Global Compact Network Canada

JURISDICTION

Chapter One of Anti-corruption Compliance Program:
A Guide for Canadian Businesses

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DAVIES

Overview and Jurisdictional Scope of the ***Corruption of Foreign Public Officials Act***

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I. INTRODUCTION

"Jurisdiction" was once described by Felix Frankfurter, a former justice of the United States Supreme Court, as "a verbal coat of too many colors".[1] In the realm of law enforcement, "jurisdiction" is indeed a broad concept, which generally refers to the power of an authority to do something, including:[2]

- the power to legislate, make rules, issue commands or grant authorizations that are binding upon persons and entities, which is sometimes referred to as prescriptive jurisdiction;
- the power to use coercive means to give effect to laws and to police or investigate a matter, which is sometimes referred to as enforcement or investigative jurisdiction; and
- the power to resolve disputes or interpret the law through decisions that carry binding force, which is also known as adjudicative jurisdiction.

This chapter serves to delineate the outer limits of the jurisdiction of Canadian authorities, including the jurisdiction of Canadian courts, to enforce Canada's Corruption of Foreign Public Officials Act (the "CFPOA") upon individuals and entities. In other words, in this chapter, we will attempt to identify the jurisdictional hooks that can bring a CFPOA offence under the jurisdiction of Canadian courts.

The first part of the present chapter gives a general overview of the scope of the CFPOA offences, which informs the authorities' jurisdiction under the CFPOA.

The second and third parts of the present chapter will address, respectively, jurisdiction over the offence and jurisdiction over the person accused of the offence. These are two separate notions,[3] but both are essential in enabling the courts to assert their jurisdiction.[4]

The fourth part will address situations where courts can assert jurisdiction over persons and entities for the actions of third parties, such as subsidiaries, distributors and partners.

Finally, the fifth part will briefly outline the situations where a given offence can fall simultaneously under the jurisdictions of the Canadian CFPOA, the US Foreign Corrupt Practices Act (the "FCPA") and the UK Bribery Act.

[1] United States v. L. A. Tucker Truck Lines, Inc., 344 US 33 at 39 (1952) [Tucker].

[2] R v. Hape, 2007 SCC 26 at para 58 [Hape].

[3] Chowdhury v. H.M.Q., 2014 ONSC 2635 at para 13 [Chowdhury]; Canada (Minister of Justice and Attorney General) v. Kavaratzis, 2006 CanLII 13237 at para 18 (ON CA) [Kavaratzis].

[4] Chowdhury, supra note 3 at para 13.

II. OVERVIEW OF THE CFPOA OFFENCES

The CFPOA provides for two criminal offences: (a) Section 3 of the CFPOA criminalizes foreign bribery while (b) Section 4 of the CFPOA provides for a books and records offence.

A. Section 3 CFPOA: Foreign Bribery Offence

Foreign corruption, as criminalized under Section 3 of the CFPOA, is:

i. the giving, offering or agreement to give or offer;

ii. an advantage or benefit of any kind;

iii. directly or indirectly to a foreign public official

in order to obtain an advantage in the course of business, and:

a. as consideration for an act or omission by the official in connection with the performance of his or her duties; or

b. to induce the official to use his or her position to influence the decisions of his or her state or public international organization.

A closer look at the main components of the offence reveals its breadth. First, the CFPOA criminalizes the conduct of giving, offering or agreeing to give or offer a bribe, regardless of whether or not the bribe was actually received by the public official.[5] In criminal law, such an offence is referred to as an inchoate offence or a conduct crime, as opposed to a result crime.[6] It follows that if a person agrees to offer a benefit to a foreign public official, but later changes his or her mind, that person has nonetheless committed an offence under the CFPOA – even if there is no evidence that money has changed hands.[7]

Second, the concept of an advantage or benefit of any kind leaves open the possibility of even relatively small benefits falling afoul of the CFPOA.[8]

> The offence targets not only offshore wire payments and envelopes filled with cash. It can also encompass lavish gifts and less obvious benefits, such as payments of tuition, promises of future employment, support for business opportunities, provision of confidential information or access to an exclusive club.[9] It could also encompass the practice of hiring or doing business with a public official's children or relatives, an issue coined as the "princeling problem".

