THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Sixth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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This article was first published in November 2017
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-93-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANAGNOSTOPOULOS

AZB & PARTNERS

BAKER & PARTNERS

BCL SOLICITORS LLP

BONN STEICHEN & PARTNERS

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PREFACE

This sixth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

1MDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US$965 million in fines and penalties for making bribe payments of over US$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations, and

remediation of internal controls and compliance programmes. The Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2017

Chapter 4

CANADA

Christopher J Ramsay[1]

I INTRODUCTION

As a democratic nation, Canada's governance is premised on representation by government officials whose judgment is unimpaired by gains from third parties. Accordingly, while Canada's laws condemn bribes in the private sphere, Canadian legislation focuses far more on bribery of public officials. Provisions prohibiting domestic bribery are set out in the Criminal Code of Canada (the Criminal Code).[2]

Being a signatory on numerous Organisation for Economic Co-operation and Development (OECD) conventions against foreign anti-corruption, Canada's anti-bribery legislation does not solely focus on risks of bribery within Canada. As a response to the increased globalisation of Canadian industries, Canadian officials have increasingly relied on the Corruption of Foreign Public Officials Act (CFPOA) to inhibit bribery by Canadian citizens and corporations within foreign countries. While Canada's anti-bribery and corruption laws are not as refined as the United States', Canada has recently followed its lead in increasing enforcement efforts[3] under foreign anti-bribery legislation. These enforcement efforts have been fruitful and, among other things, led to SNC Lavalin (a leading Canadian engineering and construction firm) being charged under the Criminal Code and CFPOA for alleged bribes to Libyan officials. Furthermore, by tabling bills such as Bill S-14 in 2013, Canada has broadened the purview of the CFPOA, and increased the penalties faced by individuals who run afoul of the statute.

Although Canada's anti-bribery and anti-corruption legislation and jurisprudence is relatively sparse,[4] especially pertaining to foreign bribery, the wider scope of the CFPOA, combined with increased enforcement efforts, should develop this jurisprudence in the future.

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1 Christopher J Ramsay is a partner at Clark Wilson LLP. The author would like to thank Michael Wilson, an articled student at Clark Wilson LLP, for his assistance with this chapter.

2 Criminal Code, R.S.C. 1985, c C-46.

3 Operational enforcement efforts are primarily coordinated by the Royal Canadian Mounted Police (RCMP). While the RCMP primarily investigates Criminal Code breaches (including domestic bribery), the RCMP's Anti-Corruption Unit investigates breaches of the CFPOA and the RCMP's National Division deals with high-profile cases of federal corruption.

4 As compared to the US Foreign Corrupt Practices Act and UK Bribery Act.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Domestic bribery

While domestic Canadian law focuses on criminalising bribery, Canadian legislation and jurisprudence condemns bribery in the civil sphere, especially in fiduciary relationships. Bribery of private parties can result in civil liability through claims of unjust enrichment,[5] or claims of breach of fiduciary duties (when bribery involves an agent or fiduciary).[6] Moving forward, this section will primarily focus on bribery as it pertains to criminal law.

ii Criminal Code

Domestic bribery is criminalised under the Criminal Code. Although the Code primarily focuses on bribery of public officers,[7] it also criminalises secret payments among public or private parties.[8] The Code's provisions have a broad scope and criminalise both offering bribes, and accepting bribes if one is a public official.

iii Definition of 'public official' and bribery of public officials

The broad definition of 'officer' and 'office' in the Criminal Code[9] creates a large net with which Canadian enforcement officers can catch corruption in the public sphere. Under the Criminal Code, an officer includes anyone who holds an office in government (including the police and the judiciary),[10] a civil or military commission, or any party who is employed in a public department or who is elected or appointed to discharge a public duty. Accordingly, even employees of public departments are subject to the Criminal Code's anti-bribery provisions.

While it is both a crime to offer bribes to officers and to accept a bribe as an officer, the latter are punished more heavily. For example, an individual who bribes a government official can face up to five years in prison,[11] while the same official who accepts the bribe can face imprisonment for up to 14 years.[12]

The bribery provisions, set out in the Criminal Code, are often tempered by further federal and provincial legislation. For example, although the bribery provisions in the Criminal Code create a draconian landscape where 'any valuable consideration'[13] or 'benefit'[14] can be considered a bribe, federal, provincial and municipal governments are allowed to enact their

5 As in *Insurance Company of British Columbia v. Dragon Driving School Canada Ltd*, 2006 BCCA 584, which held that bribes paid to a driving school could found a claim in unjust enrichment.

6 *Lister & Co v. Stubbs* (1890), 45 Ch D 1 (Eng CA), which held that a fiduciary who receives a bribe is personally liable to the beneficiary to account for the sum of money received.

