Practice Guides

Mining

Editor
Michael Bourassa

GETTING THE DEAL THROUGH

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GETTING THE DEAL THROUGH

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A High Price to Pay – An Overview of Anti-Corruption Law in Canada

Frank Mariage and Youcef Belrachid[1]

In 2013, Norm Keith, author and colleague at Fasken, stated that '[c]orruption and bribery of public officials is a fact of life and also a way of life in many countries around the world.'[2] Indeed, can any country or region around the world claim today that it is immune to corruption? This harsh reality is supported by Transparency International's Corruption Perceptions Index (CPI), which scores the public sector corruption of over 180 countries and territories around the world. The CPI ranks countries on a scale from zero to 100 – scoring closer to 100 indicates a smaller level of corruption. Conversely, in regular commercial dealings, scoring lower on the scale indicates a higher presence of corruption. A score under 50 indicates that corruption is a critical threat to the country's economy.

Transparency International's latest report, in 2017, shows some alarming trends. In fact, only 13 countries score between 80 and 90, with New Zealand leading the select group with a score of 89 (Canada is ranked eighth with a score of 82, and the United States is ranked 16th with a score of 75), but more importantly, over two-thirds of countries score below 50 on the index (Syria, South Sudan and Somalia ranking lowest with scores of 14, 12 and 9 respectively) with a global average of 43.[3] At the regional level, the worst performing region is sub-Saharan Africa with a score of 32 – 11 points under the global average.[4]

When looking more specifically at the West African region, the results are unfortunately not so encouraging either. Unsurprisingly, among the 15 members of the Economic

1 Frank Mariage is a partner and Youcef Belrachid is an articling student at Fasken Martineau DuMoulin LLP.

2 Norm Keith, *Canadian Anti-corruption Law and Compliance* (Ontario: LexisNexis Canada, 2013) at 1.

3 Transparency International, *Corruption Perceptions Index 2017*, Ernst & Young (21 February 2018), online: https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

4 ibid.

Community of West African States, only Cape Verde is ranked over the critical mark of 50 on the index. Cases of corruption have plagued West Africa for decades, especially with respect to the mining industry. In 2016, the results of an investigation ordered by the parliament of Burkina Faso revealed that the country 'lost nearly a billion dollars to corruption and mismanagement in the mining sector in the decade leading up to the fall of Blaise Compaoré [ex-president of Burkina Faso] and the year after he was forced out'[5] (ie, between 2005 and 2015). Furthermore, according to the commission in charge of the investigation, François Compaoré, Blaise Compaoré's adviser and brother, collected bribes of 5 billion CFA francs in connection to the awarding of a mining contract in 2014.[6] The head of the commission, Ousseni Tamboura, explained that '[t]he losses are essentially due to bad governance of the sector, bad management, and the appropriation of the mining economy for self-serving interests'.[7] In 2017, former Minister of Mines and Geology of the Republic of Guinea Mahmoud Thiam was sentenced in the United States under the Foreign Corrupt Practices Act (FCPA)[8] to seven years in prison for laundering US$8.5 million in bribes paid to him by executives of China Sonangol International Ltd and China International Fund in exchange for mining rights.[9] Although many more could be mentioned, these few instances unfortunately demonstrate the predominance of corrupt practices in the West African mining sector and its close nexus to public officials.

As the issue of corruption and bribery represents a great challenge for Canadian corporations – and corporations from other countries – with increasing business activities (mining, etc) in the region of West Africa (and around the world), and considering the legal risks attached to such unethical behaviour, the 'Canadian Legal Framework' section of this chapter offers an overview of the Canadian legal framework under the Corruption of Foreign Public Officials Act (CFPOA)[10] with regard to corruption in business dealings involving a foreign public official (FPO), along with a high-level comparison to the legal framework in place in the United States and the United Kingdom. 'Canadian case law' explores some of the most important case law in Canada to demonstrate the severity and seriousness with which courts have addressed the issue of bribery and corruption. 'Best practices' seeks to offer a selection of best practices with regard to international commercial dealings and corporate governance in an effort to completely eliminate the temptation to result to acts of corruption and bribery to advance business objectives or opportunities in foreign countries.

