

# **The Current Anti-Bribery and Corruption Landscape in Canada**

**Research Project for Emerging Issues/Advanced Topics Course**

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## 1.0 Executive Summary

Bribery and corruption are not new. In fact, they have been common business practices around the world for centuries. The problem is that in many countries, including Canada, bribery and corruption are against the law. Since the enactment of the Foreign Corrupt Practice Act (“FCPA”) in the US in 1977, the spotlight in North America has been on the many US companies that have been caught for greasing deals or otherwise offering benefits to foreign public officials to assist in “getting things done” – transactions which put them offside of the FCPA. Until very recently, little has been reported about this type of salacious behaviour from Canadians. But alas, recent reports have shown that even Canadian companies bribe – the question is whether or not they will get caught.

Historically, Canada has been criticized for its lack of enforcement of anti-bribery and corruption laws. Canada only introduced its own Corruption of Foreign Public Officials Act (the “CFPOA”) in 1998, over 20 years after the FCPA became law in the US. Since then, there has been continued criticism over the lack of enforcement of the law, which can be attributed to several factors, including lack of resources and lack of commitment to the issue.

The lag in enforcement can also be attributed to key differences between the CFPOA and its US counterpart in the form of the law. To be enforceable under the CFPOA, an act of bribery must be conducted in full or in part in Canada, or must have a “real and substantial” link to Canada. This is a significant difference from the US law that has a nationality clause, allowing the FCPA to keep its hold on US citizens conducting

business abroad. Another significant difference from the US law is that the CFPOA does not have a books and records provision, which would require companies to properly account for all transactions (including bribes) in their accounting records. There have been a significant amount of prosecutions in the US on the basis of violation of this requirement.

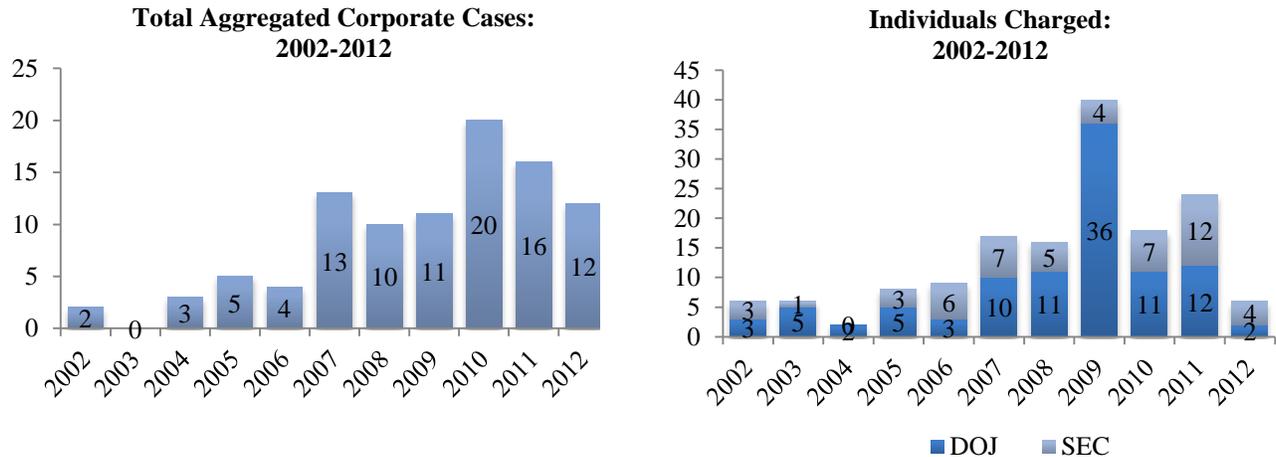
However, 2011 may have been a turning point in the anti-bribery and corruption landscape in Canada. It appears that the efforts of the special Royal Canadian Mounted Police (“RCMP”) unit, created in 2008, had finally come to fruition with the first guilty plea to violations of the CFPOA by a Canadian company. This was followed by another company’s guilty plea in 2012. In addition to these pleas, there has been one other conviction and two charges (of individuals) to date under the CFPOA. In 2013, Bill S-14 was put forth to further solidify Canada’s commitment to anti-bribery and corruption. This Bill proposes significant changes to the CFPOA, including the addition of a nationality clause and a books and records provision, both which will make the Canadian law more similar to the US.

These changes create a wealth of opportunities for Investigative and Forensic Accountants (“IFAs”). Using their knowledge and drawing on practical experience, IFAs can provide proactive assistance to help companies ensure they have appropriate controls in place to prevent bribery and corruption. If allegations of violations do arise, IFAs can assist in these complex, international investigations. It is clear that the anti-bribery and

corruption landscape in Canada is changing. Now more than ever, companies will need the help of IFAs to navigate these changes.

## 2.0 Introduction

Canada has long been criticized for its lack of enforcement of the CFPOA, which makes bribery of foreign public officials a criminal offence. Although the Act has been in force for more than 10 years, there have only been three successful prosecutions under the legislation. This is in sharp contrast to the US, which has had at least ten corporate cases in each of the last six years for violations of the FCPA. In addition, the US Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) laid 104 charges on individuals in the last five years alone.<sup>1</sup>



Source: Shearman & Sterling LLP FCPA Digest January 2013

Why does there appear to be such a gap between Canada and its closest neighbour? It has been argued that there have historically been fewer resources dedicated to foreign corruption enforcement efforts in Canada. However, there are clear suggestions that the vigour and breadth of foreign corruption enforcement is starting to change in Canada.

<sup>1</sup> Shearman & Sterling LLP, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*. January 2013. <http://shearman.symplicity.com/files/b13/b130acba9f170088a238dc5420bae06c.pdf> Accessed in April 2013.

For example, the RCMP established an International Anti-Corruption Team in 2008 with offices in Ottawa and Calgary dedicated to CFPOA enforcement. Now that they have had time to establish themselves, Canada may see an increased level of enforcement in coming years. It is notable that of the 100 individuals charged under the FCPA by the DOJ, 61 percent have been charged since the start of 2009, which is more than the number of individuals charged in the previous seven years combined.<sup>2</sup> Perhaps Canada will experience the same prosecution curve?

The US has provided a solid model of what can be accomplished with focus and a strong-handed policy.<sup>3</sup> Given the differences in the current Canadian law versus the US law, one can question whether it is the lack of *enforcement* of the law, or the *form* of the law itself that has been Canada's biggest hurdle to succeeding in the number of prosecutions as its US neighbour. Ultimately, however, the real test in Canada will be whether investigations, enforcements and sanctions in this country take a direction that has been missed in the past. If this does happen, Canadian companies will receive the message that there is a very real and necessary need to be proactive and vigilant in their foreign dealings.

This paper provides a history of the anti-bribery and corruption law in Canada, reviews Canadian convictions and charges to date, discusses criticisms of the CFPOA, compares the CFPOA in both its current and proposed state to US law, and finally concludes with

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<sup>2</sup> Ibid.

<sup>3</sup> The UK's 2011 *Bribery Act* has also followed suit with aggressive enforcement rules. However, this paper will focus only on the US given Canada's proximity and business relationship with that country.

how the current anti-bribery and corruption landscape in Canada will impact the role of the Investigative and Forensic Accountant (“IFA”) going forward.

## **2.1 Scope of Review**

Several sources were reviewed in preparation of this research paper. Given the topical nature of this subject, primary sources of information were online articles to ensure the most current information was analyzed. In addition, other research papers and journals were reviewed for historical information. Finally, the author conducted three interviews to obtain practical views on the subject matter:

- Mr. Stephan Drolet is a Senior Vice President of KPMG Forensic, and is responsible for the Forensic practice in Montreal, Quebec. Mr. Drolet has been working in the field of forensic accounting since 1989 and has led a number of global investigations. He is a Fellow Chartered Accountant with a designated specialization in Investigative and Forensic Accounting (IFA).
- Mr. Mark A. Morrison is a partner in the Calgary office of Blakes, Cassels & Graydon LLP, a national law firm. Mr. Morrison’s practice involves advising Canadian and multinational corporate clients on compliance with domestic and international anticorruption legislation (including the CFPOA), and he has conducted numerous CFPOA internal investigations and audits. He also assists clients with CFPOA/FCPA due diligence during mergers and acquisitions.
- Ms. Suzanne Schulz is a Senior Vice President of KPMG Forensic, and is responsible for the Forensic Practice in Vancouver, British Columbia. She is

a Chartered Accountant and a Chartered Business Valuator, and has been recognized as a specialist in Investigative and Forensic Accounting by the Canadian Institute of Chartered Accountants. Ms. Schulz's diverse area of practice includes anti-bribery and corruption investigations and proactive compliance related work.

A complete list of resources consulted is available in the attached bibliography.

## **2.2 Restrictions**

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## 3.0 A History of Canadian Bribery and Corruption Law and Enforcement

### 3.1 The Law

When understanding the laws that govern bribery, a distinction must be made between domestic corruption and international corruption.

#### 3.1.1 Domestic Corruption

Bribery and corruption within Canada is governed by a combination of federal statutes, parliamentary rules and administrative provisions.

The *Criminal Code* includes offences which cover the following:

- Bribery;
- Frauds on government and influence peddling;
- Fraud or a breach of trust in connection with duties of office;
- Municipal corruption;
- Selling or purchasing office;
- Influencing or negotiating appointments or dealing in offices;
- Possession of property or proceeds obtained by crime;
- Fraud;
- Laundering of proceeds of crime; and
- Secret commissions.<sup>4</sup>

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<sup>4</sup> Department of Justice Canada, *The Corruption of Foreign Public Officials Act: A Guide*. May 1999.

### 3.1.2 *International Corruption*

On the international front, corruption is managed through Canada's participation in various international forums, most notably the Organization for Economic Co-operation and Development ("OECD").<sup>5</sup> In the Spring of 1997, the OECD Ministerial called on the Member States to negotiate a binding convention to address the bribery of foreign public officials. On December 17 of that same year, Canada signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the "OECD Convention"). On December 10, 1998, Bill S-21, *An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts*, received Royal Assent. A few months later, on February 14, 1999, the Corruption of Foreign Public Officials Act entered into force.<sup>6</sup>

The law, in its original form, featured three offences:

- 1) Bribing a foreign public official;
- 2) Laundering property and proceeds; and
- 3) Possession of property and proceeds.