7 Criminal Code, Sections 119-125.

8 Criminal Code, Section 426.

9 Criminal Code, Section 118.

10 Criminal Code, Section 120.

11 Criminal Code, Section 121(3).

12 Criminal Code, Section 119-120.

13 Criminal Code, Section 119-120.

14 Criminal Code, Section 121.

own laws to determine which gifts are acceptable for officers.[15] Nevertheless, gifts beyond a certain threshold, even if acceptable, must be disclosed. The threshold is determined by the level of government that has conduct over the public officer in question.[16]

iv Political contributions

Political contributions, if provided without a quid pro quo arrangement, are generally permissible and do not offend the Criminal Code's bribery provisions. However, further federal and provincial legislation determine whether political candidates can accept benefits from certain entities.

For example, political contributions from foreign entities are banned at the federal level, as well as in five provinces.[17] However, political candidates in provinces such as British Columbia are permitted to accept foreign political contributions, owing to a lack of residency requirements for political contributions.

v Secret payments and commercial bribery

While the Criminal Code focuses on the public sphere, bribery in the private sphere is also criminalised through a ban on secret payments. The Criminal Code makes it an offence for a party to bribe an agent to do, or not do, an act contrary to his or her duties to a principal. The provision is quite broad, and encompasses all agency and employment relationships. Furthermore, individuals who do not instigate the bribery scheme, but who are willing participants, can still be convicted of bribery.[18]

The elements of the offence involve: an agency relationship; the agent receiving some benefit as consideration for an act or omission in relation to the agency relationship; the benefit being provided as consideration for an act to be undertaken in relation to the principal's affairs; the agent failing to adequately disclose the benefit; and the accused being aware of the agency relationship and knowingly providing the benefit as consideration for the act or omission by the agent.

Unlike the bribery provisions dealing with public officials, the secret payment provisions in the Criminal Code specifically criminalise the offering of bribes to agents, but not the acceptance of these bribes.

vi Who can be charged for bribery and what are the ramifications?

Both corporations and individuals can be charged under the Criminal Code for domestic bribery schemes. However, individuals and corporations face widely different sentences if convicted. A conviction of an individual usually necessitates imprisonment and a fine. Conversely, corporate convictions often carry fines and probation conditions (tasks that the corporation must complete in a certain period of time in order to remain in good standing with the relevant corporate registrar).

15 For example, the province of British Columbia regulates gifts to municipal councillors through the Community Charter, S.B.C. 2003, c 26 (BC Community Charter).

16 For example, the BC Community Charter requires a council member to disclose any gifts greater than C$250 and any gifts received over 12 months which total over C$250.

17 These provinces include Ontario and Quebec.

18 *R v. Saundercook-Menard*, (2007) 73 WCB (2d) 122.

Corporations' risks of running afoul of the Criminal Code have been heightened since Bill C-45[19] expanded the Criminal Code to allow 'senior officers' to cause corporations to commit criminal offences. Prior to Bill C-45, a corporation could only be criminally liable for an act if a 'directing mind' of the entity engaged in illicit acts.[20] However, under the current Criminal Code,[21] 'senior officers' can cause a corporation to be criminally liable for their actions if the corporation receives some benefit from the senior officer's actions, and the senior officer who is party to the offence was acting within his or her authority. Senior officers of corporations are also considered to be wilfully blind (and thus liable for criminal convictions) if they knew, or ought to have known, about the bribery offence but took no reasonable steps to stop the company from acting.[22]

The Criminal Code defines a 'senior officer' as any party who has an important role in setting policy, or managing an important part of the organisation's activities.[23] Furthermore, the Canadian Department of Justice suggests that the definition of a senior officer focuses on the function of an individual rather than a specific title.[24] This position is well founded in that it precludes high-ranking directors and officers from delegating possibly illegal tasks to lower-level managers with impunity.

What constitutes 'an important part' of an organisation's activities has not been fully tested. However, the Quebec Superior Court's recent decision in *R v. Petroles Global Inc*[25] interpreted this provision broadly, holding that a general manager, who (among other things) supervises numerous branches of a company, is a 'senior officer' pursuant to the Criminal Code.[26]

Accordingly, it is advisable to keep apprised of clarifications to, and interpretations of, the potentially expansive definition of 'senior officer' in the Criminal Code. Furthermore, the current interpretation of the definition creates ambiguity and liability for mid-level managers who lack decision-making abilities, but who nevertheless fit the description of a senior officer within the Criminal Code.[27] An individual's position, and related function, at an organisation must therefore be closely considered.

19 Bill C-45, An Act to amend the Criminal Code (criminal liability of organizations), 2d Sess, 37th Parl, 2003, cl 22.2 (assented to 7 November 2003), SC 2003, c 21.

20 Paul Blyschak, 'Corporate Liability for Foreign Corrupt Practices Under Canadian Law' (2014), *McGill LJ* at p. 661.

21 Criminal Code, Section 22.2.

22 *R v. Tri-Tex Sales & Services Ltd*, [2006] NJ No. 230 at paras. 35 and 39.

