

CORRUPTION CONVENTION AND CANADIAN LAW: RESPONSES TO OECD CRITICISM

L A N E F O S T E R

INTRODUCTION TO THE CONVENTION

It is well established that corruption causes serious social and economic harm. The U.S. Department of Commerce has summed up its perils by stating that:

corruption materially affects the environments in which companies operate and erodes the fabric of everyday economic life; it is the invisible tax that raises the cost of doing business and unfairly places it on those least able to pay. For these reasons fighting corruption head-on is of critical importance to the U.S. and other governments around the world.¹

The former president of the World Bank, James Wolfensohn, identified “the cancer of corruption” as having a devastating effect on development.² The Asian Development Bank assessed corruption as playing a “central role in weakening governance institutions that contributed to the Asian financial crisis.”³ Transparency International has asserted that:

¹ US, US Department of Commerce: International Trade Administration, *Addressing the Challenges of International Bribery and Fair Competition 2001* (C 61.2:IN 8/8/2001) (Washington, DC: US Government Printing Office, 2001) at v.

² James D Wolfensohn, “People and Development” (Speech delivered at The World Bank Annual Meeting, 1 October 1996).

³ Asian Development Bank, *ADB Annual Report 1998*, (1999) at 22, online: Asian Development Bank <www.adb.org/sites/default/files/ar1998.pdf>.

Corruption does not stop at national borders: multinational companies bribe government officials to get them to buy useless medicines and faulty equipment for public hospitals; global trafficking rings bribe immigration authorities to let them transport women and children across borders and force them into slavery; and government officials divert public money to offshore accounts leaving poor people without schools.⁴

Such powerful statements demonstrate that the world's leading institutions are acutely aware that corruption is a menace to civilized society.

The Organization for Economic Cooperation and Development (OECD) sponsored the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (*OECD Anti-Bribery Convention*).⁵ *OECD Anti-Bribery Convention* was created in 1999 for the purpose of preventing bribery of foreign public officials.⁶ The preamble of the *OECD Anti-Bribery Convention* confirms that its existence is in response to harms propagated by corruption; it asserts that bribery “raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions”.⁷ The *OECD Anti-Bribery Convention* seeks to fight corruption by urging states to: make bribes of foreign public officials a criminal offence, disallow the tax deductibility of bribes, increase their ability to enforce violations, establish jurisdiction over bribery offences committed by their nationals, and commit to a variety of other bribery prevention mechanisms.⁸

The OECD also created a working group on bribery in international business transactions.⁹ The “Working Group” is devoted to ensuring the

⁴ “Our Work on Conventions”, online: Transparency International <http://www.transparency.org/whatwedo/activity/our_work_on_conventions>.

⁵ OECD, *Bribery and Corruption, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, entered into force on 15 February 1999, (OECD publishing, 2011), online: OECD <www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> [*OECD Anti-Bribery Convention*].

⁶ *Ibid* at 40.

⁷ *Ibid* at Preamble.

⁸ *OECD Anti-Bribery Convention*, *supra* note 5. See, among other things within *OECD Anti-Bribery Convention*, arts 1.1, 4.1, 5, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions V, VIII(i).

⁹ *Ibid*, art 12. The Working Group on bribery was created in 1994, “OECD Working Group on Bribery in International Business Transactions”, online: OECD <www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm> [*Working Group – International Business Transactions*].

proper implementation and enforcement the *OECD Anti-Bribery Convention*.¹⁰ The Working Group monitors each state's progress in effecting the *OECD Anti-Bribery Convention* by conducting "site visits" to inform itself on the progress made by the state.¹¹ The Working Group will then offer an analysis and final recommendations on what the state should do in order to align their domestic policy and foreign anti-bribery laws with the *OECD Anti-Bribery Convention*.¹² Phase Reports The Working Group provides each country with feedback on its implementation of the *OECD Anti-Bribery Convention* by issuing Phase Reports.¹³ Canada was issued its Phase 3 Report in 2011.¹⁴

The purpose of this paper is to analyze Canada's response to the Working Group's Phase 3 Report. This paper will take the position that Canada's response to its Phase 3 Report has led to the most significant improvements in Canada's stand against the corruption of foreign officials thus far. Canada's fight to prevent corruption is not over, as indicated in Canada's Phase 3 follow-up, but Canada has made tremendous strides since 2011 by strengthening its position against the bribery of foreign public officials.