This new Act made it possible "to prosecute, for example, a conspiracy or an attempt to commit the offences. It would also cover aiding and abetting in committing these

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<sup>5</sup> Other organizations in which Canada has actively participated include the Organization of American States, the Council of Europe, the United Nations, the Commonwealth and within the G-8. (Source: Department of Justice Canada, *The Corruption of Foreign Public Officials Act: A Guide*. May 1999.)

<sup>6</sup> Department of Justice Canada, *The Corruption of Foreign Public Officials Act: A Guide*. May 1999.

offences, an intention in common to commit them, and counseling others to commit the offences”.<sup>7</sup>

In 2001, the second and third offences were repealed, leaving only the bribery offence, which reads as follows:

*“3.(1) 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.”*

Canada has jurisdiction over the bribery when the offence is committed in whole or in part in Canada. Alternatively, there may also be a basis for jurisdiction if it can be demonstrated that there is a “real and substantial” link to Canada.<sup>8</sup> The penalties for individuals is up to five years imprisonment; the penalty for corporations is an unlimited fine, at the discretion of the judge.

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<sup>7</sup> Department of Justice Canada, *The Corruption of Foreign Public Officials Act: A Guide*. May 1999.

<sup>8</sup> Ibid.

There are some exceptions that are permitted under the law, which are listed in sub-sections 3(3) and 3(4). Sub-section 3(3) is the saving provision which allows for payments that are permitted in the country of the foreign official or good faith payments made to pay expenses related to “i) promotion, demonstration or explanation of the person’s products or services or ii) the execution or performance of a contract between the person and the foreign state...”. Sub-section 3(4) covers “facilitation payments” which are, generally, payments made in the regular course of business to expedite transactions. Specific examples listed in the Act are:

- (a) *“the issuance of a permit, licence or other document to qualify a person to do business;*
- (b) *the processing of official documents, such as visas and work permits;*
- (c) *the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and*
- (d) *the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.”*

“Routine nature” is specifically defined to exclude decisions to award new business.

### **Bill C-31**

In an effort to eliminate one of the apparent obstacles in the current corruption law, the Canadian government introduced Bill C-31 to Parliament in May 2009. Clause 38 of this Bill was to “add provisions to the *Corruption of Foreign Public Officials Act* based on

the nationality principle so that, in certain cases, offences committed outside of Canada would be deemed to have been committed in Canada”<sup>9</sup>. This amendment would have made enforcement easier as it would eliminate the need for enforcement officials to establish a link between the offence and Canada, since the link would be effectively established by Canadian citizenship, residency, or place of incorporation. Clause 38 also proposed amendments to the scope of activities that could be covered by the CFPOA, and recommended that the CFPOA expand the offence of giving a bribe to include “conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counseling in relation to, an offence under that section”. Unfortunately, this bill died in Parliament in late 2009.

#### **Bill S-14**

With the spotlight on Canada again in 2011 following Transparency International’s *Progress Report 2011 on the Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* which ranked Canada among the countries with “little or no enforcement”, there was increased pressure to take more aggressive action to demonstrate Canada’s commitment to the fight against bribery and corruption. On February 5, 2013, Bill S-14 was submitted and proposed several significant changes to the CFPOA, under the following areas:

- Jurisdiction;
- Exceptions for certain payments;

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<sup>9</sup> Kirkby, Cynthia, “Bill C-31: An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act”, October 6, 2009.

- Accounting requirements;
- Definition of a business;
- Punishment; and
- Ability to lay charges.

These proposed changes are discussed in Section 7 below. As at the date of this paper, the Bill has not yet been passed.

### **3.2 Enforcement**

In 2008, the RCMP established the International Anti-Corruption Unit to enforce and raise awareness about the CFPOA.<sup>10</sup> This team is made up of 14 members, divided between the Calgary and Ottawa posts.<sup>11</sup> The corruption of foreign public officials is specifically referenced in the mandate of the RCMP Commercial Crime Program, and the current RCMP policy specifically identifies the CFPOA as a responsibility of the Commercial Crime Branch.<sup>12</sup>

Recent activities suggest that the RCMP special unit is positioning itself to become a more prominent force by becoming more involved the international enforcement scene.

The RCMP anti-corruption team has participated in the OECD peer review process and

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<sup>10</sup> Foreign Affairs and International Trade Canada, “Strengthening Canada’s Fight Against Foreign Bribery”, February 5, 2013. <http://www.international.gc.ca/media/aff/news-communiqués/2013/02/05b.aspx?lang=eng> Accessed in April 2013.

<sup>11</sup> Foreign Affairs and International Trade Canada, “Corporate Social Responsibility – Bribery and Corruption: The Twelfth Annual Report to Parliament”, October 17, 2011. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx> Accessed in April 2013.

<sup>12</sup> Ibid.

has been directly involved in country reviews. The team has travelled to other OECD countries to participate in the evaluation of their anti-bribery laws and related enforcement, and have been represented on the panel in a review in the United Kingdom.<sup>13</sup> In its 2011 report, the OECD lauded Canada for its increased enforcement efforts, notably the substantial efforts to raise awareness and training.<sup>14</sup>

It appears that the pressure on Canada to join ranks with its US counterpart may finally be coming to fruition. Since the inception of the special force, the RCMP has charged three companies and three individuals, as discussed in Section 4 below. Although there haven't been nearly as many charges laid in Canada as in the US, it is perhaps a tangible indicator of what is to come.

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<sup>13</sup> Moyer Jr., Homer E. *Anti-Corruption Regulation in 46 Jurisdictions Worldwide 2011*, Getting the Deal Through, 2011.

<http://www.millerchevalier.com/portalresource/lookup/poid/Z1tO19NP10LTYnMQZ56TfzcRVPMQiLsSwC3Em83!/document.name=/GettingtheDealThrough2010.pdf> Accessed in April 2013.

<sup>14</sup> OECD, "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada", March 2011. <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf> Accessed in April 2013.

## 4.0 A Review of Canadian Convictions and Charges to Date

To date, three companies have been convicted for violations of the CFPOA. In addition, there are two cases pending, and 35 ongoing investigations.<sup>15</sup>

### 4.1 Convictions

#### 4.1.1 *Griffiths Energy International Inc. (“Griffiths”)*

Griffiths is a “Canadian based international oil exploration and development company active in the Republic of Chad”.<sup>16</sup> On January 22, 2013, the company pleaded guilty to a charge under the CFPOA relating to securing an oil and gas contract in Chad. The following summarizes the salient points of the matter, as described on Griffiths’ company website:<sup>17</sup>

- Between August 30, 2009 to February 9, 2011, prior management entered into consulting contracts with two entities owned and controlled by a foreign public official and his spouse.
- In November 2011, Griffiths voluntarily disclosed that it had started investigations into the above-mentioned contracts, which was supervised by a special committee of independent directors of the Board and conducted by legal counsel.

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<sup>15</sup> Foreign Affairs and International Trade Canada, “Strengthening Canada’s Fight Against Foreign Bribery”, February 5, 2013. <http://www.international.gc.ca/media/aff/news-communications/2013/02/05b.aspx?lang=eng> Accessed in April 2013.

<sup>16</sup> Griffiths Energy Website, <http://www.griffithsenergy.com/s/home.asp> Accessed in April 2013. On May 22, 2013, the company changed its name to Caracal Energy Inc.

<sup>17</sup> Griffiths Energy Press Release, “Griffiths Energy International Announces Settlement”. <http://www.griffithsenergy.com/s/news.asp?ReportID=567642> Accessed in April 2013.

- In May 2012, the investigation ended, and Griffiths shared the results with the authorities.
- On January 15, 2013, the company was charged with one count under section 3(1)(b) of the CFPOA;
- On January 22, 2013, the company entered a guilty plea and agreed to pay a total fine of \$10.35 million.
- On January 25, 2013, the company announced that the court had agreed to accept the settlement.

While Griffiths' press release does not describe the exact nature or amount of the alleged bribe(s) (and in fact states that "the Company affirms that no influence was actually obtained as a result of providing the benefits to the foreign public official"), DFAIT has reported that, "Griffiths acknowledged having committed to paying \$2 million in cash and millions in shares in exchange for exclusive access to resources in two regions. After providing the Chad government with a \$40 million signing bonus, Griffiths was awarded the resources rights."<sup>18</sup>

This is a noteworthy case as it is the first Canadian case of self-reporting of a potential violation. While the US has an established process and a history of concessions for self-reporting, this has not yet existed in Canada, until now. Griffiths reports that "the proactive and responsible steps taken by the current management and Board to immediately self-disclose these issues to law enforcement" were considered to be a

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<sup>18</sup> Foreign Affairs and International Trade Canada, "Strengthening Canada's Fight Against Foreign Bribery", February 5, 2013. <http://www.international.gc.ca/media/aff/news-communicues/2013/02/05b.aspx?lang=eng> Accessed in April 2013.

significant factor by the Court in determining the settlement, in addition to the company's conduct since the discovery of the issue. Griffiths reports that since July 2011, it has appointed a new management team and enhanced its internal control programs to help ensure compliance with anti-bribery and corruption laws. They have also made their policies publicly available on their website. It will be interesting to see if and how this first case of self-reporting influences the willingness of other Canadian companies to self-report.

Also of interest is the amount of the fine. It is unclear how the quantum of the fine was determined, and the estimated value of the contract has not been made public. However, this case will likely be used as a benchmark for setting future fines. Mr. Morrison suggests that this is also a significant case because "Griffiths essentially just confirms that Niko [*discussed below*] wasn't just a one off, that [*the RCMP*] are going to bring charges and that the enforcement of the CFPOA is going to be a reality in Canada."

#### ***4.1.2 Niko Resources Ltd. ("Niko")***

Niko is "an international oil and natural gas exploration and production company. With its head office located in Calgary, Canada, Niko has operations in India, Bangladesh, Indonesia, Madagascar, Pakistan and Thailand."<sup>19</sup> On June 24, 2011, Niko plead guilty

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<sup>19</sup> Niko Resources Ltd.'s Website, <http://www.nikoresources.com/> Accessed in April 2013.

to one count of bribery.<sup>20</sup> The following summarizes the salient points of the matter, as described on Niko's company website:<sup>21</sup>

- The charge relates to two separate incidents that occurred in 2005:
  - The provision of a vehicle (valued at \$190,984) for personal use to the then-Bangladeshi Energy Minister; and
  - The provision of travel costs for the Minister to attend an Energy Expo in Calgary, as well as the provision of travel costs of a subsequent personal trip to New York (valued at \$5,000).
- The sentence includes a fine of \$8,260,000 plus a 15% Victim Fine Surcharge, for a total of \$9,499,000.
- The sentence also includes a Probation Order, which requires Court supervision for the next three years to ensure that Niko conducts CFPOA compliance audits. Niko will be responsible for the costs associated with this Probation Order.