In the United States, authorities have taken the position that such practice could constitute an offence if the official's duties relate to the hiring company's interests and something of value passes through the relative to the official.[10]

[5] R v. Karigar, 2013 ONSC 5199 at para 28-29 [Karigar].

[6] R v. Greenwood, [1991] OJ No. 1616 at para 31 (ONCA) (Quicklaw) [Greenwood].

[7] Karigar, supra note 5 at paras 29 and 33.

[8] However, it may prove difficult to characterize a trivial benefit as being given as consideration for an act or omission.

[9] Mark Pieth, Lucinda A. Low & Nicolas Bonucci, eds., The OECD Convention on Bribery: A Commentary, 2nd ed. (New York: Cambridge University Press, 2014) at 128.

[10] US DOJ, FCPA Opinion Releases, n° 82-01, 82-04 & 95-03, online: www.justice.gov/criminal/fraud/fcpa/.

"Late rewards" bestowed after a foreign public official has done or omitted to do something are not expressly covered by the offence. While such payments might not influence the public official to take any given course of action, they could still be viewed as evidence of a prior agreement.

An exception is provided for benefits that are permitted or required under local laws or under a public international organization's governing laws.[11] Providing travel, hospitality or entertainment to a public official can also amount to an unlawful benefit, unless the expenditures are reasonable and are directly related to a valid business purpose, such as the demonstration of products or the execution of a contract.[12] However, this exception does not, for example, cover the expenditures of a public official's guest.

An exception is also currently provided for certain "facilitation payments" made with the intent to induce a public official to perform or expedite the performance of a routine act that is part of the foreign public official's duties or functions. Such routine duties, which are usually non-discretionary, include the issue of permits, mail delivery, power and water supply, police protection or the loading and unloading of cargo.[13]

However, legislation to repeal the facilitation payment exception has been passed by Parliament and will take effect if and when it is proclaimed in force, which could happen without advance notice.[14] The suspension of the repeal gives Canadian businesses time to adjust their foreign activity accordingly.

B. Section 4 CFPOA: Books and Records Offence

The books and records offence is a relative newcomer in Canadian foreign anti-corruption law. It was introduced in the June 2013 amendments to the CFPOA. Section 4 of the CFPOA provides a number of offences for concealing bribery in accounting records. Specifically, every person who:

i. for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business; or

ii. for the purpose of hiding that bribery

commits one of the following acts:

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-existing expenditures in those books and records;

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

perpetrates an offence liable to imprisonment for a term of not more than 14 years.

[11] Corruption of Foreign Public Officials Act, SC 1998, c 34, s 3(3)(a) [CFPOA].

[12] Ibid, s 3(3)(b).

[13] Ibid, s 3(4).

[14] Fighting Foreign Corruption Act, SC 2013, c 26, s 5 [Bill S-14].

THE ALSTOM CASE

To our knowledge, no charge has yet been laid in Canada based on the books and records offence. The Alstom case in the United States provides, however, a relevant example. Between 1998 and 2004, Alstom and its direct and indirect subsidiaries allegedly paid more than US$75 million in bribes to foreign officials. Those payments were made in order to secure projects worth more than US$4 billion in Indonesia, Saudi Arabia, Egypt, Taiwan and the Bahamas. The bribery scheme allegedly continued until at least 2011 while the gain to Alstom continued to rise. The gain to Alstom was estimated at US$296 million. According to the authorities, Alstom had disguised the bribes in its books and records by, for instance:

- hiring consultants to conceal the payments to foreign officials, while purporting to perform legitimate services in connection with bidding on and executing projects;
- creating false records to conceal the improper payments;
- instructing consultants to submit false invoices and other fraudulent backup information; and
- submitting false certifications to regulatory agencies.