History of the OECD Anti-Bribery Convention

The bribery of foreign officials had been an issue long before the international community took steps to address the problem.¹⁵ This type of bribery often occurred in the form of large companies based in developed countries bribing public officials in developing states, usually in order to gain an advantage in bidding for large public contracts or gaining the rights to

¹⁰ *OECD Anti-Bribery Convention*, *supra* note 5, art 12; OECD, *OECD Working Group on Bribery: Annual Report 2013*, Annual Report on Activities Undertaken in 2012, (Paris: OECD Publishing, 2013) at 6, online: OECD <www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf> [*Working Group Report 2013*]; *Working Group – International Business Transactions*, *supra* note 9.

¹¹ "Phase 3 Country Monitoring of the OECD Anti-Bribery Convention", online: OECD <www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase3countrymonitoringoftheoecdanti-briberyconvention.htm>.

¹² *Working Group Report 2013*, *supra* note 10 at 6-7.

¹³ *Ibid* at 18-19.

¹⁴ *Ibid* at 20.

¹⁵ Mark Jorgensen Farrales, "What is Corruption?: A History of Corruption Studies and the Great Definitions Debate" (2005), University of California, San Diego - Division of Social Sciences, Working Paper at 3-4, online: Social Science Research Network (SSRN) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739962>.

exploit natural resources in the area.¹⁶ Many academics speculate that this type of bribery has hindered the growth in Africa and other developing economies.¹⁷ It was not until 1996 that Australia, Austria, Belgium, France, Germany, Luxembourg, The Netherlands, Portugal, New Zealand and Switzerland stopped allowing companies to deduct bribes as legitimate business expenses.¹⁸ Canadian corporations are intimately acquainted with the bribery of foreign officials; even now it ranks first as having the most corrupt businesses in the world according to the World Bank.¹⁹

In 1977, the United States of America passed into law the *Foreign Corrupt Practices Act*²⁰ (FCPA) in response to the Watergate scandal and a report completed by the Securities and Exchange Commission (SEC).²¹ The SEC report discovered that over 400 American companies had paid “hundreds of millions of dollars” worth of questionable or illegal payments to foreign officials or governments in order to secure a favourable action.²² The FCPA was created to restore the international community’s faith in the American system of business.²³ The FCPA made the bribery of a foreign official illegal.²⁴ FCPA legislation was well ahead of its time, as other countries did not implement similar legislation until the United States entered into discussions with the OECD to pressure these other countries to do so.²⁵

¹⁶ Clare Fletcher & Daniela Herrmann, *The Internationalisation of Corruption: Scale, Impact and Countermeasures* (Farnham, Surrey, England: Ashgate Publishing Ltd, 2012) at 121-127.

¹⁷ John Mukum Mbaku, “The International Dimension of Africa’s Struggle Against Corruption” (2010) 10 *Asper Rev of Intl Business and Trade* L 35 at 42.

¹⁸ Martine Milliet-Einbinder, “Writing Off Tax Deductibility”, *OECD Observer*, online: OECD Observer <www.oecdobserver.org/news/archivestory.php/aid/245/Writing_off_tax_deductibility_.html>.

¹⁹ “World Bank Listing of Ineligible Firms & Individuals”, (2014), online: The World Bank <web.worldbank.org/external/default/main/theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&sort_on=DEBAR_FROM_DATE&sort_order=descending&sort_data=text>.

²⁰ *Foreign Corrupt Practices Act*, 15 USC § 78dd-1 (1977) [FCPA].

²¹ US, US Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Washington, DC: US Department of Justice & US Securities and Exchange Commission, 2012) at 3, online: The United States Department of Justice <www.justice.gov/criminal/fraud/fcpa/guide.pdf> [*Resource Guide*].