23 Criminal Code, Section 2.

24 Canada, Department of Justice, *A Plain Language Guide: Bill C-45—Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*, online: Department of Justice <www.justice.gc.ca/eng/rp-pr/other-autre/c45/c45.pdf> at 5.

25 *R v. Petroles Global Inc*, 2013 QCCS 4262.

26 Paul Blyschak, 'Corporate Liability for Foreign Corrupt Practices Under Canadian Law' (2014), *McGill LJ* at p. 664.

27 See *R v. Metron Construction*, 2013 ONCA 541 for an explanation and application of the definition of 'senior officer' in the Criminal Code.

III ENFORCEMENT: DOMESTIC BRIBERY

i Prevalence of bribery and corruption in Canada

While Canada was ranked as the ninth 'least corrupt country' on Transparency International's 2016 Corruption Perceptions Index,[28] recent scandals, such as charges against Canadian engineering firm, SNC-Lavalin, as well as the Canadian Senate's sponsorship scandal,[29] illustrate that corruption in Canada is still a live issue.

ii Enforcement bodies

Domestic anti-bribery is enforced by the Royal Canadian Mounted Police (RCMP), and cases are tried in the Canadian criminal courts. The RCMP has developed several divisions, tasked with investigating cases of domestic and foreign bribery and corruption. These include: the RCMP's anti-corruption unit, which investigates cases of domestic and foreign corruption and bribery; the RCMP's National Division, which focuses on corruption of Canadian politicians; the Quebec Anti-Corruption Unit, which focuses on bribery in Quebec's construction industry; and the RCMP's internal anti-corruption unit, which inhibits corruption among police officers.

Once an RCMP investigation leads to a suspect, that suspect may be charged with a criminal offence under the applicable statute. In Canada, the Crown[30] has discretion to charge an individual or a company once there is sufficient evidence to believe that the charge may lead to a conviction (the 'Charge Approval Standard').[31]

iii Jurisprudence involving bribery

Many disputes regarding the legal test for bribery query the definition of a benefit. Bribery provisions in the Criminal Code generally contain, as an essential element, giving or receiving some form of a 'benefit' in consideration for an individual doing (or omitting to do) an action. The Supreme Court of Canada (Canada's highest court) has held that a benefit is beyond social courtesies (such as a cup of coffee), and must constitute a 'material or tangible gain' before criminal liability will be imposed.[32] Accordingly, the definition of a benefit is relatively nuanced, with an arbitrary line dividing a material or tangible gain from a social nicety. This ambiguity gives rise to fierce litigation, which has led benefits to be interpreted

28 Transparency International, Corruption Perceptions Index 2016; www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

29 The sponsorship scandal involved a Canadian federal government sponsorship programme in Quebec, instituted by the Liberal Party of Canada. The programme was intended to promote awareness of the federal government's contributions to the Quebec economy. However, bribery and misdirection of public funds, prevalent in the sponsorship programme, caused the programme to be discontinued in 2004.

30 The Crown is Canada's prosecution service. In some provinces (such as Ontario) the police have the power to lay criminal charges.

31 The Charge Approval Standard differs among provinces. Some provinces (such as Ontario) require a 'reasonable likelihood of success' at trial to lay charges, while others (such as British Columbia) use the more stringent 'substantial likelihood of conviction' standard. However, all provinces require the charge to be in the public interest.

32 See *R v. Hinchey*, [1996] 3 SCR 1128.

to include, among other things, gifts at a Christmas party[33] and donations to a specified charity.[34] On the other hand, recent cases have narrowed the definition of bribery to exclude benefits that are incidental or derivative to a *bona fide* transaction.[35]

iv The government's Integrity Regime and similar provincial programmes

In addition to criminal sanctions, bribery convictions have significant ramifications for the fiscal well-being of clients, especially those who have significant contracts with government entities. In 2015, the government introduced the Integrity Regime, necessitating businesses to be 'ethical suppliers' in order to contract with the federal government on contracts over C$10,000. The Integrity Regime imposes a 10-year blacklisting period for companies convicted under the CFPOA or the Criminal Code for bribery. Furthermore, being charged with bribery also triggers an 18-month blacklisting period, even if the corporation or individual is eventually acquitted.

A similar system, Autorité des marchés financiers (AMF), was instituted in Quebec in 2013. The AMF required any company, seeking to do business with the provincial government, to pass an integrity test and to obtain an ethics certificate from Quebec's securities regulator. The AMF provided the regulator with the discretion to audit companies and to refuse to grant an ethics certificate if public confidence was undermined by a company's dishonesty.