Alstom decided not to dispute the allegations and pleaded guilty to the charge of falsifying or causing to be falsified its books, records and accounts. It agreed to pay a criminal penalty of more than US$772 million, which constitutes the largest FCPA criminal fine and the second-largest FCPA settlement ever.

It must be noted that the facilitation payment exception addressed above is limited to the foreign bribery offence. It follows that a facilitation payment, although not criminal yet, must be recorded as such in the books and records, failing which the corporation could be exposed to criminal liability.

III. JURISDICTION OVER THE OFFENCE

Jurisdiction over the offence is the first of two conditions that must be met for a court to adjudicate an alleged offence under the CFPOA, the other being jurisdiction over the person. Jurisdiction over an alleged offence under the CFPOA can be established on two bases: (a) jurisdiction based on territory and (b) jurisdiction based on nationality.

A. Territorial Jurisdiction

Territorial jurisdiction is the primary basis of criminal jurisdiction[15] and extends to criminal offences that are committed in Canada. In recent decades, however, "bright territorial lines have blurred as economies globalize and modern developments in travel and information technology lead to more transnational and international criminal activity."[16] Consequently, the outer limits of territorial jurisdiction also evolved to extend beyond Canadian borders to criminal offences that:[17]

- commence or occur outside Canada if completed, or if a constituent element takes place, within Canada; or
- occur or begin within Canada even though the offences have consequences abroad.[18]

[15] Libman v. The Queen, [1985] 2 SCR 178 at 183 [Libman].

[16] Chowdhury, supra note 3 at para 11.

[17] Hape, supra note 2 at para 59.

[18] Ibid.

Today, in order to assert territorial jurisdiction over a CFPOA offence, courts must be satisfied that there exists a "real and substantial link" between the offence and the country,[19] a test that is not applied rigidly.[20] The real and substantial link test is not limited to the essential elements of the offence,[21] such as the guilty act or the guilty state of mind. In other words, it is not necessary to prove that the bulk of the offence is grounded in Canada. Instead, a real and substantial link can also be established where the legitimate aspects of a transaction – for instance, the execution in Canada of a contract that was obtained through the bribery of a foreign public official – occurred in Canada.[22]

The real and substantial link test implies the consideration of all relevant facts that took place in Canada and may legitimately give Canadian authorities an interest in prosecuting the offence.[23] Under the CFPOA specifically, Canadian courts and authorities have "a legitimate interest in assuming jurisdiction for the purpose of prosecuting persons involved in an international bribery scheme that has its genesis in Canada."[24]

> It follows, inevitably, that different states may have concurrent claims to jurisdiction over a criminal offence that takes place in two or more states.

In practice, "there may be sufficient links to different jurisdictions to justify proceedings in more than one place."[25] This is what usually happens in the context of the CFPOA offences due to their very nature. In fact, the bribing of foreign public officials often involves a series of operations that spans different jurisdictions and necessitates the collaboration of several actors scattered across the world. Any injustice that might result from the prosecution of a person for the same CFPOA offence in more than one country can be avoided by demonstrating that the same offence, based on substantially the same evidence, has led to an acquittal or a conviction in another jurisdiction.[26]

The following list includes situations where a real and substantial link can be established and, therefore, a territorial jurisdiction could be asserted depending on the circumstances:

- the act is planned, initiated or completed in Canada;[27]
- the impact of the offence is felt in Canada;[28]
- the essential elements of the offence take place in Canada;[29]
- the bribe was agreed to in Canada;
- the fruits of the offence, and a direct or indirect beneficiary of the bribe, such as the business to which the contract is awarded, are located in Canada;
- the scheme was agreed upon, prepared, devised, organized and developed in Canada; and
- the directing mind behind the scheme is located in Canada; and
- the fruits of the offence benefit someone in Canada.

[19] Libman, supra note 15 at para 74.

[20] R v. Karigar, 2012 ONSC 2730 at para 8 [Karigar preliminary motion].

[21] Karigar, supra note 5 at para 39.

[22] Chowdhury, supra note 3 at para 39.

[23] Libman, supra note 15 at para 71.

[24] Chowdhury, supra note 3 at para 39.