²² *Ibid.* The SEC report was ordered “in the wake of the Watergate political scandal” when the U.S. decided to crackdown on corruption.

²³ *Ibid.*

²⁴ *Ibid.* at 2.

²⁵ Masako N Darrough, *Journal of Business Ethics* “The FCPA and the OECD Convention: Some Lessons from the US Experience” (2010) 93:2 *J of Business Ethics* 255 at 259; Nick Kochan & Robin Goodyear, *Corruption: The New Corporate Challenge* (New York: Palgrave MacMillan, 2011) at 32-33.

Ultimately, these discussions led to the creation of the *OECD Anti-Bribery Convention*, whereby numerous signatory countries agreed to forbid the bribery of foreign public officials “to obtain an advantage in business.”²⁶

Once the *FCPA* had been implemented, American businesses found that they were at a competitive disadvantage compared to their rivals in other countries.²⁷ While American businesses were unable to commit bribery to gain advantages, businesses from many other developed nations had no similar restrictions.²⁸ Due to this competitive disadvantage, many critics opined that the *FCPA* should be repealed or amended.²⁹ Forced with a decision to either repeal the *FCPA* and appear to be compromising its morality, or continue to put its nation’s businesses at a significant disadvantage, the United States Government devised a creative solution. It lobbied the OECD to implement a convention which would require OECD member states to make foreign bribery illegal.³⁰ Such a convention could level the playing field in international business while having the benefit of reducing corruption worldwide.³¹

The *OECD Anti-Bribery Convention* was created by the OECD in response to growing concerns over pervasive levels of corruption and pressure from the United States government. institute The *OECD Anti-Bribery Convention* guarantees that the majority of wealthy countries in the world would have to respect anti-bribery laws. Uniformity is particularly important in regard to bribery laws, in that if one developed country has far weaker laws, companies operating out of that country would have a substantial competitive advantage in international business. Such a situation would incentivize more companies to operate in the country with weaker laws, both furthering the problem and rewarding the country with weak bribery laws. The formation of the Working Group provided the OECD with a valuable enforcement tool which could help assure uniformity. The Working Group ensures that countries are fulfilling their obligation under the *OECD Anti-Bribery*

²⁶ Kochan & Goodyear, *supra* note 25 at 32-33.

²⁷ *Ibid* at 258-259.

²⁸ *Ibid*.

²⁹ Darrough, *supra* note 25 at 258-259; Rocco R Vanasco, “The Foreign Corrupt Practices Act: an international perspective” (1999) 14:4 *Managerial Auditing J* 159 at 208-210.

³⁰ *Resource Guide*, *supra* note 21 at 3.

³¹ Susan Rose-Ackerman, ““Grand” Corruption and the Ethics of Global Business” (2002) 26:9 *J of Banking & Finance* 1889 at 1910.

Convention. If countries are not implementing the *OECD Anti-Bribery Convention* properly, the Working Group's reports will embarrass them. Such was the case with Canada prior to its response to the Phase 3 Report.

The History of the implementation of the Convention in Canada

Before moving on to analyze Canada's response to the Working Group's Phase 3 Report, it is necessary to examine the background preceding the production of the report in order for it to be properly contextualized. Canada signed the *OECD Anti-Bribery Convention* on December 17, 1997³² and ratified it on December 17th, 1998.³³ In February of 1999, the *OECD Anti-Bribery Convention* was implemented into Canadian law through the enactment of the *Corruption of Foreign Public Officials Act*.³⁴

In July of 1999 the Working Group released its Phase 1 Report on Canada's progress in instituting the *OECD Anti-Bribery Convention*.³⁵ This report focused on the *Corruption of Foreign Public Officials Act*, since it was too early to evaluate any meaningful progress made towards curbing levels of bribery.³⁶ The Working Group was generally pleased as Canada had quickly passed "legislation implementing the Convention" which generally met "the requirements set by the Convention".³⁷ The Working Group did mention a few issues with the legislation. As this paper illustrates, some of these issues went on to become major problems in Canada's future evaluations.