Although few provinces have enacted similar programmes to the AMF and the Integrity Regime, Canada's increased commitment to anti-bribery will likely necessitate an increase in these provincial anti-corruption programmes in the future. Accordingly, businesses currently working with the federal or provincial governments, or those who intend to work with these governments in the future, should take extra care to stay onside of the CFPOA and the Criminal Code.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

As commercial practices become increasingly globalised, so too does the law applying to corporate entities. The CFPOA extends Canada's jurisdiction by prohibiting Canadian individuals and entities from bribing foreign public officials. However, akin to international business, which creates an intersection of cultures and business practices, anti-bribery laws between nations frequently intersect. Therefore, while Canadian companies are subject to the CFPOA, the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act are becoming increasingly relevant for Canadian companies that expand into these regions.[36] Accordingly, while this section will focus on Canadian laws and the CFPOA, it is important to remember the international legal backdrop upon which the CFPOA functions.

i Corruption of Foreign Public Officials Act

Canada's primary legislation to combat foreign bribery is the CFPOA, which creates civil and criminal liability for individuals and entities that engage in bribery or corruption of

33 See *R v. Ruddock*, 25 NSR (2d) 77.

34 See *R v. Kozitsyn*, 2009 ONCJ 455.

35 See *R v. Duffy*, 2016 ONCJ 220.

36 It is possible for a company to face sanctions under anti-corruption statutes from different countries if both countries have jurisdiction.

foreign officials. It is an offence under the CFPOA[37] to bribe a foreign public official to act or omit to act in his or her official capacity. It is also an offence to induce an official to use his or her position to influence any acts of the foreign state, or to influence a public international organisation for which the official performs his or her duties and functions. The anti-bribery provisions of the CFPOA are not limited to individuals and, in the past, most convictions from the CFPOA have been levied against corporations.[38] However, unlike with domestic bribery, Canada does not have jurisdiction under the CFPOA to charge foreign public nationals who accept bribes.[39]

Definition of 'bribes' and 'foreign public official'

The CFPOA defines 'foreign public official' to mean a person who holds a legislative, administrative or judicial position of a foreign state, performs public duties or functions for a foreign state, including that of a public corporation, or an official or agent of a public international organisation that is formed by two or more states or governments. While the definition of a foreign public official does not include a third-party intermediary, the CFPOA[40] also deems it an offence to bribe a third party intermediary for the ultimate benefit of an official.

The CFPOA also defines bribery broadly, as 'directly or indirectly giving, offering or agreeing to give or offer a loan, reward, advantage or benefit of any kind'.[41]

The lack of convictions under the CFPOA, despite these expansive definitions, can be attributed to Canada's relatively relaxed enforcement of the CFPOA, as well as the defences to claims of bribery (set out below).

Defences

Three defences to bribery under the CFPOA include facilitation payments, legality in the foreign state, and good faith and reasonableness on the party offering the alleged bribe.

Facilitation payments are payments used to expedite or secure the performance of a routine act (such as issuance of a permit or licence) by a foreign public official.[42]

Further, any bribes that are permitted under the laws of the foreign state do not give rise to an offence under the CFPOA.[43] This defence has attracted significant controversy as it arguably encourages unscrupulous businesses to set up shop in foreign nations with non-existent anti-corruption laws.

Finally, the CFPOA[44] specifically permits parties to rebut allegations of bribery by proving that the bribe was made to pay reasonable expenses, incurred in good faith, which are directly related to the promotion, demonstration or explanation of products and services. Accordingly, reasonable expenses relating to meals and entertainment, used to promote a business, would not be considered bribes under the CFPOA.

37 CFPOA, Section 3(1).

38 See *R v. Niko Resources*, [2011] AJ No. 1586 and *R v. Griffiths Energy International*, [2013] AJ No. 412.

39 See *Chowdhury v. HMQ*, 2014 ONSC 2635.

40 CFPOA, Section 3(1).

41 CFPOA, Section 3(1).

42 CFPOA, Section 3(4).

43 CFPOA, Section 3(3)(a).

44 CFPOA, Section 3(3)(b).

ii Bill S-14

In response to criticism regarding the CFPOA's relatively narrow purview and lenient punishments,[45] Parliament enacted Bill S-14, also known as the Fighting Foreign Corruption Act. Bill S-14 recognised the need for increased deterrence for bribery, and increased the maximum punishment for bribery of a foreign public official to 14 years' imprisonment.[46]

Realising the difficulty in proving bribery under the CFPOA while respecting comity among nations, Bill S-14 made two substantive changes to the law. First, it eliminated facilitation payments as a defence for bribery, although this elimination will come into force at a date to be determined by the cabinet. Secondly, it extended Canada's jurisdiction, allowing the Crown to prosecute Canadian citizens throughout the globe, even *in absentia*. To secure a conviction, and to have jurisdiction under the CFPOA, the Crown must prove a 'real and substantial connection' to Canada. Prior to Bill S-14, this was difficult, especially when the bribery occurred in a foreign state. Accordingly, bribery offences were generally limited to those that were committed at least partly in Canada.[47]