[25] Libman, supra note 15 at 188.

[26] CFPOA, supra note 11, s 5(4).

[27] Libman, supra note 15 at 185–186.

[28] Ibid, at 185.

[29] Ibid, at 186.

THE KARIGAR CASE

The case of R v. Karigar[30] is a good illustration of a Canadian court asserting territorial jurisdiction over a CFPOA offence with international ramifications. In June 2005, the accused, Nazir Karigar, an Indian-born Canadian businessman and resident of Toronto for many years, approached Cryptometrics Canada, a company based in Ontario. He told Cryptometrics' executives that he had good contacts with certain Air India officials and advised that the airline was looking to acquire technology to deal with airline security issues, particularly passenger identification fraud. In September 2005, Karigar met with representatives of Cryptometrics Canada to discuss a passenger identification solution for Air India using Cryptometrics' technology. Karigar offered to help Cryptometrics Canada obtain the contract from Air India in return for 30 percent of the expected revenue. Over the following months, Karigar forwarded to Cryptometrics Canada a good amount of information on the expected requirements of Air India, including inside information about proposed tender terms, competitors and a draft tender.

In April 2006, Karigar met in India with a representative of Cryptometrics Canada to discuss the submission of Cryptometrics' bid. It was mentioned during the meeting that Indian officials would have to be paid in order to obtain the contract. Financial spreadsheets listing the Air India officials to be bribed and the amount of such bribes were provided. In June 2006, Karigar asked Cryptometrics' executives by e-mail if he could get US$200,000 for the co-chair of the selection committee of the Air India project. The money was transferred from Cryptometrics USA to Karigar's bank account in Mumbai. Another sum of US$250,000 was transferred from Cryptometrics to Karigar's bank account in India on the understanding that it would be paid to the then minister of civil aviation to secure the contract. None of the evidence adduced at trial proved that the bribe was ultimately paid to the Air India official.

Eventually, the operation turned sour – Cryptometrics lost the bid and Karigar was charged under the CFPOA with offering or agreeing to give or offer bribes to Indian public officials. In his defence, Karigar argued, among other things, that Canada lacked territorial jurisdiction over the offence, since the essential elements of the offence occurred abroad. Specifically, he argued that the "pullers of financial strings" behind the operation were based in New York and that the dealings with Air India officials almost all occurred in India.

The court rejected Karigar's arguments. It found that a significant portion of the activities constituting the offence took place in Canada. More specifically, the Court found that:[31]

- Karigar was a Canadian businessman and long-time Toronto resident, and Cryptometrics was a Canadian company based in Ottawa;
- at all material times in reference to efforts to secure the Air India contract, Karigar was employed by and acted as an agent of Cryptometrics Canada;
- Karigar and his co-conspirators attempted to obtain work, and an unfair advantage, for a Canadian company as the fruit of a public foreign contract obtained through bribery;
- had the contract been awarded, the evidence shows that a great deal of the work would be done by Cryptometrics Canada employees in Ottawa;
- nearly all of the real evidence, principally documents and e-mails, was situated in Canada and was seized in Canada; and
- all of the witnesses who testified at trial were from Canada.

Accordingly, the court found that the facts had a real and substantial connection to Canada,[32] asserted territorial jurisdiction over the offence and found Karigar guilty. Karigar was sentenced to three years in prison.[33]

[30] Karigar, supra note 5.

[31] Ibid, at paras 40–41.

[32] Ibid, at para 39.

[33] It is important to note that at the time of the offence by Mr. Karigar, a violation of the CFPOA was subject to a fine at the discretion of the court and imprisonment of up to five years. The maximum term of imprisonment has since been increased to 14 years. As such, it is expected that the Crown will seek proportionately harsher sentences under the amended CFPOA.

B. Jurisdiction Based on Nationality

The 2013 amendments to the CFPOA introduced a nationality-based jurisdiction. Since then, every person who is:

- a Canadian citizen;
- a permanent resident who, after the commission of the act or omission, is present in Canada; or
- a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province

may fall under the purview of the CFPOA, regardless of whether their activities have a real and substantial link with Canada.[34]

> Canadian professionals and business people who work abroad can now be prosecuted in Canada even if their actions have no connection with their country of citizenship or residence.

