It seems wrong in principle that the status of the act or omission under Canadian law should change after the fact. The UK *Bribery Act 2010* relies on the concept of "ordinarily resident in the United Kingdom", rather than permanent residency status.[1]

IV. CBA-ACT SUPPORTS FALSE BOOKS OFFENCE

CBA-ACT supports enactment of the false books offence (proposed new section 4 of the CFPOA). This fulfills the obligation established by Article 8 of the *Anti-Bribery Convention*. The OECD recommended that Canada enact prohibitions on off-the-books accounts and false books in its Phase 2 Report in 2004.

V. REPEAL OF FACILITATION PAYMENTS EXCEPTION

CBA-ACT supports efforts to end facilitation payments and ultimately to remove the facilitation payments exception from the CFPOA. However, the unfortunate reality that facilitation payments continue to be demanded in some countries, coupled with a lack of international consensus to eliminate the facilitation payments exception, suggests that Canada should tread cautiously.

From the beginning, the *Anti-Bribery Convention* recognized that facilitation payments could not easily be prevented. The *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by the Negotiating Conference on 21 November 1997, dealt with the issue as one of interpretation:

> 9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can

1 *Bribery Act 2010*, 2010 c. 23 (UK), s. 12(4)(g).

> and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

However, in 2009, the OECD recommended that its members review their policies on facilitation payments periodically and encourage companies to prohibit or discourage the use of facilitation payments.[2]

The UK's *Bribery Act 2010* does not contain a facilitation payments exception.[3] However the US *Foreign Corrupt Practices Act* retains the exception.[4] A number of other countries also maintain facilitation payments exceptions.[5]

The OECD's Phase 2 Report on Canada noted that private sector corporate and criminal defence lawyers expressed dissatisfaction with the facilitation payments exception, and some were of the view that the exception should be repealed. The OECD stopped short of recommending repeal, however.

In its Phase 3 Report on Canada, the OECD noted that facilitation payments are not uncommon.[6] Once again, it stopped short of recommending repeal of the provision, and recommended only that Canada review its policy in accordance with the 2009 recommendation.[7]

Demands for facilitation payments are still, regrettably, common in some countries. No business wants to make the payments. However, eradicating this practice is going to take time. The fact that facilitation payments are frequently demanded by low level officials who may use them to supplement otherwise meager salaries makes it difficult for developing countries to eliminate the practice.

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2 OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Adopted by the Council on 26 November 2009, Recommendation VI.

3 *Bribery Act 2010*, 2010 c. 23 (UK)

4 15 USC §78dd-1(b)

5 See Transparency International, *Progress Report of 20011 Enforcement of the OECD Anti-Bribery Convention*.

6 Phase 3 Report, ¶33.

7 Phase 3 Report, p. 16.

As well, while large enterprises may be able to resist paying facilitation payments, small and medium sized enterprises may not have this luxury.

Eliminating the facilitation payments exception is especially problematic for charities that deliver humanitarian aid in times of natural disaster or conflict. Under conditions of chaos, when lives are at stake, charities acting in good faith should have an express exception to make facilitation payments where necessary to deliver humanitarian aid to prevent death or serious injury to vulnerable populations.

Clause 5 of Bill S-14 provides that the repeal of the facilitation payment exception shall come into force on a date to be fixed by the Governor in Council, implicitly recognizing that, while there is a growing international movement toward eliminating facilitation payments exceptions in legislation, the time is not quite ripe for this change.

While future implementation of the repeal by the Governor in Council may be a practical solution to this dilemma, it is poor legislative practice. It is preferable that the question of removing the facilitation payments exception be debated by Parliament when the time to remove the exception is considered to be ripe.

CBA-ACT is of the view that the any repeal of the facilitation payments exception should not be included in Bill S-14. It should instead be enacted separately, after further study, and once a stronger international consensus has developed.

In the meantime, consistent with the OECD recommendation, measures should be taken to encourage businesses to prohibit or discourage facilitation payments. The government could take these measures administratively as part of the support it routinely grants to Canadian businesses abroad. In this regard, the government may also wish to study the implications of discouraging facilitation payments by requiring their disclosure.

VI. PROCEDURE

CBA-ACT supports the restriction on laying of charges to the RCMP. This is consistent with current practice, and removes the uncertainty that would attend parallel enforcement by different levels of government.

This is also consistent with the approach for some other white collar offences, such as offences under the *Competition Act*. By agreement between the federal and provincial governments, these offences are prosecuted by the federal Director of Public Prosecutions.

VII. INCREASED PENALTIES COULD PROVE PROBLEMATIC

Article 3 of the *Anti-Bribery Convention* provides that the range of penalties for bribery of a foreign public official should be comparable to the range of penalties for bribery of a party's own public officials.

The increase in penalties for breaches of the CFPOA to 14 years results in a range of penalties not comparable to the range of penalties in Canada for bribery of a Canadian public official. Section 121 of the *Criminal Code* establishes a maximum penalty of five years for bribing a Canadian public official (for certain public officials, such as judges and members of Parliament, ss. 119 and 120 establish a maximum of 14 years). That said, the increase to 14 years reflects a recent trend towards increased penalties for other white collar criminal offences, such as cartel offences under the *Competition Act*.

Recent amendments to the *Criminal Code* have made conditional and absolute discharges (s. 730) and conditional sentences of imprisonment (sentences served in the community, s. 742.1) unavailable for crimes punishable by a maximum sentence of 14 years.

Raising the maximum sentence for CFPOA offences to 14 years means that conditional and absolute discharges, and conditional sentences, will no longer be available for these offences. This considerably reduces the ability of prosecutors and courts to deal with less severe breaches of the CFPOA. There is no statutory threshold in the CFPOA for differentiating between less and more serious instances of corruption. Under the CFPOA, a bribe of *any* amount, no matter how low, is an indictable offence. Moreover, once the facilitation payment exception is repealed, even quite small payments to officials to secure the performance of their duties will attract penalties in Canada that may, in some cases, be disproportionate to the gravity of the offence. These sentencing options remain available for domestic bribery offences under the *Criminal Code* (except with certain public officials such as judges and members of Parliament).

VIII. CONCLUSION

CBA-ACT welcomes the government's initiative in introducing amendments to strengthen the CFPOA. While CBA-ACT supports several specific measures in Bill S-14, we note some practical implications in implementing the bill.

CBA-ACT supports efforts to end facilitation payments and ultimately to remove the facilitation payments exception from the CFPOA. However, given current realities, we recommend that the provision be enacted separately, after further study, and once a stronger international consensus has developed. In the meantime, consistent with the OECD recommendation, the government should take measures to encourage businesses to prohibit or discourage facilitation payments.