Corruption of Foreign Public Officials Act: Overview

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This Practice Note discusses the provisions of the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 and leading cases. The Note also focuses on corporate liability, the scope of middle managers and corporate compliance. This Note develops the concept of a risk-management matrix, which has been applied on a global scale. The matrix will assist an organization in identifying the appropriate level of auditing and training that will be necessary in a given situation. The decision of the Ontario Superior Court in *R. v. Arapakota*, (2023) is also discussed.

The CFPOA: Mandatory Risk Assessment

The *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (CFPOA), has been in force since 1999. In June of 2011, the CFPOA streaked across the radar screens of compliance officers when Niko Resources Ltd. (Niko), a Canadian energy company, plead guilty and paid a fine of almost $10 million as a result of bribes paid to a Bangladeshi official. The bribes included a luxury SUV (Toyota Land Cruiser) and trips to New York and Calgary.

Niko and its subsidiaries were placed on probation, requiring that the companies develop compliance procedures based on a risk assessment. The following paragraph from the Probation Order demonstrates the extent to which a risk assessment is now a mandatory element of compliance in the anti-corruption arena:

> "The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including but not limited to, its geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licences and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration."

Risk assessment is central to the high-profile case of SNC-Lavalin where the probation order requires that SNC-Lavalin Construction Inc. (SLCI) shall cause SNC-Lavalin Group to adopt new or further enhance existing internal controls, policies, and procedures in order to ensure that it maintains:

> "compliance standards and procedures, including internal controls, ethics and compliance programs on the basis of **a risk assessment** addressing the individual circumstances of SNC-Lavalin Group. In particular foreign bribery risks facing SNC-Lavalin Group, including but not limited to, its geographical organization, interactions with various types and levels of government officials; industrial sectors of

> operation, involvement in joint venture agreements, importance of licenses and permits in SNC-Lavalin Group's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration" (emphasis added) (*R. v. SNC-Lavalin Construction inc. (Socodec inc.) (December 18, 2019), Doc. 500-73-004261-158 (C.Q.)*, sentencing judgment of Justice LeBlond (SNC)).

The SNC-Lavalin case was resolved in late 2019, when the company entered a guilty plea to a count of fraud committed against various Libyan authorities. The charges under the CFPOA were withdrawn.

SNC-Lavalin paid an amount of $280 million as a fine, which is one of the largest fines assessed against a corporation in Canada. Although the plea relates to fraud, the court recognized the elements of corruption that were involved. Justice LeBlond commented that determining "the appropriate fine level for organizations is not achieved through a purely arithmetical process under Canadian law, especially in relation to offences such as fraud and corruption where there is limited precedent" (*SNC*, at paragraph 9.6).

The SNC-Lavalin plea was preceded by the conviction of Sami Bebawi several days earlier. Bebawi, a former executive with SNC, was found guilty of the five fraud and corruption charges he faced. Following a jury trial, Bebawi was convicted on counts of fraud, bribing a foreign public official, laundering proceeds of crime, and possession of stolen goods. The charges were related to SNC's dealings with the Gadhafi regime in Libya. In Mr. Bebawi's trial, the court heard details about interactions with Mr. Gadhafi's son, Saadi, who was allegedly able to facilitate business dealings for SNC in Libya. Among the kickbacks to the younger Mr. Gadhafi was a U.S.-made luxury yacht bought for $25 million after the company landed a major contract.

In 2023, the Quebec Court of Appeal upheld Bebawi’s conviction (*Bebawi c. R., 2023 CarswellQue 1221 (C.A. Que.)* (*Bebawi CA*)). The Court of Appeal described the case of the prosecution (which was obviously accepted by the jury) as a fraudulent scheme set up in Libya with the payment of colossal bribes, in particular to Mr. Saadi Gaddafi, the son of the Libyan leader at the time, Muammar Gaddafi. In terms of popular parlance, the court observed that in sheer magnitude these bribes were more than $40 million given to the son of the Head of State, not to mention a yacht worth $25 million and a second worth more than EUR12 million. Without these astronomical commissions to a son of Gaddafi and other public officials, the contracts would not have been awarded to SNC or, at the very least, these payments made it easier to obtain them.

Bebawi argued that the trial judge erred in accepting the evidence obtained from an undercover operation targeting his lawyer and in dismissing his application for a directed verdict. The Court of Appeal held that the affidavit that led to the authorization to wiretap the lawyer contained facts that should not have been included. Even if those facts were disregarded, however, there was sufficient credible and reliable evidence to justify the wiretap. Taking all the circumstances into account, the evidence was not excluded.

Centerpiece of the CFPOA

The "centerpiece" of the CFPOA is the offence of bribing a foreign public official:

> "Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.
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> Every person who commits this offence is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years."

(CFPOA, S.C. 1998, c. 34, section 3(1) and (2).)

The CFPOA contains a number of definitions which are important to consider.

"Foreign public official" means:

- A person who holds a legislative, administrative, or judicial position of a foreign state.
- A person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function.
- An official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

Note that the definition does not include members of political parties that are in opposition, but caution should be exercised in this scenario.

"Foreign state" means a country other than Canada, and includes:

- Any political subdivision of that country.
- The government, and any department or branch, of that country or of a political subdivision of that country.
- Any agency of that country or of a political subdivision of that country.

The First Litigated Case: Karigar

The case of *R. v. Karigar, 2013 CarswellOnt 11325 (Ont. S.C.J.)* (*Karigar*), was decided on August 15, 2013. This case is important on a number of levels:

- **Whistleblowing backfired, relevant only to sentence.** A very unusual aspect of the case is that Mr. Karigar described the scheme in an email sent under a pseudonym "Buddy" to the Fraud Section (FCPA) of the US Department of Justice stating he had information about US citizens paying bribes to foreign officers and inquired about reporting the matter. Mr. Karigar admitted that he is "Buddy". The statement described the scheme as follows:

  There was a tender put out by Air India (Government of India enterprise) for a biometric security system, Cryptometrics bid on the system.

  1. Cryptometrics Paid USD 200,000 to make sure that only two companies were technically qualified.

  2. They paid $250,000 for the minister to 'bless' the system. There are documents executed to return the funds if the contract is not awarded. There are recordings asking for the money back.

  3. The People involved are Mr. Robert Barra, US citizen, CEO of Cryptometrics and Dario Berini, COO of Cryptometrics, also US Citizen.

  4. I am a Canadian Citizen on contract with the Canadian subsidiary of Cryptometrics.

  5. What about my immunity?

  Ultimately Karigar did not receive immunity. To the contrary, he was charged and convicted in Canada under the CFPOA. The court decision does not discuss why Karigar's immunity request was denied.

- **Conspiracy.** The decision in *Karigar* demonstrates that the word "agrees" in CFPOA, S.C. 1998, c. 34, section 3, imports the concept of conspiracy. Moreover, where there is a conspiracy, the prosecution need not prove the identity of the recipient of a proposed bribe as this could put foreign nationals at risk. In *Karigar*, the purpose of the conspiracy to bribe was to win a tender for a multi-million-dollar contract to sell facial recognition software to Air India, a state enterprise.

- **No actual bribe, but belief in a bribe.** It is not necessary for the prosecution to prove that a bribe was actually paid to a foreign official to establish a violation of CFPOA, section 3. It is sufficient for the party to believe that a bribe was being paid to such an official. The court found that *Karigar* believed that bribes needed to be paid as a cost of doing business in India and he agreed with others to pay such bribes. He believed bribes were in fact paid and he said as much to the Deputy Trade Commissioner in Mumbai and to US authorities and to the RCMP.