The first concern raised by the Phase 1 Report was that "reasonable expenses incurred in good faith", and payments to ensure that "act[s] of a routine nature" are completed, were "exempted from the purview of the offence" of bribery of a public official.³⁸ The second concern was whether Canada's model of the identification theory would be similar to other states'

³² OECD, *Bribery and Corruption, Canada – Review of Implementation of the Convention and 1997 Recommendation*, Canada Phase 1 Report (July 1999) at 1, online: OECD <www.oecd.org/investment/anti-bribery/anti-briberyconvention/2385703.pdf> [Phase 1 Report].

³³ *Ibid.*

³⁴ *Ibid.*; *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [CFPOA].

³⁵ "Canada – OECD Anti-Bribery Convention", online: OECD <www.oecd.org/canada/canada-oecdanti-briberyconvention.htm>.

³⁶ *Phase 1 Report*, *supra* note 32.

³⁷ *Ibid.* at 23.

³⁸ *Ibid.*

models of attaching corporate criminal liability onto employees.³⁹ The report's third concern was whether sanctions would be "effective, proportionate, and dissuasive" as required by *OECD Anti-Bribery Convention*.⁴⁰ The final concern of the report was whether Canada had the jurisdiction to prosecute its nationals committing the offence of bribery of a public official in another country as required by *OECD Anti-Bribery Convention*.⁴¹ The concerns expressed about Canada's legislation were originally minor, and it was decided that further evaluation should occur during the Phase 2 Report.⁴²

In 2004, the Phase 2 Report found that minimal progress had been made by Canada on its implementation of *OECD Anti-Bribery Convention*, and that many areas required improvement.⁴³ The Working Group found that foreign bribery "ha[d] only received limited attention in terms of the government's overall planning since the passing of the *CFPOA*."⁴⁴ The report noted that "[n]o government-wide agenda for proactively addressing foreign bribery ha[d] been developed".⁴⁵ The Working Group also found that awareness of the *CFPOA* was lacking, even by the institutions assigned to implement it. The Working Group learned of an occasion where a spokesperson for the Department of Foreign Affairs and International Trade (DFAIT) incorrectly told media outlets that Canada is not required to act if a foreign official is bribed outside of Canada.⁴⁶ The Royal Canadian Mounted Police's (RCMP) Guide to Economic Crime incorrectly stated that corruption was only a priority where the Government of Canada was a target.⁴⁷ Awareness of the legislation within the private sector was also determined to be low.⁴⁸ Moreover, the *CFPOA* was not covered in the training of tax

³⁹ *Ibid.*

⁴⁰ *Ibid* at 24

⁴¹ *Ibid.*

⁴² *Ibid* at 23-24.

⁴³ OECD, *Anti-Bribery and Corruption, Canada: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions*, Canada Phase 2 Report (March 2004), online: OECD <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf>> [Phase 2 Report].

⁴⁴ *Ibid* at 5.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 7.

⁴⁷ *Ibid* at 8.

⁴⁸ *Ibid* at 9.

auditors.⁴⁹ The Working Group also noted that, after five years, Canada had yet to manage a single conviction for the bribery of a foreign official.⁵⁰ After reading the Working Group's report, one could conclude that Canada's system of enforcement was completely impotent.

In the follow up to the Phase 2 Report, progress was marginal. The Working Group started by acknowledging Canada's minor improvements, such as stronger protection for whistleblowers and its first conviction under the CFPOA.⁵¹ The lead examiners remarked that Canada was "the only Party to the Convention which ha[d] still not established nationality jurisdiction for the foreign bribery offence."⁵² The Working Group also noted that Canada had not yet clarified that "in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved".⁵³ It recommended that Canada explicitly enumerate these considerations as invalid.⁵⁴ The Working Group reiterated that the *OECD Anti-Bribery Convention* does not allow for non-profit companies to be exempt from offences of foreign bribery.⁵⁵

OECD's Phase 3 Report

The Phase 3 Report began by discussing the nature of Canada's economy. It observed that the strength of the Canadian extractive industry means that there are many Canadian businesses operating in countries where the risk of bribery solicitation is high.⁵⁶ Specifically, the examiners commented that "representatives from ... [the extraction] sector, and from

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 35.