5 Tim Cocks and Toby Copra, 'Burkina Faso mining lost $1 billion to graft in decade: parliament', Thomson Reuters (26 October 2016), online: https://www.reuters.com/article/us-burkina-mining-corruption-idUSKCN12Q2QO.

6 ibid.

7 ibid.

8 *Foreign Corrupt Practices Act*, 15 U.S.C. § 78m-78ff (1998) .

9 News24, 'US jails ex-Guinea minister over China bribes', 26 August 2017, online: https://www.news24.com/Africa/ News/us-jails-ex-guinea-minister-over-china-bribes-20170826; see also the United States Department of Justice, Justice News, 'Former Guinean Minister of Mines Sentenced to Seven Years in Prison for Receiving and Laundering $8.5 Million in Bribes From China International Fund and China Sonangol', 25 August 2017, online: https://www.justice.gov/opa/pr/former-guinean-minister-mines-sentenced-seven-years-prison-receiving-and-laundering-85.

10 *Corruption of Foreign Public Officials Act*, S.C. 1998, c 34.

Canadian legal framework

In many emerging economies, the making of certain payments to an FPO was often considered and referred to as the 'cost of doing business'. So much so that for many years, Canadian legislation on the matter allowed 'facilitation payments' as a solution to the business challenges brought upon Canadian companies by unduly slow-moving bureaucracies.[11]

With the FCPA, the United States was the instigator of an international effort to address the issue of foreign corrupt transactions around the world. This initiative gave birth to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). Signatories of the OECD Convention agree to adopt 'effective measures to deter, prevent and combat the bribery of FPOs in connection with international business transactions',[12] and most importantly to do the following:

> *take such measures as may be necessary to establish that it is a criminal offence under [the country's] law for any person intentionally to offer, promise or give any undue pecuniary or other advantage whether directly or through intermediaries, to a foreign public official [. . .] in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain [. . .] improper advantage in the conduct of international business.*[13]

The OECD Convention stresses that the attempt and conspiracy to bribe a foreign official must also be considered a criminal offence.[14] Since the ratification of the OECD Convention, over 350 individuals and over 130 entities in more than one-third of member states have been sanctioned under criminal proceedings for foreign bribery.[15] Based on the most recent enforcement data, not only have over 100 of those individuals been sentenced to prison, but there are currently over 300 investigations and over 100 prosecutions related to OECD Convention offences ongoing within member states.[16] Though these numbers may be alarming, they are no surprise. According to a recent study conducted by Ernst & Young, 36 per cent of chief financial officers (CFO) and 46 per cent of other finance team members interviewed could rationalise unethical conduct (such as corruption and bribery) to improve financial performance.[17] Canada signed the OECD

11 Since the 2013 amendments, facilitation payments are no longer allowed under the CFPOA. See 'Corruption of Foreign Public Officials Act' below.

12 Preamble, *Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents* (17 December 1997) OECD 2011 (entered into force 15 February 1999).

13 ibid.

14 ibid.

15 OECD Working Group on Bribery, '2015 Data on Enforcement of Anti-Bribery Convention', OECD 216 at 1; cited in Global Affairs Canada (GAC), 'Eighteenth Annual Report to Parliament', Canada's Fight Against Foreign Bribery, (last updated 11 October 2017) at 2 (GAC Annual Report).

16 ibid.

17 Ernst & Young, *Corporate misconduct – individual consequences*, 14th Global Fraud Survey 2016 at 14; between October 2015 and January 2016, Ernst & Young surveyed 2,825 individuals from 62 countries and territories. These individuals were senior executives, which included CFOs, chief compliance officers, heads of internal audits and heads of legal departments.

Convention on 17 December 1997, and quickly realised its obligations by enacting the CFPOA.