The decision in *Karigar* was affirmed on appeal, *R. v. Karigar, 2017 CarswellOnt 10393 (Ont. C.A.)*. Justice Feldman affirmed that the offence is clearly committed when a person agrees with a foreign public official to give that official a benefit. But equally clearly, the offence is not limited to that scenario. It includes both a **direct and an indirect** agreement to give or to offer an advantage. There is no limiting language on who must "agree", prescribing the parties to the agreement. Justice Feldman rejected the defence position that the agreement must be with the foreign official. The offence only requires that the loan, reward, advantage, or benefit that is the subject of the agreement must be a loan, reward, advantage, or benefit to (or for the benefit of) a public official.

The Sequel to Karigar

The sequel to *Karigar* is the conviction of Robert Barra and Shailesh Govindia in *R. v. Barra and Govindia, 2019 CarswellOnt 4220 (Ont. S.C.J.)* (*Barra and Govindia*). As set out above, Robert Barra was referred to by name in the email sent by Karigar to the FBI. On January 11, 2019, Mr. Justice Robert J. Smith of the Ontario Superior Court of Justice found Mr. Robert Barra and Mr. Shailesh Govindia guilty of contravening CFPOA, S.C. 1998, c. 34, section 3(1). It was alleged that Mr. Barra and Mr. Govindia had agreed to give a benefit to foreign public officials to ensure Cryptometrics Canada would obtain a contract with Air India. Both Barra and Govindia were sentenced to 36 months' imprisonment.

An interesting twist is the acquittal of Barra on separate charges of bribing two Air India employees. Justice Smith concluded that the two Air India employees were indeed "foreign public officials" within the meaning of the CFPOA, consistent with the finding of Justice Hackland in *Karigar*. Central to this conclusion was the fact that Air India was "directly owned by the Indian Government". However, Smith J. also found that the Crown was required to prove that Barra knew the official character of the two Air India employees. Thus, while there was a conviction on the bribery of the Indian minister of civil aviation, there was also an acquittal on the bribery of the two Air India employees on the basis of Barra's lack of knowledge of their official status. The uncertainty in this case stems from the fine definitions about the status of crown corporations in foreign jurisdictions, compared to the definition of crown corporations in Canada.

A Further Plot Twist

In a new plot twist, in August of 2021 the Court of Appeal declared a mistrial on appeal and ordered a new trial in *R. v. Barra, 2021 CarswellOnt 11716 (Ont. C.A.)* (*Barra*). Recall that Robert Barra was referred to by name in the email sent by Karigar to the FBI referenced above. The decision contains both procedural aspects and substantial components that will be relevant to future interpretation of the CFPOA.

The Mistrial

In *Barra and Govindia*, Crown counsel proposed to adduce reply evidence from their principal witness, Mr. Berini, about the authenticity of a document allegedly bearing his signature, introduced by counsel for Mr. Govindia during his cross-examination of Mr. Berini.

Counsel for the appellants sought an order declaring a mistrial on the basis that the Crown had failed in its disclosure obligations.

The key to understanding the mistrial is the advice provided by the Crown to defence counsel that that there was no deal, written or unwritten, in place for Mr. Berini. Yet, in the final set of disclosure Crown counsel disclosed an email sent by Mr. Berini's counsel to the Crown confirming the terms of the witness preparation meeting. That email confirmed the agreement that anything communicated by Mr. Berini during the meeting could not be tendered by the Crown in any future proceedings against him. Thus, it could not be said, as the Crown had previously advised, that there was no deal in place for Mr. Berini. The Court of Appeal eloquently describes this arrangement whereby Mr. Berini was not a mere witness, but rather "a team player":

> "In determining the nature and extent of their cross-examination of the critical Crown witness Mr. Berini, the appellants were entitled to know, contrary to what they had been advised by senior Crown counsel, that there was, in fact, an agreement with Mr. Berini about the future use of what he said during preparation. While section 13 of the Charter would protect Mr. Berini's compelled testimony from being used against him at a subsequent trial, no similar protection would be offered for the content of the Crown interviews, to the extent they went beyond that to which was testified in court. The appellants were entitled to know that Mr. Berini's involvement in the case with the Crown extended well beyond what he said in the witness box. No mere witness, he. A team player" (*Barra*, at paragraph 163).

In the result, the Court of Appeal was persuaded of the reasonable possibility that the delayed disclosure affected the overall fairness of the trial process.

No Retrial, Yet Ongoing Jurisprudential Relevance

Despite the Court of Appeal's order for a new trial, no further proceedings appear to have taken place. A new trial has not been scheduled, and the case appears to have been abandoned. This outcome leaves the broader implications of the mistrial decision unresolved, though the appellate court's reasoning continues to inform disclosure standards and prosecutorial conduct under the CFPOA.

Barra has been cited in numerous subsequent cases. It was expressly followed in *Castillo v. Xela Enterprises Ltd., 2024 CarswellOnt 2422 (Ont. C.A.) (Castillo)* and *R. v. Samoodi, 2022 CarswellOnt 11280 (Ont. S.C.J.)(Samoodi)* in relation to the principle that territorial jurisdiction is determined by the connection to Canada rather than the physical location of the conduct, as discussed below. Further, the decision in *Barra* has been referred to or considered in 28 additional cases. The decision has not received any negative treatment.

The Actus Reus Requirements for a CFPOA Offence

A significant decision was released on March 7, 2023, by the Ontario Superior Court finding Mr. Damodar Arapakota not guilty of one count of foreign corruption (CFPOA, S.C. 1998, c. 34, section 3(1)(a)) (*R. v. Arapakota, 2023 CarswellOnt 3079 (Ont. S.C.J.)*) **(***Arapakota***)**. This decision interprets both the *actus reus* and the *mens rea* requirements of the centerpiece section 3 of the CFPOA. The decision has not been cited in any subsequent cases.

Mr. Arapakota was alleged to have offered benefits valued at approximately CA$40,000 (family travel to Florida, shopping, and other expenses) to an official with the Government of Botswana. The benefit was allegedly conferred as consideration for letters from the official meant to provide comfort that the Government of Botswana would retain IMEX, a company founded and controlled by Mr. Arapakota.

Justice Maxwell of the Ontario Superior Court carefully considered the elements of the offence under CFPOA, section 3(1)(a). Drawing on Article 1(1) of *Transparency International Canada's Submission to the OECD Working Group on Bribery Phase 4 Monitoring of the Implementation of the OECD Anti-Bribery Convention in Canada* (OECD Convention) and the elements of *Criminal Code*, section 121 (bribery of Canadian government officials), the court confirmed that there are four material elements (actus reus) of the offence:

- The accused directly or indirectly gives, offers, or agrees to give or offer a loan, reward advantage or benefit of any kind.
- The accused makes the offer of this benefit to a public foreign official or to someone else for the benefit of the public foreign official.
- The accused makes the offer of the benefit in order to obtain or retain an advantage in the course of business.
- The accused makes the offer of a benefit as consideration for an act or omission by the official in connection with the performance of their duties or functions.

  (*Arapakota***,** at paragraphs 50-56).

Beyond the elements of the offence, Justice Maxwell also considered the meaning of two expressions in CFPOA, section 3(1)(a):

- In considering "benefits, reward or advantage", the word "advantage" in section 3(1)(a) should be understood to refer to a material economic advantage, one that advances the recipient's position in a material way. This excludes trivial advantages. Justice Maxwell cites the Supreme Court of Canada decision in *R. v. Hinchey, 1996 CarswellNfld 253*

(S.C.C.)), recognizing that without any qualification, an act as simple as giving or buying a cup of coffee for an official could be interpreted as a "benefit". Accordingly, the Act must be interpreted to exclude trivial advantages.

- In considering “as consideration for” under section 3(1)(a), for a benefit to be considered as consideration for what is done by a foreign public official, there must be a *quid pro quo* (Arapakota, at paragraphs 76, 77, 83 and 84). This contrasts with the different language used in CFPOA, section 3(1)(b), which targets attempts to induce a foreign public official to use their position to influence acts or decisions of the foreign state, regardless of whether the official actually does anything (*Arapakota*, at paragraphs 78-81, 84 and 85).