Niko's CEO has stated, "What happened was wrong. We acknowledge this. We accept responsibility, and we appreciate the seriousness of the actions. As a result of these events we have taken extensive steps in all aspects of our organization. One such step is the creation of the position of Chief Compliance Officer who reports directly to our Board, to ensure that something like this doesn't happen again." Niko has reported that,

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<sup>20</sup> Foreign Affairs and International Trade Canada, "Strengthening Canada's Fight Against Foreign Bribery", February 5, 2013. <http://www.international.gc.ca/media/aff/news-communications/2013/02/05b.aspx?lang=eng> Accessed in April 2013.

<sup>21</sup> Niko Resources Ltd. Press Release, "Niko Agrees to Pay \$9,499,000 According to Agreed Statement of Facts", [http://www.nikoresources.com/upload/news\\_release/141/01/press-release.pdf](http://www.nikoresources.com/upload/news_release/141/01/press-release.pdf) Accessed in April 2013.

since 2009, it has implemented a full anti-bribery and corruption compliance program, including training, risk assessment due diligence, compliance monitoring and reporting around the world.

This is an important case in Canadian history as it is the first time since the establishment of the RCMP Anti-Corruption Unit that a company has been charged. Mr. Morrison stated that, “If I had to pick one moment in time, I would say that Niko was the most significant moment in time in Canada [*for the advancement of anti-bribery and corruption enforcement*], but it started with the establishment of the RCMP units. Niko was huge.”

The significance of this case relates to the Probation Order, as a precedent has now been set. Probation Orders are very common in the US, and can be very costly to implement. This cost is borne by the company, on top of the already skyrocketing costs to defend itself. Also of interest is that the Canadian Trade Commissioner Service put a hold on providing services to Niko during the period of Court supervision.<sup>22</sup>

#### ***4.1.3 Hydro-Kleen Group Inc. (“Hydro-Kleen”)***

Hydro-Kleen is a privately owned company based in Red Deer, Alberta. It was formed to address the issues of fired heater pigging (pigging refers to the “practice of using pipeline

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<sup>22</sup> Foreign Affairs and International Trade Canada, “Strengthening Canada’s Fight Against Foreign Bribery”, February 5, 2013. <http://www.international.gc.ca/media/aff/news-communicues/2013/02/05b.aspx?lang=eng> Accessed in April 2013.

inspection gauges or “pigs” to perform various maintenance operations on a pipeline).<sup>23</sup>

The following summarizes the salient points of the matter:<sup>24, 25, 26</sup>

- A US immigration officer and his wife ran a consulting company, without the knowledge of his employer.
- Between September 2000 and November 2001, Hydro-Kleen retained the immigration officer’s company to advise on the best ways for its employees to gain entry into the US on work visas. In return for payment, he helped the company to prepare letters and coached employees on what to say when questioned by the customs officials. The court was told that, unbeknownst to Hydro-Kleen, the immigration officer also tried to block the company’s competitors from entering the US.
- In July 2002, the US immigration officer pleaded guilty to accepting secret commissions from Hydro-Kleen in exchange for showing favour to the company (he was charged under subparagraph 426(1)(a)(ii) of Canada’s Criminal Code. He received, and served, a six month sentence and was deported to the US.

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<sup>23</sup> Hydro Kleen Systems’ Website, <http://www.hydrokleengroup.com/about.html> Accessed in April 2013.

<sup>24</sup> Foreign Affairs and International Trade Canada, “Strengthening Canada’s Fight Against Foreign Bribery”, February 5, 2013. <http://www.international.gc.ca/media/aff/news-communiques/2013/02/05b.aspx?lang=eng> Accessed in April 2013, and Foreign Affairs and International Trade Canada, “Corporate Social Responsibility – Bribery and Corruption: Fifth Report to Parliament”, October 26, 2004. [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/5-report\\_parliament.aspx?lang=en&view=d](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/5-report_parliament.aspx?lang=en&view=d) Accessed in April 2013.

<sup>25</sup> Elzinga, David, “A Steep Price”, CA Magazine, November 2010. <http://www.camagazine.com/archives/print-edition/2010/nov/regulars/camagazine43455.aspx> Accessed in April 2013.

<sup>26</sup> Foreign Affairs and International Trade Canada, “Corporate Social Responsibility – Bribery and Corruption: The Twelfth Annual Report to Parliament”, October 17, 2011. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx> Accessed in April 2013.

- On January 10, 2005, Hydro-Kleen entered into a guilty plea to one count of bribery under the CFPOA and was ordered to pay a fine of \$25,000.
- Two employees (the president and another employee) were also charged with two counts of bribing a US Immigration officer who worked at the Calgary International Airport.
- The charges against the director and the officer of the company were stayed.<sup>27</sup>

Of interest in this case is the amount of the fine: it is reported that the bribes were made in a series of smaller payments, totaling \$28,298.88.<sup>28</sup> This is almost the same amount of the fine, \$25,000 and arguably a diminutive amount to the company. Although the value of the benefit received has not been disclosed, one could argue that this may be a small price to pay in the course of business, and when looking at the dollar value alone, would not been enough to deter companies in the future. This small fine of \$25,000 is in sharp contrast to the two other charges (more than five years later) of \$9.5 million and \$10.35 million, which is perhaps an indicator of the evolvement of enforcement.

## 4.2 Charges

### 4.2.1 *Mr. Nazir Karigar (formerly of CryptoMetrics Canada Inc.)*

Mr. Karigar is a former official with CryptoMetrics Canada Inc. (“CryptoMetrics”) in Ottawa. CryptoMetrics was a high-tech security company, based on Ottawa, with offices

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<sup>27</sup> The term “stay” refers to a decision to discontinue the prosecution. Stayed charges differ from withdrawn charges in that if a charge is “stayed”, it can be “brought to life” within one year of the day it was stayed. (<http://lawfacts.ca/node/195> Accessed in April 2013.)

<sup>28</sup> Elzinga, David, “A Steep Price”, CA Magazine, November 2010.

<http://www.camagazine.com/archives/print-edition/2010/nov/regulars/camagazine43455.aspx> Accessed in April 2013.

in New York and Mumbai. In 2010, the RCMP announced that they had charged Mr. Karigar under the CFPOA; shortly after he was charged, the company declared bankruptcy. Below are the salient details of the case:<sup>29</sup>

- CryptoMetrics was pursuing a \$100-million contract with Air India for a facial recognition security system.
- There are allegations that Mr. Karigar paid \$250,000 in bribes to India's Minister of Heavy Industries and a former Minister of Aviation.
- There are allegations that Mr. Karigar paid hundreds of thousands of dollars and conspired with the director of security for the airline to ensure that CryptoMetrics was awarded the deal (in the end, CryptoMetrics did not get the contract, nor did any other company).
- There are allegations that Mr. Karigar and CryptoMetrics invited Air India officials to become part owners of the company, right before they were planning to go public.
- The concerns were reported to the RCMP as a result of a tip from a diplomat from the Canadian consulate in Mumbai.
- Mr. Karigar was charged under the CFPOA in 2010.

As at the date of this paper, the case is still before the court.

This case is of significance as it is the first time an individual has pleaded not guilty to the offence. In addition, it appears that as part of his defence strategy, Mr. Karigar is

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<sup>29</sup> McArthur, Greg, Montero, David, and Nolen, Stephanie, "Canadian Accused of Bribing Cabinet Minister in India is a Test Case for Canada's Foreign Anti-Corruption Law", *The Globe & Mail*, September 6, 2012. <http://m.theglobeandmail.com/news/politics/canadian-accused-of-bribing-cabinet-minister-in-india/article2323342/?service=mobile> Accessed in April 2013.

going to challenge the law and argue that Canadians do not have jurisdiction over what happens on the other side of the world. Under the current regime, there must be a “real and substantial link” between the act and Canada. In an interview with the *Globe & Mail*, Mr. Karigar’s lawyer stated, “The charges against Mr. Karigar are going to be very difficult to prove, because right now, as the law stands, the government is required to prove that link and I’m not sure how they can prove that link.”<sup>30</sup>

#### *4.2.2 Mohammed Ismail and Ramesh Shah (formerly of SNC-Lavalin)*

SNC-Lavalin is “one of the leading engineering and construction groups in the world, and a major player in the ownership of infrastructure and in the provision of operations and maintenance services. SNC-Lavalin companies provide engineering, procurement, construction, project management and project financing services to a variety of industry sectors.”<sup>31</sup> SNC-Lavalin has been plagued with negative press for the past few years, with allegations of fraud and corruption abounding. The media reports must be untangled to separate the activities and allegations related to the CFPOA from allegations of violations of other laws and other alleged salacious activities worldwide.

In 2012, Mr. Mohammed Ismail and Mr. Ramesh Shah, both former SNC-Lavalin executives, were charged under the CFPOA. This is an ongoing case which has been developing since 2011. The following summarizes the salient details of the matter:

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<sup>30</sup> Ibid.

<sup>31</sup> SNC-Lavalin’s Website, [http://www.snclavalin.com/about\\_profile.php?lang=en](http://www.snclavalin.com/about_profile.php?lang=en) Accessed in April 2013.

- On September 1, 2011, the RCMP launched an investigation at the company's Oakville, Ontario office. The investigation related to a project in Bangladesh which the company bid on in 2011. SNC-Lavalin also started its own investigation into the matter.<sup>32</sup>
- On March 26, 2012, SNC-Lavalin publicly reported the results of their investigation into certain payments and contracts. In summary, the press release stated, "In the absence of direct and conclusive evidence, the use and purpose of the payments or nature of the services rendered or actions taken under the Agreements cannot be determined with certainty. However, the absence of conclusive findings does not exclude the possibility that, if additional facts that were adverse to the Company became known, sanctions could be brought against it in connection with possible violations of law or contracts."<sup>33</sup>
- On April 2, 2012, the World Bank gave formal notice to the subsidiary of SNC-Lavalin involved with the investigation that they had temporarily suspended their right to bid on World Bank projects.<sup>34</sup>

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<sup>32</sup> SNC-Lavalin's Media Centre, "Clarification on the Current RCMP Investigation".  
[http://www.snclavalin.com/news.php?lang=en&id=1527&action=press\\_release\\_details&paging=1&current\\_year=2011&start=11](http://www.snclavalin.com/news.php?lang=en&id=1527&action=press_release_details&paging=1&current_year=2011&start=11) Accessed in April 2013.