Corruption of Foreign Public Officials Act

The CFPOA came into force on 14 February 1999, thereby allowing Canada to officially become a member state of the OECD Convention.[18] Finally, far-reaching amendments to the CFPOA – the most important since the enactment of the CFPOA – were proposed through Bill S-14, and received royal assent on 19 June 2013 (Bill S-14).[19] Fundamental to the CFPOA is section 3(1), which codifies its primary offence – bribing an FPO. It states that every person commits a criminal offence where, in order to obtain or retain an advantage, he or she directly or indirectly provides a benefit of any kind to an FPO or to any person for the benefit of an FPO (i) as consideration for an act or omission by the official in connection with the official's duties or functions, or (ii) to induce the official to influence any acts or decisions of the foreign state or public international organisation for which such official performs duties or functions.[20]

The term 'person' as defined by the CFPOA adopts the definition in the Criminal Code[21] where it includes individuals, organisations (including corporations), the Crown and third parties such as agents, consultants or any other intermediary. As for the term 'business', the current definition under the CFPOA reads as follows: '"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.'[22] Pursuant to Keith, this definition is one of the results of Bill S-14, which effectively removed the words 'for profits' from the definition, and therefore eliminated the requirement for a business 'to be doing work for profit, be profitable or have a profit motive'.[23] Finally, a 'foreign public official' is understood broadly under the CFPOA as any person who (i) holds a legislative, administrative or judicial position of a foreign state, (ii) performs public duties or functions for a foreign state, including a person employed by a body or authority that is established to perform such duties or functions on behalf of the foreign state, or (iii) is an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.[24]

Bill S-14 has brought forth five important modifications. The most important amendment of the CFPOA is the addition of section 4(1), a new offence by which it is now illegal – among other things – to maintain false accounts, make transactions that are not recorded or adequately identified, record non-existent expenditures, use false documents or intentionally destroy accounting books if such action is carried out in order to obtain

18 Note that Canada is part of two other international treaties related to bribery and corruption on top of the OECD Convention, namely the United Nations Convention against Corruption and the Inter-American Convention Against Corruption.

19 An Act to amend the Corruption of Foreign Public Officials Act, S.C. 2013, c. 26.

20 CFPOA, supra note 9, s 3(1).

21 Criminal Code, R.S.C., 1985, c. C-46 (see Section 2).

22 CFPOA, supra note 1, s 2.

23 Keith, supra note 1 at 21.

24 CFPOA, supra note 9, s 2.

an advantage or hide that bribery.[25] Arguably, this addition 'effectively lowers the bar for prosecutions by requiring Canadian companies to keep adequate – and truthful – records, and establishing stiff fines for failure to do so'.[26] Bill S-14 has also significantly expanded the scope of Canadian jurisdiction, allowing the country to prosecute Canadian citizens (including officers and directors), permanent residents and Canadian corporations for offences under the CFPOA, regardless of where the offence took place.[27] Adding this extraterritorial application of Canadian law certainly reinforces the need for businesses to adopt rigorous and clear directions for Canadian employees working abroad.

The other three major changes concern facilitation payments, the maximum penalty for the conviction of individuals and the exclusive jurisdiction of the Royal Canadian Mounted Police (RCMP). First, prior to Bill S-14, the CFPOA used to permit facilitation payments (commonly called 'grease payments')[28] when, in particular circumstances, the payment of nominal amounts of money were made for the purpose of expediting or securing the performance of an 'act of routine nature' by an FPO.[29] This type of payment was effectively repealed by Bill S-14. However, two statutory defences have been maintained. In fact, paragraph 3(3)(a) states that no person can be found guilty under the CFPOA if the benefit given is permitted or required under the laws of the foreign state.

As for paragraph 3(3)(b), it allows the payment of reasonable expenses incurred in good faith on behalf of the FPOs that are related to the promotion of the individual's products or services, or the execution or performance of a contract between an individual and a foreign state for the official that performs duties or functions.[30]

The maximum penalty for the conviction of individuals under the CFPOA has been increased from five years to an impressive 14 years. Further, this means that 'individuals found to have violated the CFPOA will not be eligible upon conviction for either conditional sentences or discharges'.[31] Corporations, although unconcerned by prison sentences, are still exposed to monetary fines of an unlimited amount, subject to the discretion of a judge.[32] Finally, Bill S-14 enacted a new section 6 giving the exclusive

25 CFPOA, supra note 1, s 4(1).

26 Peter E Kirby and Guy W Giorno, 'Bill S-14: Canada Strengthens Its Anti-Bribery Law', Corporate Social Responsibility Law Bulletin, Fasken, (6 February 2013), online: https://www.fasken.com/en/knowledgehub/2013/02/corporatesocialresponsibilitylawbulletin-20130206.