Justice Maxwell describes the difference between the two sections as follows:

> "Similarly, s. 3(1)(a) of the *CFPOA*, properly interpreted, sets a *quid pro quo* requirement for liability by including the words "as consideration for".
>
> In contrast, s. 3(1)(b) of the *CFPOA* arguably casts the net wider than subsection (a) by requiring only that the accused "induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions" (emphasis added).
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> On a plain reading of this section, it is sufficient, under s. 3(1)(b) of the *CFPOA* that the accused induces, or attempts to induce, the foreign public official to use their position to influence the acts of the foreign state, whether the foreign public official has done anything or not. In this sense, s. 3(1)(b) of the *CFPOA* captures a different, broader scope of conduct."
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> (*Arapakota*, at paragraphs 83-85).

Conceptually, section 3(1)(a) is analogous to a contract where there is formal consideration for an act. Section 3(1)(b) by contrast is more analogous to the notion of conspiracy.

On the facts of *Arapakota* with respect to the *actus reus*, while the Crown did establish that Mr. Arapakota had offered the official a benefit and that the official did provide letters to Mr. Arapakota, Justice Maxwell was not convinced of the nexus between the two, nor whether the letter actually offered Mr. Arapakota a business advantage, casting doubt on whether there had been an actual *quid pro quo*.

The Mens Rea Requirements for a CFPOA Offence

The *mens rea* requirements for a CFPOA offence are a critical issue, particularly given the paucity of cases decided under this section.

With respect to the *mens rea* of the offence set out in CFPOA, S.C. 1998, c. 34, section 3, the Department of Justice Guide to the CFPOA states:

> "No particular mental element (*mens rea*) is expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability. The courts will be expected to read in the *mens rea* of intention and knowledge" (CFPOA Guide, at section 1).

In *Barra and Govindia*, the trial judge held that CFPOA, section 3(1), like bribery, is a specific intent offence. The trial judge was not satisfied beyond a reasonable doubt that Mr. Barra nor Mr. Berini knew that the Air India officials who received bribes were foreign public officials as defined in the CFPOA. He found that Mr. Bell and Mr. Berini, but not Mr. Barra, reasonably but incorrectly believed that Air India was a Crown corporation; in fact, however, it was owned directly by the Government of India, making the Air India employees foreign public officials as defined in the CFPOA.

On appeal, the Crown argued that if Mr. Barra knew the bribes were going to Air India employees, the scope of their responsibilities, and their ability to influence the awarding of a contract by Air India, then he had the necessary *mens rea*. The Crown argued that question of how those facts fit within the definition of a foreign public official in CFPOA, S.C. 1998, c. 34, section 2, is a question of law. An erroneous view of the law is not a defence (*Criminal Code*, section 19).

The Court of Appeal held that the trial judge did not err in his conclusion on *mens rea*. In order to have the necessary *mens rea* for an offence under CFPOA, S.C. 1998, c. 34, section 3(1), an accused must know that the person bribed or offered a bribe has the characteristics described in CFPOA, S.C. 1998, c. 34, section 2 “foreign public official” (a)-(c). The court then set out the test that should apply where the person bribed or offered a bribe is employed by a corporation:

> "In a case where the person bribed or offered a bribe is employed by a corporation, to have the necessary *mens rea*, the accused must know not only that the person was employed by the corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function. The accused need not know that this is how the CFPOA defines a foreign public official, nor that bribing the person is illegal" (*Barra*, at paragraph 80).

As applied to the facts in *Barra and Govindia*, the Court of Appeal observed that a corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country:

> "The trial judge did not find that Mr. Barra knew that Air India was established to perform a duty or function on behalf of the state of India. A corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country. Although the trial judge referred to the belief of Mr. Berini and Mr. Bell that Air India was a Crown corporation, he also noted that their belief was inaccurate. Importantly, however, he did not draw the inference that Mr. Barra shared that belief and, in our view, he was not obliged to. In light of that, it is unnecessary to consider whether that belief, if

> shared by Mr. Barra, would have been tantamount to knowledge that Air India was formed to fulfill a duty or function of the state of India" (*Barra.*, at paragraph 81).

It is true that a corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country. A classic example of this is Air Canada, which of course is not a government entity.

As a practical matter, it may be a high evidentiary bar for the prosecution to prove that the accused knew not only that the person bribed was employed by a corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function. Short of documentation such as e-mails that show knowledge, the prosecution may have to rely on testimony from associates that a given person was aware of the governmental status of an entity.

The high bar to prove such knowledge leads to a discussion of a sometimes forgotten aspect of *mens rea*, willful blindness, discussed in the next section.

The level of *mens rea* was revisited in the *Arapakota* decision. With regard to the mental (*mens rea*) element of the offence, there was a question raised by the Crown about the level of fault required under CFPOA, S.C. 1998, c. 34, section 3(1)(a). The Crown argued that the basic level of subjective fault, recklessness, was sufficient. Justice Maxwell disagreed, finding that even though it was not necessary to prove that an accused intended to do something wrong in providing a benefit to a foreign public official (referred to as a “corrupt purpose”), the Crown was required to prove more than the accused deliberately engaging the material acts that make up the *actus reus*. Drawing by analogy from the intention required to establish domestic bribery as well as the holding in the *Barra and Govindia* case, Justice Maxwell concluded that every one of the four mental elements required proof that the accused acted with intention (a purpose) and with personal knowledge of the circumstances:

> "Reading these sources together, I am satisfied that s. 3(1)(a) of the CFPOA has a subjective fault element of intention or knowledge. That is, to be guilty of the offence, the Crown must prove that the acts performed by Mr. Arapakota were done with intention and while having a subjective knowledge of the relevant circumstances. The Crown must prove Mr. Arapakota:
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> (i) intentionally offered or conferred a benefit, reward, or advantage to Dr. Kereteletswe;
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> (ii) that he did so knowing that Dr. Kereteletswe was a public foreign official;
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> (iii) that he knowingly or intentionally bestowed the benefit on Dr. Kereteletswe as consideration for official acts done by Dr. Kereteletswe; and

> (iv) that he did so for the purpose of, or in order to obtain or retain an advantage in the course of his business (regardless of whether a business advantage was actually realized, or whether the business advantage would have been received without the consideration)."

(*Arapakota*, at paragraph 67).

Justice Maxwell's interpretation of the wording in CFPOA, section 3(1)(a), sets a very high bar for proof of foreign corruption, requiring that the Crown show (1) an accused intentionally offered a benefit, (2) to a person they know is a foreign public official, (3) with the intention that the benefit serve as consideration for things done by the public official, and (4) that the accused acted for the purpose of obtaining a business advantage.

In future cases, there may be a middle ground based on recklessness that could be read into CFPOA, section 3. This interpretation would be based on the direction of the Supreme Court of Canada in *R. v. H. (A.D.), 2013 CarswellSask 304 (S.C.C.)*, that fault in criminal law requires proof at least of recklessness, but there may be a sliding scale depending on the context of the legislation.

Level of Intent Required: Includes Willful Blindness

The concept of *mens rea* includes the doctrine of willful blindness, which has been reviewed by the Supreme Court of Canada in *R. v. Briscoe, 2010 CarswellAlta 589 (S.C.C.)*. Justice Charron for the court observed that:

> "The doctrine of willful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries" (*Briscoe*, at paragraph 21).

The concept of willful blindness has a U.S. parallel in the doctrine of conscious avoidance or the "head in the sand" approach. This concept has been developed in the anti-corruption area in the Bourke case involving the "Pirate of Prague": *U.S. v. Kozeny*, 667 F.3d 122 (2d Cir., 2011) (United States v. Bourke).