However, by deeming all acts done by Canadian citizens, permanent residents, corporations, societies, firms and partnerships worldwide as acts that occur in Canada,[48] Bill S-14 did away with much of the legal nuance surrounding Canada's jurisdiction under the CFPOA. The Ontario Court of Appeal also expanded the 'real and substantial connection' test in a recent appellate decision,[49] by holding that the real and substantial connection to Canada was not limited to the essential elements of bribery.

iii Crown policies – plea-bargaining

The RCMP's anti-corruption unit is tasked with investigating allegations of foreign bribery under the CFPOA. Once the RCMP has gathered sufficient evidence, the Crown can lay charges against the suspect.[50]

Since bribery is difficult to prove, the Crown will usually engage in plea-bargaining in order to secure a conviction. In fact, many early cases involving the CFPOA proceeded with joint submissions and plea bargains.[51] The Crown (if by plea bargain), or the judge (if by sentencing hearing), will consider the accused's efforts to compensate those harmed, minimal benefits accruing from bribes,[52] and the accused's cooperation with authorities[53] to be mitigating factors when determining a proper sentence for individuals or corporations

45 Prior to the tabling of Bill S-14, the maximum punishment for bribery under the CFPOA was five years' imprisonment.

46 Joseph A Garcia and Caroline Clapham, 'Recent Trends in Corporate Governance and Disclosure' (2013), *Continuing Legal Education BC* at p. 7.

47 Susana C Mijares, 'The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?' (2015) *UWO LJ* at p. 15.

48 CFPOA, Section 5(1).

49 *R v. Karigar*, 2017 ONCA 576 at paras. 27–28.

50 As stated in Section III, the Crown will generally charge individuals upon the case meeting the Charge Approval Standard.

51 For example, *R v. Niko Resources*, [2011] AJ No. 1586, one of the first CFPOA cases.

52 *R v. Niko Resources*, [2011] AJ No. 1586 at para. 18.

53 *R v. Karigar*, 2014 ONSC 3093 at para. 27.

convicted of bribery.[54] Cooperation and self-reporting are especially important in the pre-indictment stages, since they can assist in avoiding charges being levied against individuals or corporations, and can reduce the overall penalty faced by accused parties.[55]

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

CFPOA

Bill S-14 recognised a need for increased accountability for payments made to foreign officials. Accordingly, it altered the CFPOA to require multinational companies to keep proper records of transactions and accounts. Among other things, this 'books and records' requirement precludes individuals or entities from:

a maintaining accounts that do not appear in any books and records the entity is required to keep under applicable accounting standards;

b recording non-existent expenditures; and

c making transactions that are not recorded in the entities' books and records.[56]

The CFPOA deems contravention of the books and records requirement to be an offence, with a maximum penalty of 14 years' imprisonment, if the deficiency in the book or record was created to bribe a foreign public official, or to hide bribery.

Extractive Sector Transparency Measures Act

Canada responded to corruption in the resource extraction industry by enacting the Extractive Sector Transparency Measures Act (ESTMA), which came into force on 1 June 2015 and places heightened reporting standards on commercial oil, gas and mineral extraction firms that are of a prescribed size and that trade on a Canadian stock exchange. Specifically, firms within these sectors are required to publicly report certain prescribed payments made to domestic and foreign payees in relation to the commercial development of oil, gas and minerals.

Although ESTMA focuses on government entities, a payee need not be purely governmental; its definition of a 'payee' includes any trust, board, commission, corporation or body or authority that is established to exercise or perform a power, duty or function of government. Accordingly, aboriginal governments and bands, as well as Crown corporations, would be considered payees under the Act.

Failure to comply with ESTMA's disclosure requirements is an offence punishable by summary conviction, and carries a fine of up to C$250,000.

54 Joseph A Garcia and Caroline Clapham, 'Recent Trends in Corporate Governance and Disclosure' (2013), Continuing Legal Education BC at page 7.

55 In *R v. Griffiths Energy International*, [2013] AJ No. 412 self-reporting, complete cooperation, and implementation of a pre-emptive compliance plan inhibited Crown from laying charges, while levying a relatively minor fine (C$10.35 million), despite bribes over $C2 million being made to foreign public officials.

56 Paul Blyschak, 'Corporate Liability for Foreign Corrupt Practices Under Canadian Law' (2014), *McGill LJ*.

ii Money laundering

Criminal Code

In Canada, Part XII.2 of the Criminal Code (Part XII.2) deals with 'proceeds of crime'. It was created to deter money laundering, and to get at the funds being laundered.[57] Among other things, it makes it an offence to engage in laundering proceedings of crime (money laundering).[58] Proceeds of crime is defined as any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (1) the commission in Canada of a designated offence, or (2) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.[59]

The relevant money laundering provision applies to every individual who knowingly accepts, alters, disposes of or transfers money in the money laundering chain. The offence carries with it a maximum penalty of 10 years' imprisonment.