⁵¹ OECD, *Anti-Bribery and Corruption, Canada: Phase 2: Follow-up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions*, Canada Phase 2 Follow-up Report (June 2006) at 3-4, online: OECD <www.oecd.org/daf/anti-bribery/anti-briberyconvention/36984779.pdf> [*Follow-up on Phase 2 Report*].

⁵² *Ibid* at 5.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 21-22.

⁵⁵ *Ibid* at 4.

⁵⁶ OECD, *Anti-Bribery and Corruption, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (March 2011) at 8, online: OECD <www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf> [*Phase 3 Report*].

civil society, explained during the on-site visit that high risks of bribe solicitation are present in a number of countries where the extractive industry operates.”⁵⁷ This assessment was corroborated by information published in 2009 by DFAIT which stated the following:

Canadian financial markets in Toronto and Vancouver are the world’s largest source of equity capital for mining companies undertaking exploration and development. Mining and exploration companies based in Canada account for 43 percent of global exploration expenditures. In 2008, over 75% of the world’s exploration and mining companies were headquartered in Canada. These 1293 companies had an interest in some 7809 properties in Canada and in over 100 countries around the world.

Extractive companies are increasingly searching for new resources in developing countries. Canadian mining companies have invested over \$60 billion in developing countries, including about \$41 billion in Latin America (including Mexico) and almost \$15 billion in Africa.⁵⁸

This data demonstrated why it was particularly important for Canada to take a bold stance against the corruption of foreign public officials. Unfortunately, the Phase 3 Report was unable to find any substantial improvements made by Canada in its fight against corruption.

The Working Group did commend Canada on the establishment of two new RCMP units solely dedicated to fighting corruption.⁵⁹ These units were investigating 20 different cases at the time the Phase 3 Report was issued and were also helping raise awareness of the CFPOA.⁶⁰ Canada also codified the liability for legal persons through an amendment of the *Criminal Code*.⁶¹ The corporate liability inserted into the *Criminal Code* is much broader than the current common law interpretation and could therefore assist in CFPOA prosecutions.⁶² The remainder of the report was not as complimentary and

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at 9 (quotation marks omitted).

⁵⁹ *Ibid* at 5, 27.

⁶⁰ *Ibid* at 5, 10, 27.

⁶¹ *Criminal Code*, RSC 1985, c C-46, s 22.2.

⁶² *Phase 3 Report*, *supra* note 56 at 5.

found that Canada's anti-corruption regime had maintained the same glaring defects.

Working Group Phase 3 Recommendations

This section of the paper will set out the recommendations given by the Working Group in its Phase 3 Report. The Phase 3 Report gives Canada ten recommendations, many of which had numerous sub-recommendations. The paper will only analyze the recommendations deemed most important by the report.

Firstly, the Working Group recommended that Canada amend the offence of bribing a public official under the *CFPOA*, such that it would apply to all international business, and not merely business conducted "for profit".⁶³ At the time of the Phase 3 Report, the offence of bribing a public official still did not apply to not for profit business. *Article 1* of the *OECD Anti-Bribery Convention* makes no distinction between profit seeking business and non-profit seeking business.⁶⁴ Exempting not for profit companies prevented Canada's legislation from conforming to the *OECD Anti-Bribery Convention*.⁶⁵

The next important recommendation given by the Working Group was that Canada "urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad."⁶⁶ The problem of Canada's lack of jurisdiction over its nationals committing bribery in a foreign country gained increasing attention in each phase report. The Phase 3 Report observed that "jurisdiction in Canada is in fact much narrower than for most other Convention Parties that also provide for nationality jurisdiction over foreign bribery offences."⁶⁷ The Working Group remarked that Canada had established nationality jurisdiction over other types of crime but had not in the case of the bribery of public officials.⁶⁸ The Working Group was concerned that "so long as nationality jurisdiction is absent in Canada - foreign bribery prosecutions may fail for lack of a

⁶³ *Ibid* at 59.

