

## Litigation

June 20, 2014

### **CFPOA May Not Give Canadian Courts Jurisdiction Over Foreign Nationals Outside Canada**

In the ongoing saga of the corruption charges involving SNC Lavalin, the Ontario Superior Court of Justice held that the *Corruption of Foreign Public Officials Act* (CFPOA) may not give Canadian courts jurisdiction to prosecute offences committed by foreign nationals who are not located in Canada unless they enter Canada or are extradited to Canada. Canadian courts have jurisdiction over *offences* with a connection to Canada, but this does not necessarily extend to *persons* who are outside Canada and are not Canadian nationals. While *Chowdhury v. H.M.Q.*, 2014 ONSC 2635, imposes a potentially significant limitation on the scope of the CFPOA, it also reaffirms that Canada *can* prosecute CFPOA offenses against anyone who returns to Canada voluntarily or when Canada can “lay hands” on the accused through extradition.

Following the release of *Chowdhury*, the RCMP laid charges against individuals located in the U.S. and the U.K. in connection with the Cryptometrics Canada case, demonstrating that the *Chowdhury* decision may have limited application.

#### **Background**

The applicant Abul Hasan Chowdhury is the former Interior Minister and Minister of State of Bangladesh. He is a Bangladeshi citizen and resident of Bangladesh. He is not, and has never been, a citizen or resident of Canada, nor was there any evidence that he ever visited Canada.

Chowdhury is one of five individuals jointly charged under the CFPOA with one count of bribing a foreign

public official. It is alleged that Chowdhury was paid to exert influence over the selection committee for the Padma bridge project in favour of SNC Lavalin, a Canadian company. None of Chowdhury’s conduct was alleged to have physically occurred in Canada.

The Crown did not seek a warrant for Chowdhury’s arrest, nor otherwise attempt to have Bangladesh surrender him for prosecution in Canada. The two countries do not have an extradition treaty.

#### **Decision**

The Court concluded that Canada does not currently have jurisdiction over Chowdhury, based on the distinction between (i) jurisdiction over an *offence* and (ii) jurisdiction over a *person*. The Court held that, in order to proceed with charges against an individual under the CFPOA, it must have jurisdiction over *both* the offence and the person. International law recognizes that Canada can exert worldwide jurisdiction over its nationals. But, if the accused is not a Canadian national or resident, charges can only be pursued if Canada is able to “lay hands” on the accused through the individual’s presence in Canada, either voluntary or through extradition.

Canada has jurisdiction over an offence when a significant portion of the activities constituting that offence took place in Canada. The Court readily accepted that Canada had jurisdiction over the CFPOA offence as many of the acts furthering the alleged bribery scheme occurred in Canada, the investigation was conducted in Canada and the bulk of the evidence was gathered in Canada.

However, the Court held that Canada did not have jurisdiction over Chowdhury as he is a foreign national with no previous connection to Canada. The Crown’s submission that jurisdiction over an offence automatically confers jurisdiction over all parties to that offence was rejected. After a

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comprehensive review of the relevant statutory provisions, the Court held that, as the CFPOA must be interpreted in line with international law, including the principles of sovereign equality and comity, the CFPOA cannot have been intended to extend Canada's jurisdiction over the actions of another country's nationals for acts done in their home country. International law instead dictates that Bangladesh has exclusive jurisdiction to decide to prosecute the accused or to surrender him to Canada.

Despite this conclusion, the Court refused to dismiss the case or quash the indictment as Canada could proceed with the charges if the accused ever came to Canada or Canada was able to secure his extradition by him entering a jurisdiction with an extradition treaty with Canada. Accordingly, the Court only stayed the charges.

## **Key Point for Canadian Companies**

This decision clearly indicates that, under the CFPOA, Canada must have jurisdiction over both the offence and the accused in order to proceed with a prosecution. However, while foreign nationals may not face Canadian prosecution unless they enter Canada, they can be

prosecuted if they come to Canada or a jurisdiction with an appropriate extradition treaty arrangement with Canada.

The decision does not appear to have dampened the authorities' willingness to prosecute individuals outside of Canada. Since *Chowdury*, the RCMP have issued arrest warrants against foreign nationals from the U.S. and U.K. in connection with the Cryptometrics Canada case (which we previously reported on). Further developments in that case also demonstrate that prosecutors in countries without extradition arrangements with Canada may be willing to pursue bribery charges against those accused under the CFPOA, including the public officials themselves, in their home jurisdictions.

Thus, while *Chowdury* does limit the scope of the CFPOA, foreign executives and public officials accused under its provisions may still face prosecution through the extradition process or in their home country.

For further information on the CFPOA or *Chowdury*, please contact any member of our Litigation Law Group.