27 CFPOA, supra note 9, s 5(1).

28 CFPOA, supra note 9, s 3(4) and s 3(5) of CFPOA in force in 1999 prior to being repealed by Bill S-14.

29 Riyaz Dattu, 'Expansive Changes to Canada's Foreign Anti-Corruption Legislation Now in Force: Existing Compliance Programs Will Require Revisions', Osler, Corporate Review – 2013 (June 2013), online: https://www.osler.com/en/resources/governance/2013/corporate-review-june-en/expansive-changes-to-canada-s-foreign-anti-corrupt.

30 With regard to paragraph 3(3)(a) CFPOA, so far no case law has given any example of this provision's application. In the years to come, jurisprudence should be able to enlighten our understanding of the phrasing. The same reality applies to paragraph 3(3)(b). Therefore, besides offering an overview of these provisions, it is difficult to give any additional details on their judicial interpretation at this time. It is also unclear why these provisions were not redrafted following the extensive effort to amend the CFPOA under Bill S-14.

31 ibid.

32 Keith, supra note 1 at 93. Keith gives the following explanation: 'Regarding the guilt of an organization, including a corporation, the CFPOA is silent on the issue of penalty. Therefore, the

investigative jurisdiction to the RCMP and, more precisely, to its dedicated International Anti-Corruption Unit. Although some interpret this legislative development as a logical response to a prior lack of enforcement of the CFPOA by local police officers and local crown attorneys,[33] others view this amendment as an attempt to eliminate the potential of the entire CFPOA for private prosecutions – presumably by international organisations such as NGOs.[34]

Comparing the CFPOA to the FCPA

The FCPA, enacted in 1977, was the first significant international anti-corruption law. It is enforced by both the US Department of Justice – through its Federal Bureau of Investigation – and the Securities and Exchange Commission, which have intensified, in the past decade, their identification and prosecution efforts of FCPA violations.[35] This is how the Department of Justice summarises the main FCPA offence:

> *[T]he anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.*[36]

Originally, the FCPA was only applied to public issuers and to domestic concerns (ie, US citizens and businesses).[37] However, amendments resulting from the International Anti-Bribery and Fair Competition Act of 1998[38] broadened the scope of the legislation making it applicable to three categories of persons or entities, namely 'issuers', 'domestic concerns' and certain persons and entities under 'territorial jurisdiction'.[39] These three

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default provisions in the Criminal Code, that deal with monitoring penalties for organizations, including corporations, apply to a corporation convicted under the CFPOA. Startling to many who may learn this the hard way, there is no upper or maximum penalty prescribed in the Criminal Code for an indictable offence. There is no pre-said maximum or limit to the fine.'

33 ibid at 32; Keith says: 'This amendment states in law what, is de facto, had been taking place for several years. That is the RCMP had taken over the role of being Canada's national and international police and investigating agency relating to the corruption of foreign public officials under the CFPOA.'

34 Kirby and Giorno, supra note 25.

35 T Markus Funk, 'Getting What They Pay For: The Far-Reaching Impact Of the Dodd-Frank Act's "Whistleblower Bounty" Incentives on FCPA Enforcement', Bureau of National Affairs, *White Collar Crime Report*, (10 September 2010) at 1–3.

36 The US Department of Justice, Fraud Section, 'Foreign Corrupt Practices Act' (3 February 2017), online: https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

37 Keith, supra note 1 at 4.

38 Pub. L. No. 105-366, 112 Stat. 3302 (enacted 10 November 1998).

39 GAN Business Anti-corruption Portal, 'US Foreign Corrupt Practices Act (FCPA)', Anti-corruption Legislation, online: https://www.business-anti-corruption.com/anti-corruption-legislation/fcpa-foreign-corrupt-practices-act/.

categories include all US individuals – including officers, directors and employees – as well as businesses, certain defined foreign public officials and certain issuers of financial securities.[40] The FCPA further mandates record-keeping and internal control standards for publicly held corporations registered under the Securities Exchange Act of 1934.