To be clear, the nationality-based jurisdiction does not replace territorial jurisdiction; it supplements it. In practice, it simplifies prosecution considerably by eliminating the requirement to establish a "real and substantial link" where the alleged offender is a Canadian person, resident or entity.

Further, according to the most recent case law, the new nationality-based jurisdiction is not retroactive.[35] Accordingly, only CFPOA offences committed after the coming into force of the June 2013 amendments can be prosecuted under the nationality-based jurisdiction. This is why the prosecution of Karigar, which dealt with pre-2013 facts, proceeded based on territorial jurisdiction.

IV. JURISDICTION OVER THE ACCUSED

The fact that a Canadian court has jurisdiction over an offence under the CFPOA does not necessarily mean that it has jurisdiction over all of the parties to that offence.[36] Jurisdiction over the accused must also be established for a court to have the power to adjudicate an alleged offence under the CFPOA. This will only be possible if either:

- that person physically comes into Canada, thereby making possible service in person; or
- if the other state offers to surrender that person to Canada through extradition procedures.[37]

Hence, a person accused under the CFPOA, who is resident and domiciled abroad, is a priori not subject to the jurisdiction of Canadian courts, unless he or she is found within or extradited to Canada.[38]

[34] CFPOA, supra note 11, s 5(1).

[35] Karigar, supra note 5 at para 35.

[36] Chowdhury, supra note 3 at para 54.

[37] Ibid; Canada has extradition treaties with about 50 countries, but not all of them extradite their own nationals.

[38] Ibid, at para 38.

THE PADMA BRIDGE CASE

The case of Abul Hasan Chowdhury v. Her Majesty the Queen[39] is an example where a Canadian court refused to assert jurisdiction over a foreign participant to a CFPOA offence. Chowdhury, a former interior minister of Bangladesh as well as a former minister of state, had allegedly been paid to exert influence over the selection committee for the Padma bridge project in favour of SNC-Lavalin Inc. He was a Bangladeshi citizen and resident of Bangladesh. He was not and had never been a Canadian citizen or resident, nor was there any evidence that he had ever been to Canada. Furthermore, all of Chowdhury's actions in furtherance of the alleged bribery scheme were said to have occurred in Bangladesh. At the time, Canada had no extradition treaty with Bangladesh and Canada had not attempted otherwise to have Bangladesh surrender Chowdhury for prosecution in Canada. The court found that although it had jurisdiction over the charges laid on Chowdhury, it would lack jurisdiction over the accused until Canada was able to "lay hands" on him.[40]

V. CRIMINAL LIABILITY FOR THE ACTIONS OF THIRD PARTIES

A parent company's liability with regards to CFPOA offences can be triggered and extended through the activities of third parties, including subsidiaries, by virtue of at least two mechanisms. First, third parties can engage a corporation's criminal liability through the operation of Section 22.2 of the Criminal Code when they act in their capacity as representatives of the corporation. Second, Section 3 of the CFPOA contains a built-in anti-avoidance clause, which ensures that bribery schemes of all sorts, no matter how convoluted, are deterred and punished.

A. Corporate Criminal Liability

Understanding the mechanics of corporate criminal liability for intentional offences, such as those under the CFPOA, is essential to define the true reach of the CFPOA over acts committed abroad by corporations or their subsidiaries. Pursuant to Section 22.2 of the Criminal Code, a corporation can be a party to a CFPOA offence if, with the intent, at least in part, of benefiting the organization, one of its senior officers:

1. acting within the scope of his or her authority, is a party to the CFPOA offence;
2. having the mental state required to be a party to the CFPOA offence and acting within the scope of his or her authority, directs the work of other representatives of the organization so that they commit the act or make the omission specified in the offence; or
3. knowing that representative of the organization is or is about to be a party to the CFPOA offence, fails to take all reasonable measures to stop the representative from being a party to the offence.