<sup>33</sup> SNC-Lavalin's Press Release, "SNC-Lavalin Reports on Results of Voluntary Independent Review", March 26, 2012.  
[http://www.snclavalin.com/news.php?lang=en&id=1707&action=press\\_release\\_details&paging=1&current\\_year=2012&start=36](http://www.snclavalin.com/news.php?lang=en&id=1707&action=press_release_details&paging=1&current_year=2012&start=36) Accessed in April 2013.

<sup>34</sup> SNC-Lavalin's Press Release, "SNC-Lavalin Delivers Update on Bangladesh Investigation", April 2, 2012.  
[http://www.snclavalin.com/news.php?lang=en&id=1718&action=press\\_release\\_details&paging=1&current\\_year=2012&start=36](http://www.snclavalin.com/news.php?lang=en&id=1718&action=press_release_details&paging=1&current_year=2012&start=36) Accessed in April 2013.

- On April 13, 2012, SNC-Lavalin confirmed the RCMP was executing a search warrant at its office in Quebec, and that the warrant related to an investigation of individuals who were no longer with the company.<sup>35</sup>
- In April 2012, two former SNC-Lavalin officials were charged with one count of corruption under the CFPOA: Mr. Mohammed Ismail, former Director of International Projects and Mr. Ramesh Shah, former Vice President.<sup>36</sup>
- In April 2013, SNC-Lavalin announced that it had agreed to the terms of a settlement with the World Bank, which suspends their right to bid on World Bank Group-financed projects for the next 10 years.<sup>37</sup>
- As at the date of this paper, the hearing for Mr. Ismail and Mr. Shah has not yet taken place, but is scheduled for 2013.

As can be seen from the summary above, this has been a long and trying investigation for the company, and has brought about much unwanted negative media attention. The allegations related to the CFPOA are in addition to other allegations of fraud by former executives:

- On February 9, 2012, SNC-Lavalin announced that the Executive Vice-President, Mr. Riadh Ben Aissa, is no longer with the company, effective immediately. Mr. Ben Aissa was later arrested in April 2012.<sup>38</sup>

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<sup>35</sup> SNC- Lavalin's Press Release, "SNC-Lavalin Cooperates with the RCMP", April 13, 2012. [http://www.snclavalin.com/news.php?lang=en&id=1726&action=press\\_release\\_details&paging=1&current\\_year=2012&start=31](http://www.snclavalin.com/news.php?lang=en&id=1726&action=press_release_details&paging=1&current_year=2012&start=31)

<sup>36</sup> Trace Blog, "Canada Charges Two SNC-Lavalin Employees With Corruption Under the CFPOA", June 25, 2012. <http://traceblog.org/2012/06/25/canada-charges-two-snc-lavalin-employees-with-corruption-under-the-cfpoa/> Accessed in April 2013.

<sup>37</sup> SNC- Lavalin's Press Release, "SNC-Lavalin Agrees to Settle with the World Bank", April 17, 2013. [http://www.snclavalin.com/news.php?lang=en&id=2068&action=press\\_release\\_details&current\\_year=2013](http://www.snclavalin.com/news.php?lang=en&id=2068&action=press_release_details&current_year=2013) Accessed in April 2013.

- On March 26, 2012, the same day the results of the investigation were announced, the company also announced the Chief Executive Officer, Mr. Pierre Duhaime, has stepped down from his position.<sup>39</sup>
- On April 29, 2012, the company announced that Mr. Ben Aissa, former Executive Vice-President of the company, was arrested on suspicion of conspiracy to commit fraud, fraud, and the use of false documents.<sup>40</sup>
- On November 28, 2012, the company announced that Mr. Duhaime, former Chief Executive Officer of the company, was arrested and charged with fraud in connection with the contract to build a hospital in Montreal.<sup>41</sup>

One of the lessons in this case is the tangible and intangible costs that come with the allegations of bribery, corruption, and fraud. Investors have launched two class action law suits against the company. The first action was launched in Quebec and is pending certification; the value of this claim is \$250 million. The second action was filed in Ontario and was certified in Ontario in September 2012; the value of this claim is \$1 billion. The investors are seeking damages in connection to the drop in share prices as a result of the negative public attention on the company. The plaintiffs have “alleged that

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<sup>38</sup> SNC- Lavalin’s Press Release, “SNC-Lavalin Announces Executive Changes”, February 9, 2012. [http://www.snclavalin.com/news.php?lang=en&id=1674&action=press\\_release\\_details&paging=1&current\\_year=2012&start=41](http://www.snclavalin.com/news.php?lang=en&id=1674&action=press_release_details&paging=1&current_year=2012&start=41) Accessed in April 2013.

<sup>39</sup> SNC- Lavalin’s Press Release, “SNC-Lavalin Announces Departure of Chief Executive Officer, Appointment of Interim Chief Executive Officer, and Fourth Quarter and Year-End Results for 2011”, March 26, 2012. [http://www.snclavalin.com/news.php?lang=en&id=1678&action=press\\_release\\_details&paging=1&current\\_year=2012&start=36](http://www.snclavalin.com/news.php?lang=en&id=1678&action=press_release_details&paging=1&current_year=2012&start=36) Accessed in April 2013.

<sup>40</sup> The Trace Compendium Website, SNC Lavalin Case Summary, <https://www.traceinternational2.org/compendium/view.asp?id=260> Accessed in April 2013.

<sup>41</sup> CBC News, “SNC-Lavalin Agrees to 10-year Ban from World Bank Projects”, April 17, 2013. <http://www.cbc.ca/news/business/story/2013/04/17/business-snc-lavalin.html> Accessed in April 2013.

SNC-Lavalin misrepresented that the firm's policies and practices were designed to ensure internal and external compliance with anti-bribery laws."<sup>42</sup> The costs of these damages (or settlement) will be in addition to the costs of the legal and investigation fees, all borne by the company. This, of course, is in addition to the immeasurable loss of goodwill and negative publicity.

Also of interest in this matter is that the company has hired the former Chief Compliance Officer of Siemens, Mr. Andreas Polhmann, effective March 1, 2013. Siemens is a landmark case, as they paid \$800 million in fines related to bribery and corruption charges in the US in 2008, the highest to date. Mr. Polhmann oversaw "the creation and implementation of its award-winning compliance and corporate governance system"<sup>43</sup>, which was implemented as a result of the FCPA charges. Since the FCPA charges, Siemens has been very open in speaking about the changes it has made to its ethics and compliance programs. It will be interesting to see whether the same transparent approach is taken at SNC-Lavalin. The press release announcing the hiring of Mr. Polhmann promises that the company "continues to improve and strengthen its processes across the organization" and encourages the public to visit a website link to find out more

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<sup>42</sup> Kiselbach, Daniel L., and Truman, Richard E. K., "Canada's Crackdown on Foreign Corruption". [http://www.millerthomson.com/assets/files/article\\_attachments2/DLKRET\\_2013-01\\_ILN.pdf](http://www.millerthomson.com/assets/files/article_attachments2/DLKRET_2013-01_ILN.pdf) Accessed in April 2013.

<sup>43</sup> SNC- Lavalin's Press Release, "SNC-Lavalin Hires Andreas Pohlmann, Former Chief Compliance Officer of Siemens", February 2, 2013. [http://www.snclavalin.com/news.php?lang=en&id=2022&action=press\\_release\\_details&paging=1&current\\_year=2013&start=11](http://www.snclavalin.com/news.php?lang=en&id=2022&action=press_release_details&paging=1&current_year=2013&start=11) Accessed in April 2013.

information about how “positive change is being implemented throughout the company”.<sup>44</sup>

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<sup>44</sup> Ibid.

## 5.0 Criticisms of Canada’s Anti-bribery and Corruption Enforcement

### 5.1 OECD Working Group on Bribery

Implementation of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* is monitored by the OECD Working Group on Bribery (the “Working Group”). This Working Group is a peer-driven monitoring mechanism and is made up of representatives from the member countries. The peer reviews are completed in three phases, and upon completion of each stage, country monitoring reports containing recommendations and issues for follow-up are prepared and published online. The three phases are:<sup>45</sup>

- **Phase 1:** Evaluates the adequacy of a country’s legislation to implement the Convention. This was completed for Canada in July 1999.
- **Phase 2:** Assesses whether a country is applying this legislation effectively. This was completed for Canada in March 2004; a follow-up report was issued in June 2006.
- **Phase 3:** Focuses on enforcement of the Convention, the 2009 Anti-Bribery Recommendations, and outstanding recommendations from Phase 2. This was completed for Canada in March 2011.

The recommendations and items noted for follow-up in each phase of the review have been summarized in Exhibit A. Although there were several items that were only mentioned in one or two of the phases, the following recommendations were consistently commented on in each phase of the review:

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<sup>45</sup> OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 1997. [www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm](http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm) Accessed in April 2013.

- **Facilitation payments:** Canada should consider amending the exceptions for facilitation payments and the defences for “reasonable expenses incurred in good faith” and “acts of a routine nature” as they could affect implementation of the Convention.
- **Nationality jurisdiction:** Not asserting nationality jurisdiction could create a gap in the law.
- **Sanctions:** The adequacy of this provision will depend on actual implementation. It will continue to be monitored.

It appears that Canada has finally listened, as Bill S-14 recommends changes to address all three of these areas. Bill S-14 also proposes the introduction of accounting requirements, which was recommended in Phases 2 and 3.

## 5.2 Transparency International

Transparency International (“TI”) is an organization with a mission “to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society”.<sup>46</sup> For the past eight years, they have issued a report that comments on the enforcement of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. TI uses information from its national chapters in 37 of the OECD countries to classify them into four categories of enforcement. In 2012, there were four categories: Active, Moderate, Little, and No Enforcement.

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<sup>46</sup> Transparency International Website, [http://www.transparency.org/whoweare/organisation/mission\\_vision\\_and\\_values](http://www.transparency.org/whoweare/organisation/mission_vision_and_values) Accessed in April 2013.