The existence of a robust compliance system will assist organizations in refuting any suggestion that they were willfully blind.

In *Barra and Govindia*, the trial judge concluded that, while Mr. Barra was aware that the $200,000 was in fact transferred for the purpose of bribing various Air India employees, he had a reasonable doubt as to whether Mr. Barra knew that the bribe was being made to "foreign public officials" within the meaning of CFPOA, S.C. 1998, c. 34, section 2. Given the size of this bribe, and the knowledge that a bribe was being paid at all, it is arguable that Mr. Barra should have made inquiries about the status of Air India. The question is whether this knowledge of the $200,000 bribe created a suspicion to the point where Mr. Barra saw the need for further inquiries, but deliberately chose not to make those inquiries.

It may be an issue in any retrial of Barra whether he was party to any general discussions about how government figures would get up to eight percent of the value of a contract as a bribe payment.

Exemption for Reasonable Promotional Expenses

Promotional expenses on behalf of government officials: when is this necessary? The CFPOA contains an exemption for reasonable promotional expenses. This concept may cause some initial confusion, as one does not normally think about payments to government officials as promotional in nature, unless the government is a prospective customer. However, in order to obtain government approvals, it is often necessary to explain the nature of the proposed project and this may require that foreign officials take action such as travel to the location of the proposed project or take time away from their office. The officials may require that travel be provided or that expenses are reimbursed.

Exact wording of promotional exemption. The exemption reads as follows:

> "No person is guilty of an offence under subsection (1) if the loan, reward, advantage or benefit:
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> (a) is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions; or
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> (b) was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to:
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> (i) the promotion, demonstration or explanation of the person’s products and services, or
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> (ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions."

(CFPOA, S.C. 1998, c. 34, section 3(3).)

Facilitation Payments

The CFPOA previously had an exception for facilitation payments, for example, payments made for acts of a routine nature such as the issuance of a permit or the processing of official documents.

Facilitation payments are outside government fee schedules. Facilitation payments are best described by first contrasting them to official government programs for expedited payments. For example, if applying for a passport, one can pay a fee to the government to expedite the processing of the passport. A facilitation payment, by way of contrast, is a payment made to individual government officials who indicate that approvals may be expedited by a payment to them individually, outside of an official framework (CFPOA, S.C. 1998, c. 34, section 3(4)).

Elimination of facilitation payments. The CFPOA was amended in June 2013. These amendments provided for the elimination of the exception for facilitation payments on a later date to be decided by Cabinet. The amendments are in force as of October 31, 2017, so facilitation payments are no longer permitted under the CFPOA.

Is After the Fact "Tipping" Different in Nature?

No Canadian Court has dealt with the issue of whether or not a payment made after business has been completed, analogous to a "tip" constitutes an illegal payment under the CFPOA. This issue has been dealt with by the United States Supreme Court in the decision of *Snyder v. United States*, 603 U.S.1144 S.Ct. 1947 (2024). The U.S. Supreme Court found that the main federal anti-corruption statute proscribing bribes to state and local officials does not criminalize gratuities, which the Court described as "payments made to an official after an official act as a token of appreciation." In 2013, while Snyder was mayor of Portage, Indiana, the city awarded two contracts worth over $1.1 million to purchase trash trucks from a local trucking company. The following year, 2014, Snyder received a check for $13,000 from the company. Justice Brett Kavanaugh, writing for the majority, expressed concerns that the government's proposed interpretation would criminalize, or at least raise doubts about, innocuous gifts (such as a steak dinner for a college professor) and "would radically upend gratuities rules." Justice Kavanagh poses the question as follows:

> Is a $100 Dunkin' Donuts gift card for a trash collector wrongful? What about a $200 Nike gift card for a county commissioner who voted to fund new school athletic facilities? Could students take their college professor out to Chipotle for an end-of-term celebration? And if so, would it somehow become criminal to take the professor for a steak dinner? Or to treat her to a Hoosiers game?

Justice Kavanagh defines the key test as being the timing of the agreement, not the timing of the payment:

> Consider a bribe where the agreement was made before the act but the payment was made after the act. An official might try to defend against the bribery charge by saying that the payment was received only after the official act and therefore could not have "influenced" the act. By including the term "rewarded," Congress made clear that the timing of the agreement is the key, not the timing of the payment, and thereby precluded such a potential defense.

Books and Records

A new criminal offence. As part of the June 2013 amendments, there is a new books and records offence: all transactions and expenditures must be adequately and accurately identified in the books and records of the company. While the offence does not explicitly outline a mental element, it is expected that the courts will read in the requirement of intention and knowledge,

which flows from the preamble wording "for the purpose of bribing". In contrast to the law in the United States, there is no parallel civil enforcement mechanism relating to proper books and records.

Books kept for the purpose of bribing or hiding a bribe. The new provision reads as follows:

> "(1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
>
> (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
>
> (b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
>
> (c) records non-existent expenditures in those books and records;
>
> (d) enters liabilities with incorrect identification of their object in those books and records;
>
> (d) knowingly uses false documents; or
>
> (e) intentionally destroys accounting books and records earlier than permitted by law.
>
> (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years."

(CFPOA, S.C. 1998, c. 34, section 4.)

Six categories of books and records offences. From a practical view, the books and records categories can be labelled as follows:

- **The "offsheet books" offence:** Maintaining accounts which do not appear in any of the required books and records (CFPOA, section 4(a)).
- **The "invisible transactions" offence:** Making transactions that are not reported or are inadequately recorded and identified. What constitutes "inadequate" will be a source of considerable litigation (CFPOA, section 4(b)).
- **The "fake expenditures" offence:** Recording non-existent expenditures in the books and records (CFPOA, section 4(c)).
- **The "incorrect liabilities" offence:** Entering liabilities with incorrect identification of their object in those books (CFPOA, section 4(d)).
- **The "false documents" offence:** Knowingly using false documents (CFPOA, section 4(e)).
- **The "destruction of documents" offence:** Intentionally destroying accounting books and records earlier than permitted by law (CFPOA, section 4(f)).

Transparency in books and records. Businesses should ensure that they have complete and continually updated books and records with respect to all third-party consultants in foreign jurisdictions. These books and records must be sufficiently transparent and have enough independence to withstand potential audits. Where possible, companies should demand audit rights from third-party agents. It would be wise to have a forensic accounting firm retained by counsel to review and test the books and records systems against the potential six categories of offences listed above and to remediate where necessary.

The Canadian government has not followed the U.S. route of also having a civil regime to enforce books and records requirements. Canadian companies that are cross listed in the United States must comply with U.S. books and records law. In the matter of Nordion (Canada) Inc. the U.S. Securities and Exchange Commission (SEC) imposed a civil money penalty in the amount of $375,000 on March 3, 2016. Nordion did not have adequate policies and procedures in place to detect corruption risks. Nordion mischaracterized fees paid to its Agent as legitimate business expenses when some or all of the fees may have been used to make corrupt payments to Russian government officials. In assessing the amount of the penalty, the SEC "considered remedial acts promptly undertaken by Nordion, Nordion’s self-reporting, and their cooperation afforded the Commission staff. Nordion self-reported the conduct to authorities in both the U.S. and Canada, conducted a thorough internal review, identified the illegal conduct, voluntarily produced witnesses from Canada for interviews in the U.S. and translated documents, and implemented substantial remedial measures to prevent future violations."

Nationality Jurisdiction and the Real and Substantial Connection

As part of the June 2013 amendments, Canadian authorities may now prosecute a Canadian company for actions taken entirely in a foreign country if such actions would otherwise constitute offences under the CFPOA.