Thus, a corporation's exposure to criminal liability under the CFPOA will depend upon the combined actions and mental states of its "senior officers" and "representatives," two terms that are defined under the Criminal Code.[41]

The term "representatives" refers to the organization's directors, partners, employees, agents or contractors.[42]

[39] Ibid.

[40] Ibid, at para 57.

[41] Criminal Code, RS C 1985, c C-46 s 2 [Criminal Code].

[42] Ibid.

Although the definition provided under the Criminal Code does not expressly refer to subsidiaries, it is wide enough to include them when they are acting as agents or contractors of the parent company, even if they are constituted or operating offshore. This is often the case where a subsidiary is operating in fact as a branch of the parent company.

As for "senior officers," they are representatives who either:[43]

- play an important role in the establishment of the organization's policies; or
- are responsible for managing an important aspect of the organization's activities.

Consequently, there are circumstances where a corporation could possibly engage its criminal liability through the guilty acts and minds of its senior officers and foreign representatives. This could be the case where, for instance, a senior officer:

- e-mails instructions to a foreign agent, be that the employee of a foreign subsidiary or foreign distributor, to bribe a foreign public official or hide an act of bribery;
- agrees to give a benefit to a relative of the official in exchange for turning a blind eye to toxic spills emitted by a plant operated by a foreign subsidiary;
- fails to act upon information from a whistleblower about a bribery scheme; or
- although he or she knows that the corporation is doing business with politically exposed persons in highly corrupt countries, fails to take proactive and preventive compliance measures.

The bottom line is that it is incumbent on the corporation to make sure that their senior officers comply with foreign anti-corruption legislation, proactively train the employees and third parties who are under their supervision and deter non-compliant behaviours. But who or what are senior officers exactly?

Senior officers are, in some way, the directing minds of the organization.[44] There may be several of them within a single organization, each associated with a separate and distinct sphere of activity or territory.[45] In order to determine whether an employee is a senior officer, courts consider:[46]

- the duties and responsibilities that have been given to the employee in the sphere of activity that has been delegated to him;
- the importance of the sphere of activity that the person oversees for the organization; and
- the organization's organizational chart or the division of management's responsibilities, notwithstanding the employee's title.

Directors, chief executive officers and chief financial officers are clear examples of senior officers.[47] Employees who oversee an important territory of the organization's activities and who directly report to C-suite executives could also constitute senior officers in certain circumstances.

It is important to underline that very few precedents exist for interpreting Section 22.2 of the Criminal Code. As a result, the notion of "senior officer" is still vague and its outer limits are uncertain.

[43] R v. Pétroles Global Inc., 2013 QCCS 4262 at para 39 [Pétroles Global].

[44] Ibid, at para 32.

[45] Ibid, at paras 48–49.

[46] Ibid, at para 47.

[47] Criminal Code, supra note 41, s 2.

THE PÉTROLES GLOBAL CASE

One recent decision sheds some light on the definition of "senior officer". In R v. Pétroles Global Inc.,[48] a retail gasoline operator was charged with conspiracy to fix gasoline prices. As part of its defence, the company argued that the offence had been committed without the knowledge of its senior officers and, therefore, did not give rise to criminal liability on its part. The question at issue was to determine whether the employees of Pétroles Global had been involved in the conspiracy, and whether those who had implicitly tolerated it were senior officers.

The court held that in order to determine whether an employee is a senior officer, we must:

- consider the duties and responsibilities that have been given to the person in the sphere of activity that has been delegated to that individual;
- evaluate the importance of the sphere of activity that the person oversees for the organization; and
- go beyond the title of the employee, the organization's organizational chart or the division of management's responsibilities.

In the case of Pétroles Global, for which retail gasoline sales constituted an important part of Pétroles Global's business activities and was its main source of revenue, the court concluded that the general manager for Quebec and the Maritimes was in fact a senior officer, considering that he:

- oversaw the work of six territorial managers in those provinces;
- directly reported to the vice-president of operations, the latter having no role whatsoever to play in the daily oversight of the territorial managers in Quebec and in the Maritimes; and
- oversaw the management of 207 service stations, which represented two-thirds of Pétroles Global's network.