⁶⁴ *Phase 3 Report*, *supra* note 56 at 59; see *OECD Anti-Bribery Convention*, *supra* note 5, art 1.

⁶⁵ *Phase 3 Report*, *supra* note 56 at 59.

⁶⁶ *Ibid* at 60.

⁶⁷ *Ibid* at 38.

⁶⁸ *Ibid*.

sufficient jurisdictional link over the act(s) in question.”⁶⁹ The Working Group made it known to Canada that they viewed the lack of nationality jurisdiction over a potential bribery offence as a “substantial loophole”⁷⁰ and “conclude[d] that Canada should establish nationality jurisdiction over the offence of bribing a foreign public official as a matter of urgency.”⁷¹

The Working Group also expressed concern over the inadequate sanctions administered to legal and natural persons who committed the offence of bribing a public official.⁷² The Working Group was not impressed by the punishment imposed in the *HydroKleen*⁷³ case, Canada’s lone conviction under the CFPOA. According to the Working Group, the fine levied on *HydroKleen*

amounted to less than the bribe given to the foreign public official, which was around CAD 30 000, no proceeds obtained from the bribery act were forfeited, no restitution appears to have been paid to the victim company, and the Court did not consider whether measures were taken by the company to prevent further foreign bribery acts [...].”⁷⁴

The Working Group stated they found “it difficult to see how the penalty imposed in *HydroKleen* could be an effective general or specific deterrent.”⁷⁵

The fourth main area of concern identified by the Working Group was certain factors that were to be taken into account when deciding whether to prosecute under the CFPOA.⁷⁶ The lead examiners reiterated their concern that Canada continued to allow prosecutorial discretion based on “considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved”.⁷⁷ Overall, the Phase 3 Report found that Canada’s resolve in the fight against corruption was substantially lacking.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at 39.

⁷¹ *Ibid* at 40.

⁷² *Ibid* at 22, 62.

⁷³ *R v Watts*, [2005] AJ No 568 (QL) (Alta QB) [*HydroKleen*].

⁷⁴ *Phase 3 Report*, *supra* note 56 at 22.

⁷⁵ *Ibid* [emphasis added].

⁷⁶ *Ibid* at 35.

⁷⁷ *Ibid.*

Canada's Response to Phase 3 Recommendations

This section of the paper summarizes the Working Group's findings in regards to the four main problems identified in the Phase 3 Report; jurisdictional issues, appropriate sanctions, the "for profit" clause in the CFPOA, and inappropriate factors taken into account in prosecutorial decision-making. The Phase 3 follow up was issued in May 2013.⁷⁸ The follow-up evaluation of Canada's implementation of Phase 3 recommendations was substantially more positive than past reports.

The *Fighting Foreign Corruption Act* (Bill S-14) was introduced to the Senate on February 5th 2013 and received Royal Assent on June 19th 2013 (one month after the Phase 3 follow-up was issued).⁷⁹ This bill addressed two of the "main problems" of the CFPOA as identified by the Working Group. Firstly, the bill eliminated the "for profit" clause required to be guilty of the offence of bribing a foreign public official, finally bringing non-profit organizations under the scope of the CFPOA.⁸⁰ Moreover, the new amendments gave Canada jurisdiction over foreign bribery offences committed by Canadian companies in foreign states.⁸¹ A "real and substantial link" is no longer required for Canada to be able to prosecute these companies.⁸²

Canada also made significant breakthroughs in the area of enforcement. Canada recorded its two first significant convictions under the CFPOA – both in the oil and gas sector.⁸³ On June 23rd, 2011, Niko Resources Ltd. entered a guilty plea for the bribery of a foreign public official.⁸⁴ They were fined \$9.5 million.⁸⁵ On January 22nd 2013 Griffiths Energy International plead guilty to a charge of foreign bribery.⁸⁶ The Alberta

⁷⁸ OECD, *Anti-Bribery and Corruption, Canada: Follow-Up to the Phase 3 Report & Recommendations* (May 2013) at 1, online: OECD <www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf> [Follow-up to Phase 3 Report].

