

2023 OSLER LEGAL OUTLOOK



White-collar enforcement will continue to take shape in 2024

DECEMBER 11, 2023 8 MIN READ

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Canada continued to face international criticism for its perceived lack of white-collar crime enforcement in 2023. As we wrote [last year](#), Transparency International's (TI) biennial *Exporting Corruption 2022* report found a "limited" record of foreign bribery enforcement in Canada. The report recommended increased resources for law enforcement, as well as improvements to Canada's enforcement of its *Corruption of Foreign Public Officials Act* (CFPOA) and enhancements to its remediation agreement regime. This trend continued in 2023. Canada dropped to 14th in TI's annual [Corruption Perceptions Index](#) [PDF] released in January 2023. The index ranks 180 countries and territories by their perceived levels of public sector corruption. TI was not Canada's only critic this year – the United Nations and the Organization for Economic Cooperation and Development (OECD) also raised concerns over Canada's enforcement of economic crime.

Nevertheless, events in 2023 signal an evolving regulatory and enforcement landscape in Canada. These events suggest that enhancements to Canada's enforcement toolkit will likely be forthcoming in 2024. Businesses should be mindful that these incoming reforms will aim to bolster authorities' ability to detect, investigate and prosecute various forms of economic crime. In light of these developments, businesses should prioritize familiarity with existing and novel obligations, and proactively implement policies and practices focusing on compliance with those obligations.

Developments in anti-bribery and corruption enforcement

In 2023, two significant judicial decisions were released which provide much needed guidance on the interpretation of bribery and corruption related offences under the *Criminal Code* and the CFPOA.

In February 2023, the Québec Court of Appeal in *Bebawi c. R.* clarified the requirements for a conviction of fraud in respect of corrupt conduct under the *Criminal Code*. In the case

of *Bebawi*, the fraud consisted of a complex scheme of kickbacks and payoffs made to foreign agents to secure contracts. Bebawi argued that some acts for which he was convicted did not constitute fraud as they did not jeopardize his victims' financial interests. The Court of Appeal disagreed, holding that circumstances where the corrupt conduct *could have* led to economic prejudice — or at least a risk of economic prejudice — are sufficient to ground a section 380 fraud offence under the *Criminal Code*. This decision underscores the availability of the fraud offence to prosecute corrupt conduct, even in the absence of direct financial loss resulting from that conduct.

In March 2023, the Ontario Superior Court of Justice in *R. v. Arapakota* provided further clarity regarding the bribery of foreign public officials offence under section 3(1)(a) of the CFPOA. The Court clarified that an "advantage" offered or conferred to a public official for the purpose of the offence must be a non-trivial material or tangible gain or a material economic advantage. The Court also held that the "as consideration for" language in section 3(1)(a) requires a *quid pro quo* between the payment and the advantage received. In the case of *Arapakota*, the accused allegedly gave a Botswanan official and his family a trip from New York to Orlando. The trip was provided as consideration for the official providing letters confirming the termination of a contract between the Botswanan government and an existing e-services provider and stating an intention to engage the accused's company instead. The Court found that the trip constituted a non-trivial benefit. However, the link between the trip and the official providing the letters was insufficient to meet the *quid pro quo* requirement necessary to support a conviction under section 3(1)(a).

Together, these decisions represent the most significant judicial guidance regarding corruption-based offences in Canada in several years.

Further developments can be anticipated following the OECD's [Phase 4 country monitoring](#) of Canada under the [OECD Anti-Bribery Convention](#), which was completed in October 2023. As a signatory of the OECD Anti-Bribery Convention, Canada is monitored for its implementation and enforcement of the Convention by the OECD Working Group on Bribery through a peer-review (country-to-country) system. The most recent review found that Canada's enforcement of foreign bribery "remains exceedingly low," with only two individuals and four companies sanctioned since the CFPOA came into force nearly 25 years ago.

Recommendations arising from the OECD Working Group's accompanying [report](#) [PDF] include calls for Canada to, among other things, enact whistleblower protection legislation for foreign bribery and enact a mechanism to impose liability on management of a business that fails to prevent foreign bribery (akin to the "failure to prevent bribery" offence under the *UK Bribery Act*). The report also recommended that Canada publish important elements of resolved foreign bribery cases, irrespective of their method of resolution, and maintain statistics on the detection, investigation and prosecution of foreign bribery and related offences. The report further recommended that Canada ensure that its [remediation agreement regime](#) – Canada's version of deferred prosecution agreements – reaches its full potential by issuing appropriate guidance and ensuring that it is not undermined by conflicting administrative policies.

Although it remains to be seen what action the Canadian government and regulators will take in response to the OECD's findings, further developments are likely to result from the recommendations set out in the report. This includes the potential for increased foreign bribery enforcement and use of remediation agreements in the resolution of proposed charges.