As the case of Pétroles Global demonstrates, the notion of "senior officer" may not be limited to an organization's senior management. Quite the contrary, it can have a fairly broad meaning and, depending on the circumstances, it can also encompass mid-level managers.

As investigations by the RCMP are mounting and high-profile cases are making their way through the courts, we should begin to see some decisions appear within the next few years which will give further directives on the mechanics of criminal corporate liability, including in the context of the CFPOA specifically. For the time being, caution is of key importance and corporations should take proactive measures to ensure that their foreign subsidiaries, agents, subcontractors, distributors, lobbyists and local advisers comply with the CFPOA, failing which corporations could be accused of wilful blindness, especially if they operate in countries where officials are well known to be prone to corruption.

[48] 2013 QCCS 4262.

B. Anti-avoidance Clause

The offence of foreign corruption covers both direct and indirect benefits. The notion of an indirect benefit covers an array of scenarios by which benefits can find their way to a foreign public official through intermediaries. On the one hand, it can refer to the funneling of the bribe through intermediaries, such as consultants and subsidiaries.

For instance, in R v. Niko Resources Ltd.,[49] Niko's Bangladeshi subsidiary had provided a Toyota Land Cruiser to the Bangladeshi state minister for energy and mineral resources in order to influence the minister in his dealings with Niko Bangladesh. In its guilty plea, Niko Canada acknowledged having funded Niko Bangladesh's acquisition of the car, knowing that the company would deliver it to the foreign public official.[50]

On the other hand, an indirect benefit can also refer to providing a benefit to a third party who is affiliated with a foreign public official, including a child, a relative, a political party or a business. Prosecutors could take the position that an offence has been committed if the benefit given or offered to the affiliated third party ultimately benefits the foreign public official.

The cases of R v. Griffiths Energy International[51] and SEC v. Schering-Plough Corporation are good examples of benefits that were provided to third parties who were affiliated with foreign public officials.

THE GRIFFITHS ENERGY INTERNATIONAL CASE

In Griffiths, the corporation had allegedly given US$2 million in cash as well as shares of its capital stock to the wife of Chad's ambassador to the U.S. and Canada. These illegal payments were discovered by Griffiths' new management while preparing a public offering of shares. Griffiths conducted an internal investigation, co-operated with Canadian authorities and pleaded guilty to CFPOA charges.

THE SCHERING-PLOUGH CORPORATION CASE

In the case of Schering-Plough Corporation, a US-based pharmaceutical company, the corporation had made a US$76,000 donation to a bona fide charity founded by the director of a Polish regional government health authority. The US Securities and Exchange Commission (the "SEC") found, pursuant to the US Foreign Corrupt Practices Act (the "FCPA"), that the payment was made to induce the director to purchase Schering-Plough's pharmaceutical products within the regional health authority.[52] Accordingly, the SEC viewed Schering-Plough as having given something of value – perhaps "enhanced self-worth or prestige"[53] – to a foreign public official. Schering-Plough paid a civil penalty of US$500,000 and undertook to retain an independent consultant to review its anti-corruption policies.

[49] R v. Niko Resources Ltd., 2011 CarswellAlta 2521 (ABQB) [Niko Resources].

[50] R v. Niko Resources Ltd., 2011 CarswellAlta 2521 (ABQB) [Agreed Statement of Facts] at para 4.

[51] R v. Griffiths Energy International, [2013] AJ No 412 (ABQB).

[52] SEC v. Schering-Plough Corporation, Case No 1:04CV00945 (PLF) (DDC) (9 June 2004), online: www.sec.gov/litigation/admin/34-49838.htm.

[53] Mike Koehler. "A Double Standard? Part III." (September 30, 2010), online: FCPA Professor http://fcpaprofessor.com/a-double-standard-part-iii/.