> "Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence ... is deemed to have committed that act or omission in Canada if the person is:

> (a) a Canadian citizen;
>
> (b) a permanent resident ... ;
>
> (b) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province."

(CFPOA, S.C. 1998, c. 34, section 5(1).)

If the events at issue occurred prior to the June 2013 amendments, the common law "real and substantial connection" test applies. As the amendments are a deeming provision, it is likely that the real and substantial connection test continues to apply even where the acts are done by someone who is not a Canadian citizen but where there is a real and substantial connection to Canada.

The Court of Appeal dealt with the issue of territorial jurisdiction in *Karigar* as the offence was committed prior to the amendments that established territorial jurisdiction based on Canadian nationality. The Court enumerates the type of factors that satisfied the "real and substantial link": a Canadian company was the proposed contracting party, the unfair advantage and fruits of the contract obtained through bribery would benefit that company. A great deal of the contract work was to be done in Canada. In addition, nearly all of the documents and emails that evidenced the transaction were seized in Canada, and all the witnesses were from Canada. *Karigar* is cited in the interesting civil case of *Pass Herald Ltd. v. Google LLC, 2024 CarswellNat 4134 (F.C.)*, where the Court found that it had territorial jurisdiction under certain circumstances.

In *Barra,* the Court of Appeal confirmed that the alleged conspiracy had a substantial link – a real and substantial connection – to Canada. It was, after all, Cryptometrics Canada, a Canadian company, attempting to obtain a contract to supply its biometrics recognition system to Air India, through the unlawful means of paying bribes.

In *Castillo*, the Court of Appeal followed their reasoning in *Barra*, emphasizing that it is the connection to Canada – rather than the physical location of the impugned conduct – that determines jurisdiction. The Court also highlighted that the benefit of the conduct in question accrued in Ontario, mirroring *Barra*'s holding that the Canadian interest in enforcing domestic court orders or laws can ground territorial jurisdiction even when acts occur abroad. This approach was similarly applied in *Samoodi*, where the Superior Court relied on *Barra* to find that the use of Ontario corporations and bank accounts, as well as the accrual of fraudulent proceeds in Canada, established a sufficient link to support jurisdiction.

The Role of Conspiracy

In *Barra and Govindia* the trial was conducted on the basis that the offence alleged was a conspiracy and that proof of guilt could be made through application of the co-conspirator's exception to the hearsay rule. The Court of Appeal observed that, as a matter of criminal pleading, the count as framed did not allege conspiracy in the traditional sense, nor does CFPOA, S.C. 1998, c. 34, section 3(1), the offence-creating provision. The important point made in the following passage is that none could deny the availability of the co-conspirators' (common unlawful design) exception to the hearsay rule:

> "It may be open to question whether, as a matter of criminal pleading, the count with which we are concerned alleges the inchoate or preliminary crime of conspiracy, as opposed to a count charging joint commission of a substantive offence whose external circumstances may include an agreement. However, as a means of proof, none could gainsay the availability of the co-conspirators' (common unlawful design) exception to the hearsay rule: *R. v. Koufis, [1941] S.C.R. 481*; *R. v. Cloutier, [1940] S.C.R. 131*" (*Barra*, at paragraph 174).

In this case, there was a common agreement that continued throughout – to obtain the Air India contract for Cryptometrics Canada. There was a common means to achieve that goal. "In a word, bribery.**"** Given the common agreement, the court carves out some granular details that the Crown need not prove:

> "It was not necessary for the Crown to prove that the parties to the agreement were in direct communication with one another, that each was aware of the identity of the other alleged co-conspirators, nor that each was aware of all of the details. Provided each, as in this case Mr. Govindia, was aware of the general nature of the common design and intended to adhere to it, liability is established: Longworth, at pp. 565-66" (*Barra*, at paragraph 181).

Corporate Liability Under the CFPOA

As the CFPOA is federal legislation that creates indictable offences, the *Criminal Code* party provisions apply, which incorporate the party provisions concerning corporate liability:

> "Senior officer" means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer" (*Criminal Code*, section 2).

Tone from the middle. On August 9, 2013, Justice Tôth of the Quebec Superior Court delivered a decision in the trial of *R. c. Pétroles Global inc., 2013 CarswellQue 9172 (C.S. Que.)* (Global Fuels). This case was the first litigated case in Canada to test the parameters of the *Criminal Code*'s corporate criminal liability provisions. What led to the conviction of Global Fuels of price fixing is the fact that a regional manager of Global Fuels knowingly allowed territory managers to participate in collusion. There was no evidence that the head office of Global Fuels was aware of the scheme, nor was the prosecution required to prove this. The actions of middle managers were sufficient to make Global Fuels criminally liable. From a corporate compliance view, tone from the top has been converted into tone from the middle.

The court ruled that a new regime had been created:

> "It creates a new regime of criminal liability that applies not only to corporations, but unions, municipalities, partnerships and other associations of persons. It replaces the traditional legal concept of corporate liability based on the fault of the corporation's "directing mind(s)", the board of directors and those with the power to set corporate policy, with liability tied to the fault of all of the corporation's "senior officers". That definition includes all those employees, agents or contractors who play "an important role in the establishment of an organization's policies" or who have responsibility "for managing an important aspect of the organization's activities". It will no longer be necessary for prosecutors to prove fault in the boardrooms or at the highest levels of a corporation: the fault even of middle managers may suffice."

> (Justice Tôth in *Global Fuels* at paragraph 40, citing Todd L. Archibald, Kenneth E. Jull and Kent W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Aurora, Ontario: Canada Law Book, 2004), c.-5, p. 5:40:30).

Middle managers responsible for managing. The use of the word "or" creates a disjunctive test that collapses policy with operational duties. "Senior officer" means a representative who plays an important role in the establishment of the organization's policies or is responsible for managing an important aspect of the organization's activities.

Important aspect of the organization's activities. The reference in the legislation to an "important role" in the establishment of the organization's policies or the managing of an "important aspect" of the organization's activities creates a grey area for interpretation. The Canadian government recognizes the grey area created by the concept of "important role":

> "While the courts would still have to decide in each case whether a particular person is a senior manager, I believe the proposal clearly indicates our intention that the guilty mind of a middle manager should be considered the guilty mind of the corporation itself. For example, the manager of a sector of a business such as sales, security or marketing, and the manager of a unit of the enterprise like a region, a store or a plant, could be considered senior officers by the courts" (Justice Tôth in *Global Fuels*, at paragraph 35).

The test to determine whether a person is a "senior officer" requires a functional analysis that goes beyond the title of the employee.

The concept of senior officer" was addressed in the high-profile case of SLCI. The Company entered a guilty plea to a count of fraud committed against various Libyan authorities. A joint statement of facts was accepted by the court. The following paragraph referred to the senior officers:

> "Two individuals meet the definition of a "senior officer" of SLCI under section 2 of the *Criminal Code*. They also meet the definition of "directing minds" of SLCI as both occupied the position of President and Chief Executive Officer of SLCI. These senior officers committed offences, and SLCI, through the acts and omissions of these senior officers, is therefore responsible for such acts and omissions as a result of the application of the theory of identification at common law and section 22.2 of the *Criminal Code*.

> The two officers were Riadh Ben Laroussi Ben Aissa (Ben Aissa), a "senior officer" (as defined under section 2 of the *Criminal Code*) of SLCI at the time and also a directing mind, and Sami Bebawi who was the President of SLCI from 1999 to 2006 and the direct supervisor of Ben Aissa" (*SNC*, at paragraph 6.2).

For offences involving corruption, the test for corporate criminal liability is set out in of the *Criminal Code*, section 22.2, as follows:

> **"22.2** In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers
>
> (a) acting within the scope of their authority, is a party to the offence;
>
> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
>
> (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence."