Changes to the anti-money laundering and anti-terrorist financing regime in Canada

In 2023, several legislative reforms were introduced to give teeth to Canada's anti-money laundering and anti-terrorist financing (AML/ATF) regime. These include proposals to enhance mechanisms for detection, investigation and prosecution, to expand the net for misconduct and to introduce greater sanctions for offenders.

In March 2023, as part of its [Budget 2023](#), the federal government proposed amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and the *Criminal Code* to strengthen Canada's investigative, enforcement and information sharing capacity in relation to anti-money laundering. These proposed reforms are, in part, intended to increase the regulatory oversight powers of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). These powers include the ability to levy administrative monetary penalties against violators' directors, officers and agents.

The legislation also proposes to create a new agency called the Canada Financial Crimes Agency, which would be dedicated to investigating and enforcing major complex financial crimes. This follows the establishment of other specialized enforcement authorities in Canada in recent years, including the 2019 addition of the [Serious Frauds Office](#) in Ontario and the 2021 addition of the RCMP's [Special Advisory Group](#) at the Toronto Integrated Market Enforcement Team.

In June 2023, the Department of Finance published a [white paper](#) [PDF] announcing its Consultation on Strengthening Canada's Anti-Money Laundering and Terrorist Financing Regime. The paper sought input from the public on the viability, development and execution of proposed changes to the AML/ATF regime in Canada. Among others, the changes proposed to develop a pan-Canadian approach to beneficial ownership transparency and develop the mandate and structure of the Canada Financial Crimes Agency. Further, the paper proposed to amend the offence of laundering proceeds of crime to better address third-party money laundering and create additional offences for economically-motivated and profit-oriented crimes, such as phishing or spoofing.

It was also proposed that the *Criminal Code* be amended to address challenges posed by digital assets. Amendments would enable the seizure of digital assets and expressly provide for their admissibility as evidence. The proposed changes would also expand the jurisdiction of production orders in Canada to apply extraterritorially.

In March 2023, the federal government [tabled](#) legislation (Bill C-42) to create a publicly accessible corporate beneficial ownership registry under the *Canada Business Corporations Act*. The registry – which follows revelations of money laundering in data leaks such as the Panama Papers and FinCEN Files, as well as the Cullen Commission's [Final Report](#) – has been the subject of advocacy in recent years by international and industry organizations such as TI. It reflects an ongoing trend of industry input into Canada's anti-money laundering laws and enforcement, as well as developments in beneficial ownership transparency globally. Further details are described in our [Impact of transparency register requirements on financial sponsors](#) article.

Canadian companies should expect these proposals to begin taking shape in the next year, in the form of new legislation and new regulatory bodies. Changes are also likely to come to existing laws and regulatory bodies to enhance their efficiency. All of this is aimed at greater transparency and enforcement for money laundering offences.

Supply chain diligence and human rights developments

Legislative and enforcement developments in 2023 continued to underscore the need for companies to ensure compliance with the various laws aimed at curbing economic crime throughout their supply chains. As we discuss in our [Supply chains, 'friend-shoring' and cooperation with allies](#) article, modern slavery legislation passed in Canada will impose new reporting obligations on government institutions and certain private entities relating to the use of forced labour and child labour by supply chain participants.

The enactment of the *Modern Slavery Act* signals increasing enforcement and oversight over supply chain and human rights issues. In 2023, the Office of the Canadian Ombudsperson for Responsible Enterprise (CORE) – which reviews complaints about possible human rights abuses by Canadian companies operating abroad in the garment, mining, and oil and gas sectors – began reviewing 15 complaints and released initial assessment reports in eight of them. Ongoing proceedings include independent fact-finding investigations against Canadian companies in seven of the complaints.

Notwithstanding these efforts, Canada continues to face pressure to increase enforcement of human rights and supply chain issues. In September 2023, Canada was [criticized](#) [PDF] by the United Nations Special Rapporteur on Contemporary Forms of Slavery for its current approach to human rights due diligence for Canadian companies, including CORE's effectiveness and independence.

Enforcement authorities increasingly expect companies to take appropriate measures to ensure compliance not only within the organization, but also throughout all levels of their supply chain and operations. These measures include conducting appropriate diligence in relation to suppliers and business partners, as well as obtaining compliance representations and warranties in contractual agreements. Such diligence should cover not only modern slavery and human rights issues, but also corruption and other forms of economic crime.

Supply chain and human rights issues are likely to remain at the regulatory and enforcement forefront throughout 2024. Authorities will undoubtedly be keeping a close eye on businesses and their efforts to integrate themselves into Canada's novel and untested modern slavery regime.