⁷⁹ Canada, Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act*, 1st Sess, 41st Parl [Fighting Foreign Corruption Act].

⁸⁰ *Ibid.*, cl 2(3); see CFPOA, *supra* note 34, s 2.

⁸¹ *Fighting Foreign Corruption Act*, *supra* note 79, cl 4; see CFPOA, *supra* note 34, ss 5(1), 5(2).

⁸² *Fighting Foreign Corruption Act*, *supra* note 79, cl 4; see CFPOA, *supra* note 34, ss 5(1), 5(2).

⁸³ Follow-up to Phase 3 Report, *supra* note 78 at 18.

⁸⁴ *R v Niko Resources Ltd.*, 2011 CarswellAlta 2521 (WL Can) at para 1, 101 WCB (2d) 118 (Alta QB) [Niko].

⁸⁵ *Ibid.* at para 21.

⁸⁶ *R v Griffiths Energy International*, [2013] AJ No 412 (QL) at para 5 (Alta QB) [Griffiths].

Court of Queen's Bench levied a fine of \$10.35 million CDN on the corporation.⁸⁷ In addition, "the prosecutor [in charge] ... initiated forfeiture proceedings" on the bribe recipients.⁸⁸

The Working Group also recognized a list of "improper considerations" that could be considered as factors when exercising prosecutorial discretion.⁸⁹ The Prosecution Public Service of Canada (PPSC) was in the midst of redeveloping its Deskbook when the Phase 3 follow-up Report was released.⁹⁰ The Deskbook sets out considerations to be taken into account when exercising prosecutorial discretion.⁹¹ The Working Group stated that while modifying the Deskbook, Canada

...will consider clarifying that it is never proper to consider the following factors in investigating and prosecuting offences under the CFPOA: national economic interest, potential effect upon relations with another State, or the identity of the natural or legal persons involved.⁹²

The report assessed progress on discretionary factors relating to prosecution as ongoing.⁹³

Analysis of Phase 3 Implementations

By addressing the Phase 3 Report's most significant concerns, Canada has made dramatic and vital improvements towards fulfilling its role in the world's fight against corruption. This section of the paper will analyze how and why Canada's fulfillment of the Working Group's recommendations have, and will continue to have, a positive impact in reducing foreign corruption. As a result of erasing the "for profit" requirement needed to be guilty of a CFPOA offence, Canada has ensured that non-profit organizations cannot be used as a loophole to bribe foreign officials. By enacting national jurisdiction over foreign bribery offences, Canada is able to prosecute nationals regardless of where the bribe occurs. The recording of two major

⁸⁷ *Ibid* at paras 10, 28.

⁸⁸ *Follow-up to Phase 3 Report*, *supra* note 78 at 18; see *Griffiths*, *supra* note 86 at paras 34, 38.

⁸⁹ *Ibid* at 7.

⁹⁰ *Ibid* at 8.

⁹¹ *Ibid*.

⁹² *Ibid* at 3.

⁹³ *Ibid*.

convictions under *CFPOA* shows that Canada is not all rhetoric and no substance. The strong sentences handed down by Canadian courts in the *Niko*, *Griffiths*, and *Karigar*⁹⁴ (discussed later) cases demonstrated to Canadian multinationals that there are serious consequences to bribing a foreign public official. Finally, Canada's consideration of changing certain factors governing prosecutorial discretion in *CFPOA* cases could ensure that Canada will not allow national interests to subvert its efforts at preventing corruption. The following section of the paper will address all four major issues individually. It will attempt to illustrate the potential positive effects that each major change could have on Canada's anti-corruption efforts.