Scope of authority. Had the case of SNC-Lavalin gone to trial with respect to allegations of breaching the CFPOA, the issue of scope of authority would have been likely litigated. The case of SNC-Lavalin was resolved by way of a settlement by way of a plea to fraud. The "scope of authority" hurdle was passed by way of a joint statement of facts:

> "BEN AISSA and BEBAWI were "senior officers" and directing minds of SLCI, as defined by the jurisprudence and under section 2 of the *Criminal Code*. Pursuant to the theory of identification and section 22.2 of the *Criminal Code*, BEN AISSA and BEBAWI were acting **within the scope of their respective authorities** and were parties to an offence, had the mental state required to be a party to the offence and acted within the scope of their respective authorities to direct the work of other representatives in relation to the specified offence. They acted with the intent, at least in part, to benefit SLCI" (emphasis added) (*SNC*, at paragraph 6.35)

Compliance systems at two levels:

- **Senior officer level.** At the senior officer level, a robust compliance program will hopefully result in compliance with the law. At this level, however, there is no compliance defence. If there is a failure and senior officers commit the offence of bribery, the corporation is liable.
- **Areas under senior officer's supervision.** At the levels under the senior officer's supervision, a compliance system may support a defence based on the taking of reasonable measures. At this level, there is a compliance defence.

What organizations have to show is that **all** reasonable measures were taken to ensure compliance with rules and regulations applicable to a particular case. If a senior officer knows that a representative of the organization is or is about to be a party to the offence, they must **take all reasonable measures** to stop them from being a party to the offence.

In the context of foreign corruption, much attention has been paid recently to the UK legislation, which creates a strict liability offence for commercial organizations for failing to prevent bribery where an associate person engages in bribery with the intention of obtaining or retaining business for the organization or to obtain and retain an advantage in the conduct of business for the organization. Although the UK legislation is innovative, the Canadian legislation is not far behind, since the failure of senior officers to take all reasonable measures to stop employees or agents from paying bribes will lead to criminal liability in Canada. The difference, of course, is that, in Canada, the prosecution must prove the absence of reasonable steps beyond reasonable doubt.

Agents and Contractors

Two types of potential liability. Companies in Canada may be liable for the acts of agents and contractors in two different ways:

- A company may be aware that an agent is about to pay a bribe and fail to take all reasonable measures to stop them.
- If an agent or contractor is delegated management of an important aspect of an organization's activities, the agent may become part of the class of senior officers who bind the corporation in criminal law, even where the executives of the corporation are unaware that the agent is offside.

Review duties placed on agents and contractors. The potential impact of a combination of the CFPOA and the *Criminal Code* party provisions may be a surprise to many executives. Most Canadian companies do not view their foreign agents and contractors in places such as Russia, China, and Brazil as potential senior officers who can bind the company in criminal law. Yet contracts are often drawn up with foreign agents with a view to maximizing the duties and obligations that such agents have. Careful review of "duty heavy" contracts may reveal that the impact is to delegate responsibility to the foreign agent to manage an important part of the organization's business in that foreign jurisdiction with the potential effect that the foreign agent becomes a senior officer.

Maintain a full roster of all third-party agents. It is imperative that businesses survey and keep a list of everyone they have acting as third-party agents in a foreign jurisdiction, no matter how small the transactions may be. Companies should also develop comprehensive training programs for third-party agents in foreign jurisdictions, as well as procedures for ensuring the oversight of these agents.

Sentencing

Individual liability. Karigar was sentenced on May 23, 2014, to a penitentiary term of three years for conspiring to bribe several Indian government officials (see *R. v. Karigar, 2014 CarswellOnt 6981 (Ont. S.C.J.)*). Superior Court Justice Hackland ruled that Karigar "had a leading role in a conspiracy to bribe Air India officials in what was undoubtedly a sophisticated scheme to win a tender for a Canadian based company" (*Karigar 2014*, at paragraph 36). The court issued the following warning: "Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary" (*Karigar 2014*, at paragraph 36).

The SNC-Lavalin plea referred to above was preceded by the conviction of Sami Bebawi, a former executive with SNC, of the five fraud and corruption charges he faced. The charges were related to SNC's dealings with the Gadhafi regime in Libya. In Mr. Bebawi's trial, the court heard details about interactions with Mr. Gadhafi's son, Saadi, who was allegedly able to facilitate business dealings for SNC-Lavalin in Libya. Among the kickbacks to the younger Mr. Gadhafi was a U.S.-made luxury yacht bought for $25 million after the company landed a major contract, the court heard.

Citing "institutional corporate greed" existing within SNC-Lavalin at the time, Justice Cournoyer sentenced Bebawi to an 8.5-year prison term. Justice Cournoyer ruled that "Mr. Bebawi took part in the distribution of many tens of millions of dollars to members or associates of what one expert described as a dictatorial kleptocracy. He also personally received almost $30 million" (*R. c. Bebawi, 2020 CarswellQue 15938 (C.S. Que.)*, at paragraph 1). In terms of proportionality, it should be noted that Mr. Bebawi was 73 years old at the time of sentencing. A sentence of over eight years in prison is significant (*Bebawi C.S.*).

In 2023, the Quebec Court of Appeal upheld Bebawi's conviction (*Bebawi CA*). The Court of Appeal described the case of the prosecution (which was obviously accepted by the jury) as a fraudulent scheme set up in Libya with the payment of colossal bribes, in particular, to Mr. Saadi Gaddafi, the son of the Libyan leader at the time Muammar Gaddafi. In terms of popular parlance, the court observed that in sheer magnitude these bribes were more than $40 million given to the son of the Head of State, not to mention a yacht worth $25 million and a second worth more than EUR12 million.. Without these astronomical commissions to a son of Gaddafi and other public officials, the contracts would not have been awarded to SNC or, at the very least, these payments made it easier to obtain them.

With respect to the sentence, the court upheld the jail term but varied the period for repayment of the fine in lieu of forfeiture, which was extended to two years from the date of the appeal judgment.

Corporate liability. Previous cases, such as *R. v. Griffiths Energy International, [2013] A.J. No. 412 (Alta. Q.B.)* (GEI) and Niko involved corporate accused and were resolved by way of guilty pleas.

In *GEI*, the company was a private, Calgary-based oil and gas company, pleading guilty on a single count of bribery under the CFPOA. The charge arose from GEI's illegal payment of US $2 million to Chadian officials, a transaction described by the sentencing judge as "an embarrassment to all Canadians". After extensively cooperating with authorities in Canada and the US, GEI was fined $10.35 million.

GEI demonstrates that cooperating with authorities once wrongdoing has been discovered (and implementing robust compliance procedures) can reduce penalties resulting from such misconduct.

GEI's admission of guilt and cooperation with authorities ought to serve as an example that despite the fine imposed, the benefits dramatically outweigh the costs. Compare the sentence imposed to Niko after they pled guilty to bribing Bangladeshi officials in 2011. While the bribes included a luxury SUV, and trips to New York and Calgary, the illicit contributions only amounted to approximately $200,000. However, the firm was still slapped with a fine of almost $10 million. Comparatively, GEI's bribe to Chadian officials was over 10 times as high, and yet as a result of the company's cooperation with authorities (and new internal

compliance policies now in place), the fine was almost identical. Self-reporting in GEI's case was clearly beneficial as their voluntary disclosure was noted by Justice Brooker as having resulted in the fines being more favourable.

SNC-Lavalin paid an amount of $280 million as a fine, which is one of the largest fines assessed against a corporation in Canada. Although the plea relates to fraud, the Court recognized the elements of corruption that were involved. Justice LeBlond commented that determining "the appropriate fine level for organizations is not achieved through a purely arithmetical process under Canadian law, especially in relation to offences such as fraud and corruption where there is limited precedent" (*SNC*, at paragraph 9.6).