Furthermore, the Criminal Code also permits courts to order forfeiture of the proceeds of crime ,where an offender is convicted or discharged of a designated offence (which includes money laundering).[60] In other words, if the court is satisfied, on a balance of probabilities, that any property is proceeds of crime, and that the designated offence was committed in relation to that property, then the court is obligated to order that the property be forfeited to the Crown.[61]

Proceeds of Crime (Money Laundering) and Terrorist Financing Act

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) was enacted in 2000 in order to inhibit criminals from laundering proceeds of crime through the financial services industry, and to combat the financing of terrorist activities.[62] The object of the PCMLTFA was attained by establishing increased record-keeping and client identification requirements for financial institutions, as well as by instituting reporting requirements for both suspicious financial transactions and cross-border movements of monetary instruments.

The PCMLTFA also created the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), a federal agency that collects, analyses, assesses and discloses information in order to assist in the detection, prevention and deterrence of money laundering.

Financial record-keeping under the PCMLTFA

Although the PCMLTFA has a wide ambit, the statute primarily applies to companies that deal with significant financial transactions, such as banks, credit unions, insurance companies and trust companies.[63] Businesses to which the PCMLTFA applies must verify their client's identity, maintain detailed records and report transactions that are prescribed by regulations.

57 Mr Justice Selwyn R Rommilly, 'Proceeds of Crime: the Basics of Part XII.2 of the Criminal Code' (2011), Continuing Legal Education BC.

58 Criminal Code, Section 462.31.

59 Criminal Code, Section 462.3(1).

60 Criminal Code, Section 462.37(1).

61 Mr Justice Selwyn R Rommilly, 'Proceeds of Crime: the Basics of Part XII.2 of the Criminal Code' (2011), Continuing Legal Education BC at p. 24.

62 Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17.

63 PCMLTA, Section 5.

Applicable businesses also have the responsibility of reporting to FINTRAC any transactions for which the business has reasonable grounds to suspect money laundering or terrorist financing, in addition to any cross-border movements of currency or monetary instruments.[64]

It is a criminal offence for a business or business person to fail to comply with the reporting requirements set out in the PCMLTFA. The offence has a maximum penalty of a C$50,000 fine and a six-month term of imprisonment if the Crown proceeds by summary conviction, and has a maximum penalty of a C$500,000 fine and a five-year term of imprisonment if the Crown proceeds by indictment.

2017 federal budget

The 2017 federal budget announced the Liberal Party's intention to strengthen Canada's 'Anti-Money Laundering and Anti-Terrorist Finance Regime'.[65] To meet this target, the Liberals plan to increase the transparency of companies and the beneficial ownership of entities and trusts. The party is also proposing to increase the purview of the PCMLTFA by (1) increasing the list of agencies who may receive financial intelligence pertaining to threats to Canadian security, (2) instituting more effective intelligence on beneficial ownership of legal entities, and (3) strengthening the framework and compliance of reporting entities under the PCMLTFA. These changes to the PCMLTFA, if passed by Parliament, will have far-reaching effects on both privacy law and reporting requirements for commercial entities. It is therefore advisable to keep abreast of any changes to the PCMLTFA.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

In recent years, Canada has been criticised for its lack of enforcement of foreign bribery, being the G7 country with the least number of enforcement mechanisms in 2012.[66] However, recent changes to the CFPOA as well as the creation of anti-bribery divisions in the RCMP, have significantly improved Canada's ability to combat foreign bribery.

i CFPOA cases

Before 2013, CFPOA cases primarily centred around corporations. Corporations that were charged with bribery would usually enter into a plea bargain and would pay a fine. Although certain sentences put corporations on probation, and required the corporations to engage in a compliance programme to prevent recidivism,[67] there was little impetus to follow the CFPOA. In other words, fines under the CFPOA became a cost of doing business.

However, this mentality changed in 2013 with the first successful conviction of an individual, Mr Nazir Karigar, under the CFPOA.[68] Despite several mitigating factors, such as his cooperation with investigators, Mr Karigar was still sentenced to a prison term of three years.

64 PCMLTA, Section 3(a)(ii).

65 Government of Canada, 'Budget Plan' (2017), Chapter 4.

66 Susana C Mijares, 'The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?' (2015) *UWO LJ* at p. 14.

67 See *R v. Niko Resources*, [2011] AJ No. 1586.

68 See *R v. Karigar*, 2013 ONSC 5199 (Mr Karigar's trial) and *R v. Karigar*, 2014 ONSC 3093 (Mr Karigar's sentencing hearing).