VI. COMPETING AND OVERLAPPING JURISDICTIONS

"Criminal conduct that crosses borders will be increasingly frequent," as stated by the court in Chowdhury.

> "As a consequence, there will be times when more than one state will have a claim for jurisdiction over a criminal offence."[54]

Since several countries have adopted or are about to adopt extraterritorial foreign anti-corruption statutes, instances of overlapping or competing assertion of jurisdiction will become more frequent. Two of those statutes are worth noting, given their large scope, which renders them potentially applicable to Canadian businesses.

A. US Foreign Corrupt Practices Act

The American foreign anti-corruption law, the FCPA, has an equally broad scope. In fact, in recent years, US anti-corruption legislations have drastically expanded in jurisdictional scope. The FCPA covers three categories of individuals and companies.[55]

First, the FCPA applies to "issuers," that is, to all companies listed on a national securities exchange in the United States and to all companies whose stock is traded on the over-the-counter market in the United States that are required to produce periodic reports to the SEC.[56] Thus, to be subject to the FCPA, an issuer does not need to be based in the United States and does not need to operate business in the United States.

Second, the FCPA applies to "domestic concerns," namely, in the case of an individual, any United States citizen, national or resident and, in the case of a corporation, any business which either is organized under the laws of the United States (or of its states) or has its principal place of business in the United States.[57]

Third, the FCPA contains a territorial jurisdiction provision, thereby encompassing individuals and entities which, although not issuers or domestic concerns, make an act forbidden by the FCPA while in the territory of the United States.[58]

In all three cases, officers, directors, employees, agents, or stockholders acting on behalf of those individuals or entities can become liable under the FCPA.[59]

B. UK Bribery Act

The British foreign anti-corruption statute, the UK Bribery Act, is widely regarded as one of the strictest foreign anti-corruption legislations in the world. It prohibits both the bribing of foreign public officials,[60] including facilitation payments, and the payment of secret commissions to private parties.[61] In particular, it is an offence for an organization to fail to prevent bribery, even if such failure is not intentional, unless the organization can prove that it has adopted adequate procedures in order to prevent corruption.[62] This strict liability provision therefore places a strong incentive on companies to put in place an effective anti-bribery compliance program.

[54] Chowdhury, supra note 3 at para 33.

[55] 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 U.S. Foreign Corrupt Practices Act, at 10, online: http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[56] Ibid.

[57] Ibid, at 11.

[58] Ibid.

[59] Ibid, at 10–11.

[60] Bribery Act 2010 (UK), c 23, s 6.

[61] Ibid, s 3.

[62] Ibid, s 7.

With regard to its jurisdictional reach, the UK Bribery Act has a wide extraterritorial scope encompassing both British companies operating abroad and foreign companies operating in the United Kingdom.[63] In the former case, a company incorporated under the laws of the United Kingdom can become liable if its subsidiary, agent or service provider abroad commits an offence under the UK Bribery Act in the context of performing services for the UK parent company.[64] In the latter case, overseas companies, which operate a business or part of a business in the United Kingdom, can become liable under the Bribery Act even if the bribery is committed and the benefit is received abroad.[65]

VII. CONCLUSION

Gone are the days when governments would turn a blind eye to the corruption of foreign public officials, tacitly condoning the questionable actions and behaviour of individuals and businesses as a commonplace aspect of doing business abroad or "as a kind of grease to move economic machinery along when there were bureaucratic obstacles."[66] Several countries, including Canada, have adopted broad extraterritorial statutes to catch foreign bribery schemes in order to address what has been referred to as "a serious foreign policy problem."[67]

As guidance on the scope of the CFPOA either from the authorities or from the judiciary has been scarce so far, prevention, namely in the form of a robust compliance program, is of key importance for corporations that are anxious to mitigate their exposure risks.

[63] Ibid, s 12.

[64] Ibid.

[65] Ibid.

[66] Debates of the Senate (Hansard), 36th Parl, 1st Sess, vol 137, issue 100 (3 December 1998) at 1650 (Wesley Cragg).

[67] US, Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations, 94th Cong (1975) at 2 (Senator Frank Church).