A particularity of the FCPA is that both criminal and civil penalties are available; and they can be significant, reaching up to C$2 million per count for corporations under criminal proceedings, whereas individuals face both a maximum fine of C$1 million per count and imprisonment for up to five years. As for civil proceedings, sentences may range from C$50,000 to C$500,000 for corporations, and from C$5,000 to C$100,000 for individuals. Another particularity is that the FCPA also provides for additional penalties in case of wilful violations such as 'wilfully [sic] and knowingly making a false or misleading statement'.[41] These penalties can amount to C$25 million per count for corporations, and C$5 million per count or 20 years of prison, or both, for individuals.[42]

Another major difference with the CFPOA is that, unlike under Canadian law, facilitation payments are permitted under the FCPA. The FCPA states that the anti-bribery provisions 'shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official'.[43] Similarly to the CFPOA, however, lawful payments under the laws of the foreign country and reasonable bona fide expenditures incurred by, or on behalf of, the foreign official or party, which are related to the promotion, demonstration or explanation or product or services, or the execution of a contract with a foreign government, are also exceptions.[44]

Comparing the CFPOA to the Bribery Act

In an effort to replace legislation that was more than 100 years old, the United Kingdom, after having ratified the OECD Convention, took more than a decade longer than Canada to enact anti-corruption legislation. In addressing the general bribery offences, the Bribery Act 2010 (UKBA)[45] came into force on 1 July 2011 and 'prohibits both the giving and the receiving of financial or other advantage to induce a person to improperly perform a function or activity or to reward a person for improperly performing a function or activity'.[46] The UKBA also targets the bribery of FPOs by prohibiting a person from giving a financial or other advantage to an FPO in order to obtain or retain a business or an advantage in the conduct of such business. Similarly to both the CFPOA and the FCPA (as well as the OECD Convention), section 6(3)(b) of the UKBA provides a defence for payments permitted under the written law applicable in the foreign country.

Similarly to the CFPOA, enforcement under the UKBA is carried out by way of criminal prosecution, and fines – of an unlimited amount – are left to the discretion of the court. As for imprisonment sentences for individuals, the maximum period is 10 years, slightly lower than the CFPOA. Another distinction from both the FCPA and the CFPOA

40 Keith, supra note 1 at 4.
41 ibid at 6.
42 ibid.
43 FCPA, supra note 7, s 78dd-1(b).
44 Keith, supra note 1 at 5–6.
45 Bribery Act 2010, c. 23, online: http://www.legislation.gov.uk/ukpga/2010/23/contents.
46 Keith, supra note 1 at 13; see also Bribery Act 2010, ch. 23.

is that a commercial and business organisation may be found guilty of failing to prevent the prohibited types of bribery. As Keith explains, '[i]n this situation, the organization may raise a defence of due diligence by proving that, at the time of the alleged offence, it "had in place adequate procedures designed to prevent persons associated with [the organisation] from undertaking such conduct"'.[47]

Canadian case law

The first major prosecution of a Canadian corporation under Canada's CFPOA happened with regard to Niko Resources Ltd (Niko), a publicly traded oil and natural gas exploration and production company based in Calgary, Alberta. In this case, Niko entered a guilty plea before the Court of Queen's Bench (Calgary) on 24 June 2011 for a count of bribery resulting in a fine of C$8.26 million and an added 15 per cent victim surcharge.[48] According to the plea bargain agreement between Niko and the Crown, the subsidiary Niko Bangladesh entered into a joint venture agreement (JVA) in 2003 with BAPEX[49] to develop two gas fields in Bangladesh. On 7 January 2005, while drilling, an explosion occurred at the Chattak-2 gas well[50] that left a large crater in the ground. Although nobody got injured by the incident, the gas fire burned for weeks, forcing the evacuation of many. The resulting diplomatic crisis and negative press denouncing the fairness of the entire JVA award process presumably led to the bribery described as follows in the plea agreement:

> *In May 2005, Niko Bangladesh provided the use of a [Toyota Land Cruiser] costing [. . .] $190,984.00 to AKM Mosharraf Hossain, the Bangladeshi State Minister for Energy and Mineral Resources, in order to influence the Minister in dealings with Niko Bangladesh within the context of ongoing business dealings [. . .] Additionally, Niko Canada paid the travel and accommodation expenses for Minister [. . .] Hossain to travel from Bangladesh to Calgary to attend to GO EXPO oil and gas exposition, and onward to New York and Chicago, so that the Minister could visit his family who lived there, the cost being approximately $5,000.00.*[51]

The Crown justified in part the negotiated penalty with the defence as covering, among other things, the cost of the RCMP investigation, which, according to the prosecutor, cost in this single case almost C$870,000. The *Niko* case, as we will see, clearly set the tone for the following jurisprudence.

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47 ibid at 14; referring to the Bribery Act 2010, s 7(2).

48 In addition to the fine, Niko was placed under a probation order, which put the company under the court's supervision for three years to ensure that audits were completed, to examine the company's compliance with the CFPOA. This decision was a major turning point in CFPOA prosecutions, especially considering that in the only prior case – *R v Watts*, [2005] A.J. No. 568 (Alta. Q.B.) – HydroKleen Systems Inc received a monetary fine of only C$25,000. See also GAC Annual Report, supra note 14.

49 BAPEX is the common reference of Bangladesh Petroleum Exploration and Production Company Limited. BAPEX is an exploration and production company, which is indirectly wholly owned by the government of Bangladesh.

50 Located in the Tengratila gas field in north-eastern Bangladesh.

51 *R v Niko Ressources Ltd*, Reported Clerk Proceedings, Calgary, Alberta, 24 June 2011, the Honourable Mr Justice Brooker, (Alta. QB) at 3.

In fact, the next case is one where Griffiths Energy International Inc (Griffith), a privately held oil and gas company based in Calgary, was sentenced, on 25 January 2013, to pay a C$9 million fine with a 15 per cent victim surcharge, for a total financial penalty of C$10.35 million.[52] This case is of particular interest because it relates to the largest fine imposed under the CFPOA to date. More so, it is the first case where a corporation took steps to self-disclose its past corrupt practices.

In 2008, Griffith made initial enquiries about acquiring blocks in Chad, and established contact with the Chadian embassy. Then occurred, through the embassy, a formal introduction to Chad's then Minister of Petroleum and Energy.[53] What followed was a series of negotiation sessions between 2009 and 2011 that led to the payment of C$2 million to a corporate entity owned by the wife of the foreign ambassador, as well as the issuance of a number of founder shares of Griffith.[54] Shortly thereafter, a boating accident resulted in the death of Brant Griffith, high-profile Bay Street investment banker and founder of Griffith. It is therefore the succeeding management team that made the decision, once it discovered the corrupt transactions, to disclose its CFPOA breaches to authorities, and cooperate with their investigation, effectively resulting in a guilty plea that Griffith directly agreed to provide, and indirectly provided, improper benefits to a Chadian public official in order to further the business objectives of Griffith. Despite the joint submission by the prosecution and defence, the court explained that such joint submission is not binding on the court and added as follows:

> *The bribing of a foreign official by a Canadian company is a serious matter. As I said in R. v. Niko Resources Ltd., such bribes, besides being an embarrassment to all Canadians, prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries; and where, as here, the bribe is to an official of a developing nation, it undermines the bureaucratic or governmental infrastructure for which the bribed official works. Accordingly, the penalty imposed must be sufficient to show the Court's denunciation of such conduct as well as provide deterrence to other potential offenders.*[55]

This case clearly shows that although self-disclosure may help mitigate legal consequences, it still does not prevent heavy fines from being imposed.

The next case – *R v Karigar*[56] – is of particular importance as it represents the very first imprisonment sentence held against an individual under the CFPOA.[57] On 15 August 2013, Nazir Karigar was convicted to three years' imprisonment by the Ontario Superior Court of Justice for making a payment to Indian government officials to facilitate the execution of a multimillion-dollar contract for the supply of a security system by Cryptometrics, a

52 GAC Annual Report, supra note 46.

53 Keith, supra note 1 at 131; citing the agreed statement of facts, set out as exhibit two in the proceedings.

54 ibid at 132–137.