TI concludes that the overall global level of enforcement remains inadequate as only seven of the member countries have received the status of “Active Enforcement”, and that “only Active Enforcement provides an effective deterrent to foreign bribery”.<sup>47</sup> Canada has historically fared poorly in this report, receiving a rating of “Little or No Enforcement” since 2005. Mr. Morrison believes that the two main reasons that Canada has historically lagged behind the US in its enforcement are “resource allocation and commitment to the issue”. He further explains that “Canada is not alone in being a country that has been slower to buy into the seriousness of the issue, but I do think that really starting from 2008 they have definitely shown a commitment to throwing more resources at enforcement and I think that’s why we’ve seen a change.” Ms. Schulz has a similar opinion. She believes that the reason Canada may be seen to be behind the US “comes down to available resources for enforcement, and the emphasis that is placed on anti-corruption as a priority. Before the RCMP unit was set up, there wasn’t a body that was focused just solely on the issue.”

It may be that this increased commitment has finally paid off as the TI report actually brought positive news to Canada this year – Canada was upgraded from “Little Enforcement” to “Moderate Enforcement”, joining ranks with the likes of Australia, Belgium, France and Japan and leaving Brazil, Mexico, Turkey and others behind. The countries by category in the most recent report are set out below:

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<sup>47</sup> Transparency International, *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012*, September 6, 2012. [http://www.transparency.org/whatwedo/pub/exporting\\_corruption\\_country\\_enforcement\\_of\\_the\\_oecd\\_anti\\_bribery\\_conventio](http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio) Accessed in April 2013.

Category	Country
Active Enforcement	Denmark, Germany, Italy, Norway, Switzerland, United Kingdom, United States
Moderate Enforcement	Argentina, Australia, Austria, Belgium, <b>Canada</b> , Finland, France, Japan, Korea (South), Netherlands, Spain, Sweden
Little Enforcement	Brazil, Bulgaria, Chile, Hungary, Luxembourg, Mexico, Portugal, Slovak Republic, Slovenia, Turkey
No Enforcement	Czech Republic, Estonia, Greece, Ireland, Israel, New Zealand, Poland, South Africa

TI commented that it was encouraging to see that there were 34 ongoing CFPOA investigations by the RCMP. However, they do mention that “the investigation and prosecution of future cases would be greatly facilitated by adopting a nationality jurisdiction”.<sup>48</sup> TI reaffirmed the OECD’s recommendation that “the CFPOA should be amended to introduce nationality jurisdiction as, under the current situation, the prosecution is required to devote scarce resources to establish that the facts disclose a “real and substantial link” to Canada”.<sup>49</sup>

### 5.3 Other Criticisms

These criticisms of the CFPOA are echoed in the media at large. From a distance, it is difficult to understand how the US, Canada’s closest neighbor and a country with similar business customs, has prosecuted so many cases and Canada has not. Common explanations arising from the legal community include the lack of nationality jurisdiction

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

and the lack of a books and records provision, as previously discussed. Other criticisms are as follows:<sup>50</sup>

- Mens Rea: The Crown must prove the necessary mens rea. Unlike the FCPA, there is no definition of willful blindness in the CFPOA.
- No Voluntary Disclosure: Companies are reluctant to come forward as there is no established process.
- No Automatic Debarment: Companies would be less likely to violate the law if punishment included automatic debarment from bidding on government contracts.

Mr. Drolet suggests that the lack of enforcement could be as simple as being rooted in Canada's culture: "We're not an enforcement type of culture. We're trying to change the attitude of companies, trying to do more proactive measures. It's not in the culture of Canadians to enforce drastically; we are slow in moving into enforcement. This is evident by looking at Canada's anti-money laundering regime."

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<sup>50</sup> Klotz, James M., "Yes, Even Canadian Companies Pay Bribes", <http://www.lexpert.ca/USGuide-Corporate/featured-articles/yes-even-canadian-companies-pay-bribes-141/> Accessed in April 2013.

## 6.0 Comparison of the Canadian Law to the US Law

The FCPA was enacted in the United States in 1977 “for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.”<sup>51</sup> Essentially, the law makes it illegal to pay bribes to foreign public officials. This is accomplished through the two elements of the law:

1. Anti-bribery provisions; and
2. Accounting provisions.

### 6.1 Anti-bribery Provisions

The FCPA prohibits “*an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to*

*(1) any foreign official for purposes of*

*a) (i) influencing any act or decision of such foreign official in his official capacity,*

*(ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or*

*(iii) securing any improper advantage; or*

*b) inducing such foreign official to use his influence with a foreign government or*

*instrumentality thereof to affect or influence any act or decision of such*

*government or instrumentality,*

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<sup>51</sup> United States Department of Justice, “Foreign Corrupt Practices Act: An Overview”. <http://www.justice.gov/criminal/fraud/fcpa/> Accessed in April 2013.

*in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”<sup>52</sup>*

The law continues to prohibit the same type of activity against foreign political parties, or any person (which has been interpreted to include agents). The law surrounding the actual act of bribery is very similar to Section 3.(1) of the CFPOA, in that they both include the elements of foreign public officials, providing anything of value, and inducing behaviour, to obtain or retain business. As well, both laws permit exceptions for “facilitation payments” (see discussion of facilitation payments in Section 3.1.2 above).

## **6.2 Accounting Provisions**

One of the most significant ways that the FCPA differs from the CFPOA is that it includes a books and records provision. The FCPA requires that corporations “(a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.”<sup>53</sup> The purpose of this provision is to prevent off-book transactions, and to ensure that the financial activity of the company is transparent.

It becomes quickly apparent that the structure of the FCPA using the two general provisions creates a predicament for companies who have bribed: if it is not recorded

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<sup>52</sup> *Foreign Corrupt Practices Act*, Current through Pub. L. 105-366 (November 10, 1998).

<sup>53</sup> United States Department of Justice, “Foreign Corrupt Practices Act: An Overview”. <http://www.justice.gov/criminal/fraud/fcpa/> Accessed in April 2013.

(which happens more often than not), the accounting provisions are violated; if it is recorded, the bribery provisions are violated. This no-win situation was a clever way to write the law, and arguably one of the most significant reasons that the US has seen more success on the enforcement front. There were 66 “books and records” cases vs. 32 cases that involved “gifts, hospitality and travel” but did not include “books and records” issues.<sup>54</sup> The frequency in occurrence of books and records cases may suggest that these types of issues are easier to prove out, and therefore may be more attractive to enforcement agencies to prosecute.

### **6.3 Jurisdiction**

A company may be subject to the FCPA under the following circumstances:

- If it is a US company;
- If the implicated employee is a US citizen, national, or resident of the US;
- If securities are registered in the US or you are required to file with the SEC (and any officer, director, employee or agent of this company);
- If the company or individuals causes an act in furtherance of a corrupt payment to take place in the US.<sup>55</sup>

This definition is far more broad than the CFPOA, which requires that either the act of bribery be conducted in whole or in part in Canada, or that a “real and substantial” link be

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<sup>54</sup> Based on a search of the Trace International Compendium, <http://www.traceinternational.org/Knowledge/Compendium.html> Accessed in May 2013.

<sup>55</sup> KPMG, “Anti-Bribery & Corruption Services”, [http://www.kpmg.com/Ca/en/IssuesAndInsights/ArticlesPublications/Documents/5494\\_Anit%20Bribery%20Brochure\\_web\\_v4.pdf](http://www.kpmg.com/Ca/en/IssuesAndInsights/ArticlesPublications/Documents/5494_Anit%20Bribery%20Brochure_web_v4.pdf) Accessed in April 2013.

made to Canada. As well, Canada does not yet have a provision to permit jurisdiction on a nationality basis.

## 6.4 Penalties

The most significant difference in penalties between the US and Canada is that Canada does not distinguish between maximum financial penalties for individuals and companies, where as the US does. In addition, the Canada law is prosecuted under criminal law, whereas violators of the FCPA can be subject to both criminal and civil fines. The fines for acts of bribery under the CFPOA and FCPA are set out below:

	Penalties for Acts of Bribery		
	CFPOA	FCPA <sup>56</sup>	
		Individuals	Companies
Criminal fine	Unlimited fines	\$100,000	\$2 million
Civil fine	N/A	\$16,000 per violation	\$16,000 per violation

Although it is arguable that the thought of the CFPOA's unlimited fines is more daunting than the FCPA, Canada has only yet levied two penalties, in the amounts of \$10.35 million and \$9.5 million. As more cases follow, it will be interesting to see how courts use their discretion and whether the level of fees will get as high as has been seen in the US. The chart below summarizes the top ten FCPA fines to date:<sup>57</sup>

	Company	FCPA Fines/Penalties	Year
1	Siemens (Germany)	\$800 million	2008
2	KBR/Haliburton (US)	\$579 million	2009
3	BAE (UK)	\$400 million	2010

<sup>56</sup> Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, November, 2012.

<sup>57</sup> Cassin, Richard L., "France's Total SA Cracks our Top Ten List", May 29, 2013.

<http://www.fcablog.com/blog/2013/5/29/frances-total-sa-cracks-our-top-10-list.html>, accessed May in 2013.

	<b>Company</b>	<b>FCPA Fines/Penalties</b>	<b>Year</b>
4	Total S.A. (France)	\$398 million	2013
5	Snamprogetti Netherlands B.V. /ENI S.p.A (Holland/Italy )	\$365 million	2010
6	Technip S.A. (France )	\$338 million	2010
7	JGC Corporation (Japan)	\$219 million	2011
8	Daimler AG (Germany )	\$185 million	2010
9	Alcatel-Lucent (France )	\$137 million	2010
10	Magyar Telekom / Deutsche Telekom (Hungary/Germany)	\$95 million	2011

There is no difference in the amount of prison time an individual could face for the act of bribery, as it is five years under both the CFPOA and FCPA.

The US also differs in that it has a books and records provision as discussed above, (whereas Canada does not, yet) and corresponding penalties, as follows:

	<b>Penalties for Books and Records Violations<sup>58</sup></b>	
	<b>FCPA</b>	
	<b>Individuals</b>	<b>Companies</b>
Prison time	20 years	n/a
Criminal fine	\$5 million	\$25 million
Civil fine	Up to \$150,000 per violation	Up to \$725,000 per violation

## **6.5 Applicability to Not-for-Profit Organizations and Transactions**

The FCPA applies to any “domestic concern” of the US, which is defined in the Act as:

*“(A) any individual who is a citizen, national, or resident of the United States;*

*and*

<sup>58</sup> Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, November, 2012.