The sentencing decision in SNC-Lavalin contains a detailed roadmap of factors that will be considered in proportionate balancing. With respect to quantum and the probation order, the parties had put forth a joint recommendation that consisted of a fine of CA$280 million to be accompanied by a three-year probation order that set out very precise and detailed conditions that are to be followed by SLCI under supervision of the Court. There is precedent value in this quantum and probation order.

However, with respect to the various factors in the *Criminal Code* corporate liability sentencing provisions, after reviewing the arguments made by both parties and the references by the parties to the applicable principles drawn from the *Criminal Code*, the Canadian caselaw, and the references to the US and UK experiences in similar matters, Justice LeBlond noted that, by different approaches and for different reasons, the parties had nevertheless come to a similar result, thus the joint submission. The routes proposed by the prosecutor and the defence diverged widely with respect to methodology but, as the Court pointed out, ended up at the same location and quantum.

Justice LeBlond concluded that the joint submission was reasonable and was not contrary to the public interest. However, the decision does not attempt to pick which approach or combination of methodological approaches would apply, as this was not necessary given the joint submission. Accordingly, the decision is of limited precedential value in regard to the various listed factors.

Potential Debarment

The Government of Canada imposes debarment through the new Ineligibility and Suspension Policy, effective May 31, 2024. The Office of Supplier Integrity and Compliance (OSIC) replaces the previous Integrity Regime. It enables Public Services and Procurement Canada (PSPC) to identify suppliers of concern, take appropriate action to mitigate the risk they pose, and promote ethical business practices in the marketplace. The offence of bribing a foreign public official remains listed in the regime, ensuring that suppliers involved in such corrupt practices face strict consequences, including debarment measures such as suspension or ineligibility to contract with the federal government. Suppliers may be debarred not only for their own direct misconduct but also where they knowingly benefit from or indirectly enable corrupt acts carried out by affiliates, reflecting a broad and robust approach to accountability.

The Registrar will consider the actions or omissions of affiliates only if the Registrar determines, in the Registrar's discretion, that the supplier directed, influenced, authorized, assented to, acquiesced to, or participated in those actions or omissions. This includes circumstances set out in section 8.1 of the Policy where the supplier's conduct "directly or indirectly enabled" the affiliate's offence, and the supplier "knew or ought to have known" of the affiliate's involvement. If the supplier knows about the affiliate's improper conduct, this will suffice. But the inquiry does not stop there, as the wording "ought to have known is used". Notably, consistent with the legal interpretation of similar terms in *R. v. Felderhof, 2007 CarswellOnt 4879 (Ont. C.J.)*, the test for "acquiescing" is objective, as is the standard for "ought to have known", and thus does not require proof that the supplier had actual knowledge or intent regarding the wrongful conduct. This means that liability may arise where a reasonable person in the supplier's position would have been expected to take steps to prevent or object to the misconduct, underscoring the policy's strict liability approach to accountability and its emphasis on proactive compliance. Consequently, organizations

must implement robust due diligence systems and internal controls that effectively meet this regulatory standard, to proactively prevent misconduct and avoid the risk of debarment.

In contrast with the prior regime, the current policy provides that ineligibility periods are a ***maximum*** of 10-years, with the actual length determined at the Registrar's discretion. In determining the period of ineligibility, the Registrar considers the seriousness of the offence, including factors such as the supplier's role in the corrupt conduct, the extent of planning and senior management involvement, any gains realized, and the costs incurred by public authorities in investigating and prosecuting the offence. The policy emphasizes the importance of suppliers taking concrete remedial actions, such as voluntarily disclosing wrongdoing, cooperating with authorities, implementing effective compliance programs, and instituting personnel or procedural changes to prevent recurrence. The more egregious the conduct, the more substantial the remedial efforts required to mitigate the period of debarment.

The policy also provides a limited review process when ineligibility results from the actions of affiliates, allowing suppliers to submit new information within a strict timeframe to contest claims that they directed or acquiesced in corrupt conduct they ought to have known about. However, such submissions do not automatically stay the ineligibility.

There is also a public interest exception permitting contracting authorities, with approval from senior officials to award contracts to ineligible or suspended suppliers in extraordinary circumstances – such as emergencies or when the supplier is uniquely qualified – often conditioned on administrative agreements that impose stringent compliance and monitoring obligations.

Significantly, suppliers are required to actively monitor and verify the eligibility status of their first-tier subcontractors, ensuring that no contracts are awarded to or performed by subcontractors who are themselves ineligible or suspended due to corruption-related offences. Failure to comply can result in the supplier's own ineligibility. Transparency is further enhanced by mandatory disclosures regarding ownership, management, and any changes in circumstances that might affect eligibility throughout the contract term.

Finally, the policy addresses attempts to evade debarment through corporate restructuring, mergers, or successor entities, allowing the Registrar to extend ineligibility to affiliated or successor organizations involved in the wrongdoing. Upon the request of the Registrar, independent third-party experts may be engaged to verify compliance, validate certifications, and assess remedial measures. Through this comprehensive and stringent framework, the Ineligibility and Suspension Policy stands as a vital tool in Canada's fight against the corruption of foreign public officials, reinforcing accountability and integrity across federal procurement activities.

Enforcement

In a significant development, on February 10, 2025, the United States has paused Department of Justice enforcement of the *Foreign Corrupt Practices Act of 1977* (FCPA) pursuant to an executive order issued by President Trump. The order directs the U.S. Attorney General to undertake a 180-day review (extendable by another 180 days) with two key objectives. First, to evaluate all current FCPA investigations and enforcement actions and determine whether adjustments are needed to restore the "proper bounds" of enforcement and protect Presidential foreign policy powers. And second, to update FCPA enforcement guidelines to better reflect American foreign policy priorities, promote U.S. economic competitiveness, and ensure efficient use of federal enforcement resources.

On June 9, 2025, Deputy Attorney General Todd Blanche issued a memorandum (the Guidelines) on "Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA)" by the US Department of Justice (DOJ). Prosecutors shall focus on cases in which individuals have engaged in criminal misconduct and not attribute nonspecific malfeasance to corporate structures; proceed as expeditiously as possible in their investigations; and consider collateral

consequences, such as the potential disruption to lawful business and the impact on a company's employees, throughout an investigation, not only at the resolution phase.

The DOJ will “shift focus away” from cases that do not involve a connection to Transnational Criminal Organizations (“TCOs”) and cartels. The Guidelines state that enforcement should not focus on “routine” or “generally accepted” business practices and “courtesies” or conduct involving low dollar amounts; instead, enforcement is more appropriate when “the alleged misconduct bears strong indicia of corrupt intent tied to particular individuals, such as substantial bribe payments, proven and sophisticated efforts to conceal bribe payments, fraudulent conduct in furtherance of the bribery scheme, and efforts to obstruct justice.”

While the pause may signal a change in the U.S.'s enforcement posture, Canadian companies should not interpret it as a free pass. The executive order does not affect Canada’s CFPOA, which remains in force. Moreover, U.S. enforcement could resume after the review period, and Canadian businesses with U.S. ties or listings may still be subject to FCPA jurisdiction. This is a pause—not a repeal—and companies should remain vigilant in their compliance efforts. The Blanche memo sets out factors where the FCPA may still be enforced and confirms that there is no free pass.

New Systems to Encourage Compliance

It is essential that the tone from the top reject the notion that bribes are a cost of doing business. Agents cannot be used as vehicles to improperly achieve objectives. Canadian companies must be ever vigilant in monitoring and, where appropriate, auditing the process of negotiations and agreements made with agents and third parties who may be interacting with government officials on their behalf. Individuals must realize that they can and will go to jail for bribery offences.