55 *R v Griffiths Energy International*, [2013] A.J. No. 412 at para 8–9.

56 *R v Karigar*, 2013 ONSC 5199, [2013] O.J. No. 3661.

57 GAC Annual Report, supra note 14.

Canadian high-tech firm.[58] More specifically, the accused was the paid agent of a group of Canadian companies that sought to secure a major contract from Air India for the provision of facial recognition software and related equipment.[59] The contract sought was never awarded to any entity represented by the accused.

As the Court puts it, several aspects of the evidence supported the conclusion that the accused was an 'active and knowledgeable part of a conspiracy to offer bribes to Air India officials to obtain the Air India contract'.[60] Among other things, the vice president attended meetings at which the necessity of bribes was raised; several emails contained details around the method of payment of such bribes; and a spreadsheet budgeting intended bribes were circulated within the company.[61] The collection of such facts led the Court to conclude that it was not necessary for the Crown to establish actual payment of the bribe and that it was sufficient to show that the accused believed that bribes were in fact paid, as was demonstrated in his comments to various authorities.[62]

On 6 July 2017, the Ontario Court of Appeal dismissed Karigar's appeal from his 2013 conviction. The Court held that 'the foreign bribery offence is clearly committed when a person agrees with a foreign public official to give that official a benefit, but, equally clearly, when there is an indirect agreement to give or offer an advantage.'[63]

As these cases have shown, the consequences of an infraction under the CFPOA can be fairly important, and further demonstrate the necessity for Canadian corporations to exercise thorough oversight of all persons involved in performing acts and duties for or on their behalf. The message is indeed clear: there is no room for complacency. It is therefore imperative for all businesses to be proactive in implementing preventative measures against acts of bribery and corruption. 'Best practices' further addresses this issue and offers a set of advice on best practices that will allow corporations to minimise the potential risks of being engaged directly or indirectly in such acts.

Best practices

As seen so far, since its initial enactment, the CFPOA was strengthened, and its reach extended by the passage of Bill S-14. It is thus an undeniable truth that the corporate risk landscape is changing when it comes to the issue of corrupt practices in international business dealings. In this regard, what can Canadian businesses do to foster corrupt-free business practices and ensure compliance with the CFPOA? In our opinion, this can and should be achieved through, notably, the use of preventative measures and training programmes.

Preventing violations and minimising liability requires an effective compliance programme. To create an effective compliance programme, it is vital to first identify the specific risks a company faces. Based on the level of identified risk, it will subsequently be

58 ibid.
59 *R v Karigar*, supra note 54 at para 3.
60 ibid at para 15.
61 ibid at para 30.
62 ibid at para 33.
63 GAC Annual Report, supra note 14; in reference to *R v Karigar*, 2017 ONCA 576, [2017] O.J. No. 3530 at para 43.

possible – and necessary – to design a programme that allocates resources and oversight to transactions and areas of the company's business. In the event that a violation to the CFPOA occurs, an effective compliance programme may make the difference between a conviction following the decision by enforcement authorities to prosecute or not. In terms of risk assessment, it is important to know that investigations and prosecutions frequently involve facts relating to the use of third-party intermediaries such as sale agents, distributors and finders, and various business combinations such as join ventures.[64]

When looking for compliance programmes, it is suggested that corporations take particular care in implementing the following elements:

- management support and resources;
- written standards and controls;
- monitoring, auditing and evaluation protocols;
- enforcement measures;
- continuous review; and
- whistle-blower procedures.