*(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.”*

This definition is different than the CFPOA, which has a nuance that the business or the obtaining of business is “for profit”. This has meant that not-for-profit entities, or arguably business deals that were not profitable, were not covered under the CFPOA. The US definition is much broader and does not allow for these exemptions.

## 6.6 Comparison of the Current CFPOA to the FCPA

The chart below summarizes and compares the key provisions in the current CFPOA to the FCPA.

**Table 1: Comparison of the Current CFPOA to the FCPA**

<b>Terms</b>	<b>Current CFPOA</b>	<b>FCPA</b>
Facilitation payments permitted	Yes	Yes
Books and records provisions	No	Yes
Jurisdiction based on nationality	No	Yes
Maximum sentence for the act of bribery	5 years imprisonment Unlimited fines	<u>Individuals:</u> 5 years imprisonment; \$100,000 criminal fine; \$16,000 civil fine per violation  <u>Companies:</u> \$2 million criminal fine;

Terms	Current CFPOA	FCPA
		\$16,000 civil fine per violation
Maximum sentence for falsification of books and records	Not currently covered under the CFPOA	<u>Individuals:</u> 20 years in prison; \$5 million criminal fine; up to \$150,000 civil fine per violation  <u>Companies:</u> \$25 million criminal fine; up to \$725,000 civil fine per violation
Law applies to not-for-profit organizations?	No	Yes

## 7.0 Proposed Changes to the CFPOA

On February 5, 2013, a bill was submitted to propose several significant changes to the CFPOA (“Bill S-14”), under the following areas:

- Jurisdiction;
- Exceptions for certain payments;
- Accounting requirements;
- Punishment;
- Definition of a business; and
- Ability to lay charges.

Mr. Morrison suggests that Bill S-14 “is confirming the message which most of our clients have now already received, which is that anti-corruption enforcement and anti-corruption laws are real, it’s important, and [Bill S-14] is just yet a further sign that [the CFPOA] is real and it’s here to stay and it’s something that they need to pay attention to.”

Each of these areas, and the potential impact for Canadian companies, is analyzed in detail below.

### 7.1 Jurisdiction

The current law requires that a significant portion of the bribery of the foreign public official be committed in whole or in part in Canada, or that there be a “real and substantial” link between the offence and Canada.<sup>59</sup>

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<sup>59</sup> Department of Justice Canada, *The Corruption of Foreign Public Officials Act: A Guide*. May 1999.

Bill S-14 proposes to expand the CFPOA's jurisdiction with the addition of several clauses that are more similar to the FCPA's jurisdictional reach. It is proposed that if an act is committed outside of Canada, it is deemed to have been committed within Canada (and therefore subject to prosecution), if the person is:

- a) *“a Canadian citizen;*
- b) *a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or omission, is present in Canada; or*
- c) *a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.”*<sup>60</sup>

Mr. Morrison believes that “This is by far the most significant aspect of the [*Bill S-14*] amendments.” He believes that this will lead to increased enforcement as “One of the real challenges enforcement authorities face is tying conduct back to Canada.” The proposal continues to add a jurisdictional clause which allows the proceedings to be commenced in any territorial division within Canada, and the trial and punishment would be as if the act was committed in that division.<sup>61</sup>

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<sup>60</sup> Parliament of Canada, *Bill S-14*, Section 5(1)  
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5960861&File=30> Accessed in April 2013.

<sup>61</sup> Parliament of Canada, *Bill S-14*, Section 5(2)  
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5960861&File=30> Accessed in April 2013.

In the past, a savvy Canadian businessperson may have been able to elude the effects of the CFPOA simply by scheduling an illicit business meeting outside of Canadian borders (assuming a “real and substantial” link to Canada was not made). These proposed changes will now allow the law to reach abroad and take action against multi-national companies employing Canadians outside of Canada’s border.

This change may also impact public company disclosures. In the past, if a “real and substantial” link could not be made to Canada, disclosure may not have been required as there would have been no criminal exposure in Canada. Going forward, if a company finds an incident of bribery, there may be different considerations with respect to potential exposure in Canada because the jurisdictional loophole will be plugged.

## **7.2 Exception for Certain Payments**

Canada is one of only five countries around the world that currently makes exceptions for facilitation payments (joining the United States, New Zealand, South Korea, and Australia)<sup>62</sup>, but Bill S-14 proposes to change this by removing that clause. It is interesting to note that that proposed amendment relating to facilitation payments uses the word “eventual” in reference to the removal to the exception for these payments, and that this is the only amendment that uses this non-committal wording.<sup>63</sup> It is possible that this

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<sup>62</sup> Dent, Peter and Ophelie Brunelle Quraishi, “Busting Bribery: Canada is Serious About Fighting Corruption”, April 6, 2013. <http://opencanada.org/features/the-think-tank/comments/busting-bribery/> Accessed in April 2013.

<sup>63</sup> Ibid.

delay in implementation is to allow for Canadian corporations to phase out any such prevailing practices in their current foreign business activities.<sup>64</sup>

### 7.3 Accounting Requirements

The governance of books and records currently falls under several bodies: falsification and forgery is covered by the Canadian Criminal Code, the Income Tax Act, and the Canadian Business Corporations Act; in addition, provincial securities regulators may ensure compliance with Generally Accepted Accounting Principles (“GAAP”). Bill S-14 requires that a company maintain adequate books and records, violation of which could result in a maximum of 14 years in prison and unlimited fines. Specifically, the amendment states:

*“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;*

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<sup>64</sup> Dattu, Riyaz, “Canada Redoubles Efforts on Combating Foreign Bribery and Corruption: Officers and Directors of Canadian Businesses Warned to “Play by the Rules””, February 6, 2013. <http://www.osler.com/NewsResources/Canada-Redoubles-Efforts-at-Combating-Foreign-Bribery-and-Corruption-Officers-and-Directors-of-Canadian-Businesses-Warned-to-Play-by-the-Rules/> Accessed in April 2013.

- d) *enters liabilities with incorrect identification of their object in those books and records;*
- e) *knowingly uses false documents; or*
- f) *intentionally destroys accounting books and records earlier than permitted by law.*<sup>65</sup>

At first glance, this appears to be the most daunting change for Canadian companies, for several reasons. First, it would be unusual for a company to accurately record a bribe. These types of transactions are often made in cash, solely for the purpose of breaking the paper trail. Companies are in a no-win situation: if they record the bribe, they are essentially confessing their guilt; if they disguise the bribe in the records and get caught doing so, they will also be held accountable. And under the proposed amendments, the jail time could be the same under either offence. As the court has more discretion over the fines (they are unlimited), it is up to a judge to determine what the monetary penalty should be.

The second concern for Canadian companies arises from looking at the history of prosecutions in the US. There have been 66 “books and records” cases vs. 32 cases that involved “gifts, hospitality and travel” but did not include “books and records” issues.<sup>66</sup> Mr. Drolet suggests that, “Until they get caught, most companies assume that their books are proper. But in the US, that is where they are getting caught the most. If companies

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<sup>65</sup> Parliament of Canada, *Bill S-14*.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5960861&File=30> Accessed in April 2013.

<sup>66</sup> Based on a search of the Trace International Compendium, <http://www.traceinternational.org/Knowledge/Compendium.html> Accessed in May 2013.

don't record the transactions exactly, and I don't think they realize this nuance just yet, they will be surprised.”

However, Mr. Morrison suggests that the books and records may not have the same type of impact in Canada as it does in the US. He explains that “In the US, the books and records provisions are civil provisions, so proof is only required on a balance of probabilities basis...the US has created a very low hurdle for enforcement of its books and records provisions whereas Canada has kept its enforcement on a criminal, beyond a reasonable doubt standard...You still need to prove a bribe beyond a reasonable doubt.” He thinks you might see books and records charges tacked on to other charges. In addition, he says that, “the larger companies and certainly companies that are subject to US regulation already are pretty conscious and pretty focused on the importance of internal accounting controls.”

Regardless, Ms. Schulz suggests that this change will get attention, as it “brings anti-bribery and corruption squarely into the camp of the CFO and the Audit Committee. Because the requirements come back to record keeping and how companies are accounting for transactions, it will get more emphasis from these two camps. These parties will be considering the CFPOA a little closer.”

#### **7.4 Definition of a Business**

The current act defines a business as “*any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit*”

(emphasis added).<sup>67</sup> As discussed above, this definition has received a vast amount of criticism, as Canada is the only OECD Member State signatory that has made this distinction.<sup>68</sup> The proposed amendment modifies this definition by removing the “for profit” component, and will stand as follows: “*any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.*”<sup>69</sup>

What this means for Canadian companies is that the law can now reach into another sector, and impact not-for-profit, non-governmental, and humanitarian organizations. In Canada, there are approximately 165,000 non-profits and charities, representing \$106 billion or 7.1% of the Gross Domestic Product (larger than automotive or manufacturing industries).<sup>70</sup> With many of these organizations committed to international causes, this is a whole new business sector that will come into the scope of the CFPOA.

This also limits the defence that the benefit associated with the bribe was not “profitable”, as this argument will no longer be relevant, bringing the CFPOA more into line with the FCPA.

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<sup>67</sup> *Corruption of Foreign Public Officials Act*, Section 2, Current version: in force since February 2002.

<sup>68</sup> Dent, Peter and Ophelie Brunelle Quraishi, “Busting Bribery: Canada is Serious About Fighting Corruption”, April 6, 2013. <http://opencanada.org/features/the-think-tank/comments/busting-bribery/> Accessed in April 2013.

<sup>69</sup> Parliament of Canada, *Bill S-14*.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5960861&File=30> Accessed in April 2013.

<sup>70</sup> Imagine Canada Website: Research & Public Policy - Charities & Nonprofit Organizations, <http://www.imaginecanada.ca/node/32> Accessed in May 2013.

## 7.5 Penalties

Under the current law, the maximum sentence for bribery is five years imprisonment. The proposed amendments would almost triple this, extending the maximum punishment to 14 years imprisonment. There are no proposed changes to the maximum fines, which are currently unlimited and at the discretion of the judge.