Key steps in a risk-based approach. An interesting comparison is the UK Bribery Act, which has created a strict liability offence (with a defence of due diligence) for a failure by companies to prevent bribery. The UK Ministry of Justice March 30, 2011, Guidance sets out six principles of a risk-based approach to managing bribery risks, which can be summarized as follows:

- **Proportionate procedures**: The one size fits all solution is rejected in favour of a tailor-made approach.
- **Top-level commitment**: This requires that senior officers specifically address bribery risks.
- **Risk assessment**: External risks (such as country risk and sector risk) must be evaluated along with internal risks (such as poor training, cultures that promote excessive risk taking and poor financial controls).
- **Due diligence**: The Guidance encourages commercial organizations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.
- **Communication (including training)**: Communication is not only tone from the top, but the creation of a confidential means to report bribery conduct.
- **Monitoring and review**: Methods may include staff surveys, testing, and verification of procedures by outside parties and certified compliance by multilateral bodies.

The steps in a risk-based approach should not be foreign to Canadian counsel who will have seen a similar approach developed in competition law. The Competition Bureau has identified seven elements that are fundamental to a proper compliance program regardless of the particular model adopted, its level of complexity or the size of a business. In the "Corporate Compliance Programs" Bulletin of the Competition Bureau, at section 4, the seven essential elements that should be incorporated in every program are:

1. Management Commitment and Support

2. Risk-Based Corporate Compliance Assessment

3. Corporate Compliance Policies and Procedures

4. Compliance Training and Communication

5. Monitoring, Verification and Reporting Mechanisms

6. Consistent Disciplinary Procedures and Incentives for Compliance

7. Compliance Program Evaluation

Risk Assessment

Risk assessment is relevant to anti-corruption on several levels:

- Proper risk management will reduce the risk of non-compliance.
- A robust risk-assessment matrix may be introduced in court as documentary proof of a proper system.
- The parties provision of the *Criminal Code* expands the concepts of corporate liability to require that senior officers take all reasonable steps to prevent corruption that they become aware of. The requirement to take all reasonable steps makes risk assessment essential.

Methodology: A risk matrix. Risk assessment requires a balancing of two fundamental concepts: "precautions taken to avoid the event" versus "systems to measure potential gravity of impact". The two categories can be used to generate a matrix that directs priorities in the taking of preventative steps.

The risk-management matrix has been accepted within engineering and environmental fields for some time now. Matrix analysis is also used by the federal government. For example, the Treasury Board of Canada has developed a sophisticated corporate risk profile that colour codes a risk matrix and sets out plans of action based on the level of risk. The International Chamber of Commerce Antitrust Compliance Toolkit uses matrix analysis extensively in the global antitrust field. See pages 18-23 for examples of the matrix in operation.

Application of matrix analysis to anti-corruption. A matrix will identify the appropriate level of supervision or auditing for each organization.

The above matrix sets out ranges of priorities. This is a fairly basic model, which will be significantly expanded in practice:

- **Level 1.** In the lowest quadrant of risk, compliance training will be appropriate, based on existing Codes of Conduct.
- **Level 2.** The second level of risk contemplates that the legal department, or external legal counsel, will review the financial and compliance audits that have been conducted internally to ensure compliance with the CFPOA.
- **Level 3.** The third or medium level of risk requires that the legal department or external legal counsel conduct an audit of the due diligence system in place with respect to CFPOA compliance. This type of audit is more advanced than the second stage as it requires the legal department to make its own inquiries and review documents, whereas the second stage only requires that the legal advisor review the results of the audits as done internally.
- **Level 4.** The fourth stage of internal investigation is a quantum leap and reflects the fact that level 4 is serious in terms of probability and gravity. The internal investigation will require interviews and retaining experts as required, such as forensic accountants. Reports must be prepared to the company and board of directors along with legal advice concerning remedial measures and the potential for self-reporting, as contemplated in the highest quadrant of risk.
- **Level 5.** The fifth stage may require self-reporting to authorities with the hope that a prosecution can be avoided or any penalty lessened.

A "Red Flags" analysis is an important part of risk assessment in the context of foreign corruption. In the case of SNC-Lavalin, the agreed statement of facts included offshore companies and foreign bank accounts, which are classic red flags.

Compliance programs may also be a factor on sentencing as a mitigating factor. In the SNC-Lavalin case, Justice LeBlond took into account the extensive post-offence remedial efforts of the company:

> "Since early 2012, the SNC-Lavalin Group Inc., the ultimate parent company of the wider organization, took measures to reduce the likelihood that it, or its affiliates, including SLCI and SLII, would commit a subsequent offence. Those measures include a complete turnover of the corporate executive team and Board of Directors, the implementation of a robust Compliance and Ethics Program, the adoption of the necessary and appropriate steps to ensure that checks and balances now exist in order to prevent any similar situation or wrongful conduct from occurring again" (*SNC*, at paragraph 6.6).

Remediation Agreements

The Government of Canada made the decision to create a deferred prosecution program following public consultations. The deferred agreements are termed "Remediation Agreements", which are defined as "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement"(*Criminal Code*, section 715.3). The purpose and conditions required for a remediation agreement are set out in Part XXII.1 of the *Criminal Code*.

A remediation agreement between Ultra Electronics Forensic Technology Inc. (UEFTI) and federal prosecutors was approved by the Superior Court of Quebec in February of 2023 (Justice Marc David, Judgment under *Criminal Code*, section 715.37) and is Canada's second remediation agreement. The first remediation agreement was struck between Quebec provincial prosecutors and SNC-Lavalin Group Inc. over corruption in its contract to refurbish the Jacques Cartier Bridge in Montreal.

In Ultra Electronics, the Agreed Statement of Facts details the three procurement contracts concluded over the years between UEFTI and the Philippine National Police (PNP). The total contract value of these procurements was approximately CA$17 million. Commissions paid to the local commercial agents responsible for disbursing bribes are estimated at CA$4.4 million. This amount includes both fees for legitimate services rendered and the disbursed bribes.

Justice David noted that UEFTI had demonstrated its desire to reform its corporate culture and comply with anti-bribery and corruption laws. Justice David concluded that:

> "Approving this agreement serves not only to encourage voluntary disclosure of wrongdoing on the part of other organizations, but also serves as a model of the type and degree of collaboration that will afford deference on the part of a court."

Remediation agreements are considered in detail in Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance*. Loose-leaf. (Toronto: Thomson Reuters, 2023), at Chapter 23, Immunity, Leniency and Deferred Prosecution Agreements: Permissible and Prohibited Routes.

Potential Future Developments

Transparency International Canada produced a White Paper in November of 2023 entitled *Bringing a "Failure to Prevent" Offence to Canada*. This paper provides a recommendation for Canada to adopt a 'failure to prevent' corruption offence as part of its efforts to counter corruption. This means that organizations would have the duty to instill policies, processes, and leadership that would actively prevent corruption from taking root. If an organization were later accused of engaging in corruption, it could be held liable for not having done enough to prevent that act from occurring in the first place.

Organizations would be forced to take compliance seriously and institute effective procedures to guard against the possibility of corruption, or face being charged with a criminal offence.

Guided by international examples, introducing a new 'failure to prevent' corruption offence to Canada's anti-corruption regime could ignite a system that incentivizes compliance with the law and which appropriately punishes offenders for not having taken compliance seriously.

The proposed creation of a strict liability failure to prevent offence would be new to Canadian criminal law. However, as set out above in this note, there is arguably a generic failure to prevent element imbedded in organizational liability in Canada through the third basis of imputing the subjective intent of a senior officer to the organization. Section 22.2(c) of the *Criminal Code* states that: "an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence". The major difference is that under *the Criminal Code* the onus of proof remains on the prosecution beyond a reasonable doubt to prove the failure to take reasonable measures, whereas the proposed new strict liability offence would reverse the onus to show reasonable steps.

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