In July 2017, the Ontario Court of Appeal upheld Mr Karigar's sentence and confirmed that the CFPOA provisions pertaining to anti-corruption were necessarily broad, in that they caught agreements to offer bribes to foreign public officials, even if the officials were not privy to the agreement.[69]

ii Gathering evidence (wiretaps)

Bribery of a foreign public official is difficult to prove, and enforcement agents must gather extensive evidence to secure a conviction. Thankfully (for the agents), the CFPOA and the Criminal Code have certain synergies. The Criminal Code[70] permits enforcement agents to engage in wiretaps to secure evidence (if previously authorised by the judiciary). These wiretap warrants are only permitted for certain heinous offences, of which bribery under the CFPOA is one. Despite the access to wiretaps, Canadian enforcement agencies must also rely on coordinated international efforts to enforce the CFPOA.

iii Canada's Department of Foreign Affairs, Trade, and International Development

Canada's Department of Foreign Affairs, Trade and International Development has instituted Global Affairs Canada (GAC), which manages Canada's diplomatic and consular relations in the international realm.

GAC applies the 2010 Policy and Procedure for Reporting Allegations of Bribery abroad by Canadians or Canadian Companies (the 2010 Policy), which instructs GAC to disclose when one of its delegates receives information that a Canadian company or individual has bribed a foreign public official or committed a bribery-related offence.[71] Upon receipt of this information, the GAC delegate must provide the information to the GAC headquarters. The information is then passed on to law enforcement in accordance with the established procedures set out in the 2010 Policy.

iv Immunity for international anti-corruption organisations

Canada's government and judiciary both understand the importance of coordination among international anti-corruption and anti-bribery agencies. International actors, working together towards a common goal, significantly increase the probability that multinational corporations' unlawful dealings will be brought to justice.

The recent 2016 Supreme Court decision, *World Bank Group v. Wallace* (*World Bank*),[72] illustrates the importance of international cooperation among anti-bribery agencies, as well as the Canadian judiciary's encouragement of these coordinated investigations. In *World Bank*, an international investigative organisation (the World Bank Group) provided documents to the RCMP, which the latter then subsequently used to obtain authorisation to investigate SNC-Lavalin executives using wiretaps. The executives then tried to challenge the wiretap application by forcing the World Bank Group to disclose documents and to appear for questioning before the court. The Supreme Court, understanding the importance of a global coordinated effort against anti-bribery, as well as the chilling effect the requested order

69 See *R v. Karigar*, 2017 ONCA 576.

70 Criminal Code, Section 183.

71 Government of Canada, 'Canada's Fight against Foreign Bribery', Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-16.aspx?lang=eng.

72 See *World Bank Group v. Wallace*, 2016 SCC 15.

would have on international cooperation, held that investigators for the World Bank Group (as well as similar agencies under the Bretton Woods and Related Agreements Act (Canada)) had immunity from being ordered to disclose documents, and being cross-examined on documents they provided to domestic enforcement agencies.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Canada has signed and ratified a number of conventions aimed at minimising anti-bribery and anti-corruption worldwide, including: the Convention on Avoiding Bribery of Foreign Public Officials in International Business Transactions (which laid the groundwork for the CFPOA); the UN Convention against Corruption; the Inter-American Convention against Corruption; and the United Nations Convention against Transnational Organized Crime.

Despite signing these international conventions, Canada was heavily criticised by the OECD for failing to implement sufficient enforcement mechanisms under the Convention on Avoiding Bribery of Foreign Public Officials in International Business Transactions.[73] However, the OECD's criticisms seemed to subside after Canada bolstered the CFPOA through Bill S-14 and began charging natural persons (rather than solely corporate entities) under anti-corruption legislation.

VIII LEGISLATIVE DEVELOPMENTS

i Quebec Reimbursement Programme

In 2015, the Quebec National Assembly enacted the 'Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts'. The Act creates a self-reporting opportunity, called the Reimbursement Programme, for corporations and individuals whose fraudulent actions have resulted in costs to the Quebec government. Corporations and individuals who engage in the programme must self-report their fraudulent activities and submit a proposed settlement to the Quebec government. The proposal is then negotiated (on a without-prejudice basis) in front of an appointed director. If a settlement is reached, then the agreement (and the name of the company or individual who engaged in fraud) is publicly disclosed.

The Reimbursement Programme will run until November 2017, after which the Quebec government will take civil action against individuals who have cost the provincial government money because of fraud. Although participation in the Reimbursement Programme does not preclude criminal charges, self-reporting will be a mitigating factor for sentencing, and may convince the Crown to refrain from laying charges (as restitution may make charging the individual or corporation contrary to the public interest).

ii Bill S-14: removal of the facilitation payments defence

Although Bill S-14 eliminated the facilitation payments defence from the CFPOA, the elimination will be applicable upon a date determined by the cabinet. As of August 2017, facilitation payments are still exempted from the purview of the CFPOA (accordingly, it may be necessary to research whether the facilitation payment defence is still valid). If the cabinet

73 OECD, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada' (March 2011).

does eliminate facilitation payments, it could have a major impact on Canadian companies' ability to compete in the global market, especially in nations where facilitation payments are prevalent.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Corporate whistle-blowers

When it comes to anti-bribery, Canada has followed the United States, both in the explicit wording of the CFPOA, and through increased enforcement efforts. As Canada moves forward with prosecuting individuals,[74] it will be interesting to see if Canada follows the United States' pretrial bargaining tactics.