## 7.6 Ability to Lay Charges

In the past, both provincial and federal law enforcement officers were permitted to lay charges pursuant to the CFPOA.<sup>71</sup> Now, the RCMP will be given exclusive authority to lay charges under the Act. This may streamline the enforcement process, and eliminate the potential for any jurisdictional conflict between federal and provincial law enforcement agencies.<sup>72</sup>

**Table 2: A “before and after” comparison of the CFPOA to the FCPA**

Terms	CFPOA		FCPA
	Current	Proposed	
Facilitation payments permitted	Yes	No <sup>73</sup>	Yes
Books and records provisions	No	Yes	Yes

<sup>71</sup> Berman, Wendy and Wansbrough, Jonathan, “Proposed Amendments to the Corruption of Foreign Public Officials Act will have a Significant Impact on Canadian Companies Doing Business Abroad”, February 22, 2013.

[http://www.casselsbrock.com/CBNewsletter/Proposed\\_Amendments\\_to\\_the\\_Corruption\\_of\\_Foreign\\_Public\\_Officials\\_Act\\_Will\\_Have\\_a\\_Significant\\_Impact\\_on\\_Canadian\\_Companies\\_Doing\\_Business\\_Abroad](http://www.casselsbrock.com/CBNewsletter/Proposed_Amendments_to_the_Corruption_of_Foreign_Public_Officials_Act_Will_Have_a_Significant_Impact_on_Canadian_Companies_Doing_Business_Abroad) Accessed in April 2013.

<sup>72</sup> Ibid.

<sup>73</sup> One could argue that the CFPOA is more stringent than the FCPA in this category.

Terms	CFPOA		FCPA
	Current	Proposed	
Jurisdiction based on nationality	No	Yes	Yes
Maximum sentence for the act of bribery	5 years imprisonment  Unlimited fines	14 years imprisonment  Unlimited fines	<u>Individuals:</u> 5 years imprisonment; \$100,000 criminal fine; \$16,000 civil fine per violation  <u>Companies:</u> \$2 million criminal fine; \$16,000 civil fine per violation
Maximum sentence for falsification of books and records	Not currently covered under the CFPOA	14 years imprisonment  Unlimited fines	<u>Individuals:</u> 20 years in prison; \$5 million criminal fine; up to \$150,000 civil fine per violation  <u>Companies:</u> \$25 million criminal fine; up to \$725,000 civil fine per violation
Law applies to not-for-profit organizations?	No	Yes	Yes

## 8.0 The Role of the IFA Going Forward

Several lawyers have opined that they expect the proposed amendments to be approved quite quickly:

- “The legislation containing the amendments...is expected to pass quickly through Canadian Parliament without opposition.”<sup>74</sup>
- The CFPOA “is likely to become law quickly and Canadian businesses will have to revisit their anti-corruption policies to ensure compliance” as it passed second reading on February 27, 2013.<sup>75</sup>
- When asked if he thinks whether Bill S-14 will pass, Mr. Morrison responded, “Yes, absolutely. No doubt.”

In addition, lawyers are advising that Canadian companies should consider reviewing their existing anti-bribery and corruption control systems and making changes as necessary:

- “Officers and directors of Canadian corporations should strongly consider investing in creating or maintaining an ethical corporate culture, which now

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<sup>74</sup> Dattu, Riyaz, “Canada Redoubles Efforts on Combating Foreign Bribery and Corruption: Officers and Directors of Canadian Businesses Warned to “Play by the Rules””, February 6, 2013. <http://www.osler.com/NewsResources/Canada-Redoubles-Efforts-at-Combating-Foreign-Bribery-and-Corruption-Officers-and-Directors-of-Canadian-Businesses-Warned-to-Play-by-the-Rules/> Accessed in April 2013.

<sup>75</sup> Cole, Emily, Kiselbach, Daniel L., Klotz, James M., Truman, Richard E.K., “Businesses Operating Outside of Canada Beware – Changes to Canada’s Anti-Corruption Law Will Require Re-examination of Current Practices”, March 6, 2013. <http://www.millerthomson.com/en/publications/newsletters/international-trade-customs-and-commodity/march-6-2013/businesses-operating-outside-of-canada-beware> Accessed in April 2013.

more than ever constitutes an imperative for ensuring a viable foreign business and the avoidance of personal sanctions including imprisonment.”<sup>76</sup>

- “The version [*of Bill S-14*] currently before the Senate reflects the Government of Canada’s commitment to combating bribery and corruption through increased enforcement under the CFPOA and highlights the critical importance of robust compliance measures for Canadian individuals and companies conducting business outside of Canada.”<sup>77</sup>
- “An effective anti-corruption compliance program will reduce the chances of a CFPOA violation significantly. It may also reduce the likelihood of a criminal prosecution or limit the penalties that may be imposed if a violation is ultimately discovered.”<sup>78</sup>

In particular, high-growth small to mid-sized companies are at an increased risk for non-compliance. As Mr. Morrison explains, “It is not unusual that when a small company experiences a high rate of growth that their size and their financial wherewithal often outpaces their compliance programs.”

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<sup>76</sup> Dattu, Riyaz, “Canada Redoubles Efforts on Combating Foreign Bribery and Corruption: Officers and Directors of Canadian Businesses Warned to “Play by the Rules””, February 6, 2013. <http://www.osler.com/NewsResources/Canada-Redoubles-Efforts-at-Combating-Foreign-Bribery-and-Corruption-Officers-and-Directors-of-Canadian-Businesses-Warned-to-Play-by-the-Rules/> Accessed in April 2013.

<sup>77</sup> Berman, Wendy and Wansbrough, Jonathan, “Proposed Amendments to the Corruption of Foreign Public Officials Act will have a Significant Impact on Canadian Companies Doing Business Abroad”, February 22, 2013. [http://www.casselsbrock.com/CBNewsletter/Proposed\\_Amendments\\_to\\_the\\_Corruption\\_of\\_Foreign\\_Public\\_Officials\\_Act\\_Will\\_Have\\_a\\_Significant\\_Impact\\_on\\_Canadian\\_Companies\\_Doing\\_Business\\_Abroad](http://www.casselsbrock.com/CBNewsletter/Proposed_Amendments_to_the_Corruption_of_Foreign_Public_Officials_Act_Will_Have_a_Significant_Impact_on_Canadian_Companies_Doing_Business_Abroad) Accessed in April 2013.

<sup>78</sup> Chang, Henry J., “Anti-Corruption Compliance Programs Essential for Canadian Corporations Operating Globally”, originally published in *Blaneys on Business*, March 2013. [http://www.blaney.com/sites/default/files/AntiCorruptionComplianceProgramsEssentialForCanadianCorporatingGlobally\\_\\_HChang\\_2013.pdf](http://www.blaney.com/sites/default/files/AntiCorruptionComplianceProgramsEssentialForCanadianCorporatingGlobally__HChang_2013.pdf) Accessed in April 2013.

The likelihood of changes to the law and the expected increase in enforcement activities open the door to a wealth of opportunities for Investigative and Forensic Accountants (“IFAs”). Mr. Drolet explains that, “Before two Canadian companies pleaded guilty in recent years, no one was really interested in anti-bribery and corruption. Since the pleas, there is more awareness, and we are getting more questions about it. Companies are being more proactive, people are wondering if they have the appropriate policies in place, and what they can implement to reduce risk.” Mr. Morrison says that his “clients’ awareness and focus on anti-corruption issues has grown exponentially.” IFAs can act both as an advisor, assisting a company in proactively changing policies and procedures to help to ensure compliance with the law, as well as be an investigator should the need to investigate allegations of non-compliance arise.

The discussion that follows focuses on the current CFPOA and the proposed changes, however it is increasingly important for Canadian companies to understand the impact and applicability of various international anti-bribery and corruption legislation on their organizations. The opinion as to which law an organization may be subject to is a legal one, and therefore should be determined by the organizations’ legal counsel. However, IFAs, through their training and experience, have the skill set to work with lawyers and the business to identify risk factors that might put the corporation under the scope of various laws.

## 8.1 The IFA as an Advisor

When assessing how the current CFPOA and proposed amendments will impact it, a company should use a risk-based approach to identify areas that need to be addressed. Part of this assessment includes evaluating the practical implications of non-compliance. While the obvious penalties for CFPOA violations can range from fines to prison time, there are other impacts for an organization to consider:

- **Investigation costs** – Even before any penalties are assessed, a company may incur costs associated with investigating allegations of bribery and corruption. For example: cosmetic company Avon has reported spending \$339.7 million USD since 2009 on “ ‘professional and related fees’ associated with a global FCPA investigation and compliance reviews”; News Corp. spent \$179 million USD on legal and professional fees related to allegations of bribery payments that emerged two years ago; and oilfield services company Weatherford has spent \$125 million USD for legal and professional fees relating to alleged government bribery in Europe, amongst other things.<sup>79</sup> Even more shocking is the amount that Walmart has spent so far in relation to allegations of a bribery scheme to win market share in Mexico in the early 2000s: the total to date is \$157 million USD, with an average of \$604,000 a day for fiscal 2013.<sup>80</sup>
- **Reputational cost** – One way this cost can be measured is by looking at the impact of share prices, which can reflect investor confidence in the company.

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<sup>79</sup> Jaeger, Jaelyn, “Analysis: The Rising Costs of FCPA Investigations”, March 4, 2013. <http://www.complianceweek.com/analysis-the-rising-costs-of-fcpa-investigations/article/282957/> Accessed in April 2013.

<sup>80</sup> Ibid.

However, this is often a more intangible cost and is measured by public opinion and reaction to less than favourable media attention.

- **Valuation of acquisitions** - A benchmark case in the US illustrates the risks a buyer faces when relying on a seller's representations in a merger or acquisition. In this case, it was found that the target company had paid approximately \$2.2 million in bribes to public officials; the purchaser only discovered this information after the deal closed. Although the purchaser subsequently conducted an investigation, terminated the corruptly-obtained agreements, and made a voluntary disclosure, this discovery led to a write off of \$22.3 million less than two years after the initial investment.<sup>81</sup> This example emphasizes the need to include appropriate risk based, anti-bribery and corruption regulatory compliance in a due diligence exercise. At the very least, compliance controls should be implemented post-acquisition.
- **Loss of key personnel and impact on “tone at the top”** – In the two Canadian cases wherein individuals were charged, these employees were at the executive or official level. The cost to find, replace and train employees at this level is significant, in addition to the downtime during the search. Perhaps more significant, but immeasurable, is the negative impact on the perceived “tone at the top” that filters through to lower level employees.