Furthermore, it is highly recommended that corporations adopt a written code of ethics reminding employees that it is essential that all of the corporation's activities be conducted with integrity and transparency. In order to be effective, such code should include clear guidance as to proper behaviours to have when dealing with customers, suppliers, other employees, shareholders and other third parties. It should also include the procedure to follow in order to report a case of non-compliance with the code. Finally, the promotion of best practices within a business and the prevention of corruption, traffic of influence and conflicts of interest is best ensured by the adoption of a written code of conduct. The code of conduct complements the compliance programme and the code of ethics in that it aims to inform employees of the risks associated with bribery and traffic of influence, as well as proscribed behaviour within the company. It is therefore a great tool to emphasise a zero-tolerance policy towards corrupt practices. It is also possible to adopt a code of ethical conduct regrouping all that has been mentioned above.

The main goal of ensuring a continuous training of directors, officers or any other employee of the corporation is to establish a constant reminder of the corporation's anti-corruption culture and ethical business practices. As such, training on the relevant legal frameworks and their implications is a good starting point to establish the importance of upholding the corporation's standard. Other separate trainings should target matters such as business ethics, risks related to corruption, issues for the corporation arising from bribery and corrupt practices, and the importance of compliance. Furthermore, we highly suggest that these trainings be offered online via a private server in order to facilitate their access.

64 As seen previously in *R v. Niko Ressources Ltd*, supra note 49.

Conclusion

It is clear that acts of corruption and bribery continue to occur on a regular basis in any jurisdiction given that, as shown in Transparency International's latest CPI, no country is immune to such acts (with some regions being prone to acts of bribery and corruption more than others). Going forward, however, as the landscape of corporate risk changes, public scrutiny intensifies and regulations tighten around the world, it has become an inevitable requirement for companies to thoroughly conduct risk assessments and implement a top-down culture against bribery and corruption.

In addressing the concerning issue of corruption, this chapter offered an overview of the Canadian legal framework with regards to corruption in business dealings involving an FPO, and established that the CFPOA, alongside the Criminal Code, directly codified the offences of corruption, bribery and false accounts (and also showed that the CFPOA is part of a greater network of anti-bribery laws, including the UKBA and the FCPA). Walking through the CFPOA's latest amendments, this piece sought to identify the nature and scope of its codified offences. This chapter also explored in detail some of the most important case law in Canada in order to draw lessons worth learning. From this analysis, it has become apparent that any benefit sought through corrupt practices is marginal compared to the consequences of getting caught. Finally, this chapter offered a selection of best practices with regard to international commercial dealings and corporate governance.

Ultimately, it is easy to conclude that corruption and bribery no longer have their place in international affairs, and that compliance can be achieved if the suggested mechanisms are diligently and consistently enforced. The question of whether the business community has the will to adapt no longer seems to be a question but rather a necessity.

Appendix 1

About the Authors

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Mr Mariage joined Fasken's global mining group in June 2012. Mr Mariage practises in securities, corporate and mining law. Mr Mariage mainly represents mining companies and accompanies them in the process that leads to the discovery, sale or mining of mineral deposits in Canada or abroad. He is listed in the *Canadian Lexpert Directory*, *Chambers Canada*, *Best Lawyers in Canada* and *Who's Who Legal* for his expertise in mining law. He received the designation of 'Lawyer of the Year' from *Best Lawyers in Canada* in 2017 (Natural Resources Law) and in 2018 (Mining Law). Mr Mariage served as the chair of the Quebec Mineral Exploration Association from 2014 to 2018. He also gives lectures for the TSX Venture Exchange on how to manage companies that are listed on a stock exchange.

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Mr Belrachid joined Fasken's Montreal office in May 2016 as a student at law. Mr Belrachid is currently completing his articling, after which he will be a member of both the Bar of Quebec and the Law Society of Ontario. Mr Belrachid holds a Bachelor of Civil Law from the University of Montreal's Faculty of Law, where he graduated on the Dean's Honours List for academic excellence. Mr Belrachid also received his Juris Doctor from Osgoode Hall Law School. Prior to joining Fasken, Mr Belrachid worked as a research assistant at the University of Montreal. There, he did significant work related to contract law for renowned scholar Didier Lluelles, and contributed to the Centre de recherche en droit public under the supervision of Professor Vincent Gautrais. Mr Belrachid was also

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Written from diverse jurisdictional viewpoints by leading industry practitioners, this Practice Guide – published by Getting the Deal Through – examines key themes topical to the international mining community.

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