The United States' Attorneys' Manual, similar to Canada's Crown Policy Manual, encourages the US Department of Justice (DOJ) attorneys to dispose of bribery matters by non-prosecution.[75] This methodology often manifests itself in the form of plea deals with corporations.[76] However, the DOJ places more culpability for bribery on individual actors than on corporations. As a result, DOJ attorneys often offer lenient sentences to corporations in exchange for incriminating evidence against the corporation's individual agents.

While Canada's Crown, relative to the US DOJ, has been reticent to engage in this form of plea-bargaining in other areas of criminal law (such as in street-level drug cases), the difficulty in proving bribery beyond a reasonable doubt may require the Crown to engage in similar pre-indictment negotiations with the corporation accused.

ii Solicitor and client privilege

While the PCMLTFA is a far-reaching statute, the Supreme Court confirmed[77] that the reporting requirements set out in the PCMLTFA do not apply to solicitor and client communications. Emphasising the importance of privilege under the Canadian Charter of Rights and Freedoms, the Supreme Court struck down provisions in the PCMLTFA that would require lawyers to record and retain information about their clients for the purpose of providing the incriminating information to government agencies (namely FINTRAC).

Accordingly, counsel in Canada must be wary of any laws that require a lawyer to provide information about clients to state agents. It is a lawyer's primary duty to protect his or her client's interests and, as such, counsel must stalwartly object to any disclosure that could prejudice clientele.

X COMPLIANCE

Neither the Criminal Code nor the CFPOA requires Canadian multinational corporations to engage in anti-corruption or anti-bribery compliance programmes. Since compliance programmes were not contemplated by the Criminal Code or CFPOA, the legislation does not provide direction as to the content of these programmes. In response to the gap in

74 In 2013, Mr Karigar became the first individual to be convicted of bribery under the CFPOA.

75 US Attorneys' Manual Section 9-28-200B; www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

76 Elizabeth E Joh and Thomas W Joo, 'The Corporation as Snitch: The New DoJ Guidelines on Prosecuting White Collar Crime' (2015) *VA L Rev* Online.

77 *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7.

legislation, certain training initiatives, such as TRACE International,[78] have been instituted to assist multinational corporations in developing best practices that follow anti-bribery legislation.[79]

Although courts have not provided explicit guidance, the probation orders from recent CFPOA decisions[80] provide insight into what a successful compliance programme might entail. Furthermore, some Canadian lawyers have suggested that a perfect or 'platinum' compliance programme would consist of 21 steps, including periodic audits to confirm compliance with the CFPOA,[81] as well as periodic educational sessions where senior officers are informed of changes in anti-bribery and anti-corruption law.[82]

XI OUTLOOK AND CONCLUSIONS

Canada's anti-bribery and anti-corruption laws are still considered nascent. However, as Canada's efforts to enforce both domestic and foreign bribery increases, there are likely to be legislative changes to both the Criminal Code and the CFPOA, as well as jurisprudential developments in the area of anti-bribery and anti-corruption.

Recent cases[83] have both increased the CFPOA's purview and confirmed the need for cooperation among different agencies in international anti-corruption investigations. These cases reveal a trend towards stricter enforcement of anti-corruption and anti-bribery legislation. The increased enforcement of anti-bribery, combined with greater punishment under the CFPOA,[84] means that Canada is poised to follow international leaders in enforcing foreign bribery.[85] Future cases, such as the charges against SNC-Lavalin for corruption and bribery, will likely determine the future landscape of international business for Canadian corporations.

While Canadian legislation does not require compliance programmes, Canada's justice system has shown significant leniency to entities that make good faith attempts to remain compliant with the CFPOA.

78 Trace, 'About Trace', www.traceinternational.org/about-trace.

79 Susana C Mijares, 'The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?' (2015) *UWO LJ* at p. 11.

80 Such as *R v. Niko Resources*, [2011] AJ No. 1586.

81 As set out in the probation order in *R v. Niko Resources*, [2011] AJ No. 1586.

82 James M Klotz, 'The Anti-Corruption Dilemma for Canadian Companies – Just How Far Must Companies Go to Comply with the Law?' (2013) Thomson Reuters Lexpert.

83 Such as *R v. Karigar*, 2017 ONCA 576 and *World Bank Group v. Wallace*, 2016 SCC 15.

84 As a result of Bill S-14's amendments.

85 Susana C Mijares, 'The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?' (2015) *UWO LJ*.

Appendix 1

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ISBN 978-1-910813-93-5