The quantum of these costs should be enough to caution any company into proactively addressing their anti-bribery and corruption programs.

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<sup>81</sup> Shearman & Stirling LLP, “Latin Node Inc.: Undiscovered FCPA Violations Wipe Out an Investment”, April 15, 2009. <http://www.shearman.com/latin-node-inc-undiscovered-fcpa-violations-wipe-out-an-investment/> Accessed in April 2013.

An IFA can assist with the risk assessment process by helping to answer the following questions:

- Does the company operate in countries where bribery and corruption are prevalent?
- Does the company operate in an industry with a reputation for corruption?
- Does the company operate in countries with significant interaction with government officials?
- Who exactly is the company doing business with?
- Has the organization experienced previous incidents of bribery and corruption?
- Is the company considering acquiring an organization that has any of the above concerns?
- How might violations of anti-bribery and corruption laws impact the company?
- What pressures exist that may put compliance with the laws at risk?

In addition to helping an organization understand its operational risks, an IFA has the background and training to help identify gaps in an entity's accounting control system, and to make recommendations which can assist a company in ensuring that they have adequate books and records should this proposed amendment to the CFPOA be passed.

The completion of a risk assessment, as discussed above, provides a framework for evaluating anti-bribery and corruption controls.

Any anti-bribery and corruption program should be multi-faceted and address several interrelated elements, starting with the tone at the top of an organization. Key aspects of an anti-bribery and corruption program may include:

- Entity level controls such as code of conduct, communication and training, and management oversight;
- Process level controls over certain higher-risk accounts such as cash disbursements and time and expense processes;
- Due diligence procedures around interactions with third parties;
- Detection controls such as whistleblower mechanisms and data analytics; and
- Response plans such as investigation, remediation and disclosure protocols.

To assist companies in designing a comprehensive program, the OECD adopted the “Good Practice Guidance on Internal Controls, Ethics, and Compliance” in February 2010. The guidance sets out twelve principles of a good compliance program. These principles are summarized below:

1. Commitment and support from Senior Management;
2. Corporate policy prohibiting foreign bribery;
3. Compliance is the duty of individuals at all levels of the company;
4. Oversight is assigned to one or more senior corporate officers;
5. Applicable to all directors, officers and employees and addresses key risk areas outlined in the guidance, including gifts, hospitality expenses and facilitation payments;

6. Applicable to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, joint venture partners, etc.;
7. Internal controls designed to maintain fair and accurate books, records and accounts;
8. Periodic communication and documented training for all levels of staff;
9. Measures to encourage and support the observance of ethics and compliance programs;
10. Appropriate disciplinary procedures to address violations;
11. Measures to provide guidance and advice on an urgent basis regarding difficult situations, and allow for confidential reporting of, and response to, suspected violations; and
12. Periodic reviews of the effectiveness of ethics and compliance programs.

TI Canada has also published an “Anti-Corruption Compliance Checklist to help companies assess how robust their program is and identify areas to make improvements.

The document recommends a six step process, summarized below:<sup>82</sup>

Stage	Company Relevance
Assess	Where do you stand? What are the risks?
Plan	Benchmark against best practice using a code and develop detailed policies.

<sup>82</sup> Transparency International Canada, Anti-Corruption Compliance Checklist, Second Edition 2012(R1). [http://www.transparency.ca/9-Files/Older/2012-New/2012-TI-Canada\\_Anti-Corruption\\_Checklist\\_2012R1.pdf](http://www.transparency.ca/9-Files/Older/2012-New/2012-TI-Canada_Anti-Corruption_Checklist_2012R1.pdf) Accessed in April 2013.

Stage	Company Relevance
Act	Implement your no-bribe policies through detailed procedures.
Monitor	Carry out continuous self-checks and improvement.
Report to Stakeholders	Report internally and externally on what you do.
Assure	Raise the credibility of what you do.

Ms. Schulz believes that, “the people best suited to provide proactive assistance are people who understand what goes wrong, how these violations occur and what has put companies offside in the past.” IFAs can draw on their knowledge and practical experience to provide a real benefit to companies in this area.

Also related to these proactive measures is ensuring that appropriate anti-bribery and corruption due diligence is conducted prior to an acquisition. IFAs can help to review whether the target company has appropriate anti-bribery and corruption policies in place, and perform data analytics to identify potential instances of non-compliance. As Mr. Drolet states, “This is important, because after an acquisition you are stuck with the company and any problems they may bring.”

In summary, Mr. Drolet says, “I don’t think this is a fad, it is here to stay. [*Companies*] need to be more proactive, have proper policies in place and audit these policies. They should also use data analytics to proactively identify potential risky transactions. The next step is that you need to audit that employees are complying with the new policies.

Some things are already in place in some companies, but they need to be tweaked a bit and improve it.” These are all areas that an IFA is well-position to assist with.

## **8.2 The IFA as an Investigator**

Despite a company’s best efforts, allegations of violations may arise. An organization needs a clearly defined response plan that sets out who is responsible for the investigation, the process to be followed, and how the alleged wrongdoer is dealt with. Effective response programs will set out guidelines for the use of outside counsel and when to involve other third parties, such as professional service firms, that can assist with either the investigation of the authorities.

Some red flags that may indicate that a more in-depth investigation is warranted include:

- Fees and/or commissions to third parties are required to be paid up front;
- The amount of fees or commission are not commensurate with the value being provided or are inconsistent with the local going rate;
- The individuals you are doing business with have family or business relationships with foreign government official or royal family member;
- There are suggestions, blatant or less obvious, that money is needed to “get the business”;
- Third-parties have made requests for inflated invoices – this suggests that money may be used for purposes other than stated on the invoice;

- A prospective agent or consultant refuses to comply with the principles contained in the company Code of Business Conduct and Ethics or provide anti-bribery representations;
- Requests for offshore payments or other unusual payment structures;
- Requests that commissions be paid to third parties other than retained consultants;
- Unusual bonuses paid to foreign operational managers;
- Suspicious journal entries;
- False invoices;
- Unusual cash disbursements;
- “Off-book” accounting, or transactions recorded in a way that does not represent the substance of the transaction; and
- Missing documentation.

Anti-bribery and corruption investigations are largely similar to any other investigation, however there are added elements of complexity. Firstly, the investigator must be familiar with the anti-bribery laws to understand whether there may be violations. This includes not only being familiar with the CFPOA, but also being able to identify factors that could cause a company to be subject to other international laws. As this is a legal decision, a lawyer is best suited to make this final determination. Once the legal landscape has been established, the IFA can carry out the investigation work steps. Given the inherent global aspect of foreign corruption, it will be important to establish a team that is familiar with the local language and business practices of the country in

which the investigation is taking place. IFAs can also help with the collection and preservation of traditional information and electronic discovery procedures. Upon completion of the investigation, the IFA may be able to act as an expert witness to testify in court.

Ms. Schulz summarizes some of the key skills that IFAs can bring to an investigation:

“We can put bodies on ground in foreign jurisdictions quickly. These types of investigations often benefit from people that are native to the jurisdiction and understand language and local business skills, which we can provide. We can also bring independence and objectivity to the investigation. This allows a company to show the regulators that they have taken an appropriate response and that they have taken the issue seriously.” Overall, given their background and training, IFAs are well-suited to assist a company in conducting a global bribery and corruption investigation.

## Exhibit A: Summary of the OECD’s Peer Reviews of Canada

Summary of Recommendations or Follow-up	Phase 1 <sup>83</sup>	Phase 2 <sup>84</sup>	Phase 3 <sup>85</sup>
<b>Facilitation payments</b> – Canada should consider amending the exceptions for facilitation payments and the defences for “reasonable expenses incurred in good faith” and “acts of a routine nature” as they could affect implementation of the Convention.	X	X	X
<b>Nationality jurisdiction</b> – Not asserting nationality jurisdiction could create a gap in the law.	X	X	X
<b>Sanctions</b> – The adequacy of this provision will depend on actual implementation. It will continue to be monitored.	X	X	X
<b>Awareness of the law</b> – Canada should adopt a more systematic and coordinated approach in all government agencies. This should also be extended to companies.		X	X
<b>Investigation and prosecution</b> – Canada should establish a coordinating role for one of the principal agencies.		X	X
<b>Accounting requirements</b> – Canada should consider introducing laws to prevent and detect bribery through accounting requirements, external audit and internal company records.		X	X
<b>Other measures for preventing and detecting bribery</b> – Recommendations relate to whistleblower protection, process for reporting allegations, tax reporting, and disclosure to law enforcement authorities.		X	X

<sup>83</sup> OECD, “Canada: Review of Implementation of the Convention and 1997 Recommendation”, 1997. <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2385703.pdf> Accessed in April 2013.

<sup>84</sup> OECD, “Canada: Phase 2 – Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions”, March 25, 2004. <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf> Accessed in April 2013.

<sup>85</sup> OECD, “Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada”, March 2011. <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf> Accessed in April 2013.

Summary of Recommendations or Follow-up	Phase 1 <sup>83</sup>	Phase 2 <sup>84</sup>	Phase 3 <sup>85</sup>
<i>Definition of a business</i> – Canada should remove the “for profit” element.		X	X
<i>Prosecutorial discretion</i> – Canada should clarify the guidelines.		X	X
<i>Policies of other agencies</i> – Canada should revisit the policies of other agencies (such as Export Development Canada, Canadian International Development Agency, and Public Works and Government Services Canada) on dealing with applicants that have been convicted of bribery and corruption.		X	X
<i>Statistical information</i> – Canada should compile information on the sanctions, including differentiating between individuals and companies, and plea-bargains and trial proceedings.		X	X
<i>Corporate criminal liability</i> – This issue would benefit from a horizontal analysis of other parties to the Convention.	X		
<i>Additional penalty</i> – Canada should prevent convicted companies from contracting with the government.			X
<i>Investigation resources</i> – The RCMP teams should remain with at least six full-time members plus one civil servant for each team. Consider additional resources.			X
<i>Voluntary disclosure</i> – Canada should consider options which might encourage self-reporting.			X
<i>Compliance programs</i> – Canada should promote compliance programs.			X

*Legend*

	<i>Noted in all three phases</i>
	<i>Noted in two of the three phases</i>
	<i>Noted in only one phase</i>

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