Eliminating the “For Profit” Requirement

Prior to the enactment of Bill S-14, the *CFPOA* defined business as follows: “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit.”⁹⁵ The *CFPOA*'s definition of business is now: “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.”⁹⁶

This seemingly small two word change in the definition of business could have significant ramifications for Canada's anti-corruption efforts. First, one must appreciate the size and scope of Canada's non-profit sector. The non-profit sector is responsible for approximately 8.1 percent of Canada's GDP, which is more than the entire retail industry and nearly as much as the mining, oil and gas extraction industry.⁹⁷ There are over 170, 000 non-profit organizations in Canada, employing approximately two million Canadians.⁹⁸ Non-profit organizations have a wide-range of goals and mandates. A disturbingly common characteristic of non-profit organizations is that money donated to their charity often does not end up going to their cause. For example, over the span of ten years the “Kid's Wish Foundation” in the United States raised \$127.9 million, while only 2.5 percent of that money went to the charity's cause.⁹⁹ Approximately \$109 million of the \$127.8

⁹⁴ *R v Karigar*, 2013 ONSC 5199 (CanLII) [*Karigar*].

⁹⁵ *Phase 2 Report*, *supra* note 43 at 28 [emphasis added].

⁹⁶ *CFPOA*, *supra* note 34, s 2.

⁹⁷ “Sector Impact”, online: Imagine Canada <sectorsource.ca/research-and-impact/sector-impact>.

⁹⁸ *Ibid.*

⁹⁹ “America's Worst Charities”, *Tampa Bay Times* (15 November 2013), online: <www.tampabay.com/americas-worst-charities/>.

million went directly back into the paid fundraiser's pockets.¹⁰⁰ There is a plethora of charities with similar statistics.¹⁰¹ Moreover, many of these charities have a large number of arguably over-compensated employees.¹⁰² Instead of serving a cause, these types of charities often serve the people who run them.

The facts above illustrate that it is naïve to assume that non-profit organizations and charities are immune from committing acts of bribery. Each charity has goals that it is designed to accomplish. If a billion dollar charity has to pay a government in a third-world country an \$80,000 bribe in order to provide aid throughout that country, it is not incomprehensible that they would pay the bribe. They may see it as morally acceptable if, for example, it allows them to feed starving children. It could also bring recognition to the charity's leaders and provide more employment for other members of the company. It could also help them further other organizational mandates if it allows them to promote the Charity's values, such as pro-life or pro-choice charities. The sole fact that the organization does not earn a profit on the transaction does not mean they do not gain benefits.

While removing the non-profit clause should help Canada's anti-corruption efforts, the negative consequences associated with such a change should also be considered. For instance, a charity paying a bribe to a corrupt government to allow the charity to provide clean water to citizens has substantial positive benefits. While the bribe rewards the corrupt government, it can also help solve immediate problems and help save lives. Whether such bribes are a societal net positive or negative is an interesting question, but beyond the scope of this paper. However, it is important to remember these considerations when assessing the overall policy decision to disallow bribes for non-profit organizations.

Removing the "for profit" clause also eradicates the ability of corrupt companies to utilize non-profit organizations as a loophole through which bribes could occur. For example, a non-profit organization could have been set up as a shell company. Specifically, the company attempting to bribe a public official could have previously donated money to the charity and then

¹⁰⁰ *Ibid.*

¹⁰¹ See *Ibid.*

¹⁰² Paul Waldie, "Six-figure Salaries the Norm at Top Charities", *The Globe and Mail* (14 April 2010), online: <www.theglobeandmail.com/news/national/six-figure-salaries-the-norm-at-top-charities/article4352708/>.

have this charity pay a bribe to a foreign public official in the guise of another purpose. Such a setup would make it more difficult to track the money to the company making the original bribe. This potential method of bribery is no longer available, since payments can be considered bribes even if they are not done for the purpose of profit. Organizations are often able to use charities to funnel money covertly because “society is often less suspicious of and more sympathetic to charities, associating them with the development of the societal conscience.”¹⁰³ It is important that Canada has recognized the potential for charities to be used as a tool through which bribery of foreign officials can occur and taken steps to prevent it from happening.

Establishing Nationality Jurisdiction

Establishing nationality jurisdiction over foreign bribery offences “addresses a long-standing weakness of the CFPOA.”¹⁰⁴ Prior to the enactment of bill S-14, Canadians could bribe foreign officials without risking prosecution in Canada as long as there was not a “real and substantial” link to Canada.¹⁰⁵ This requirement meant that if a Canadian was bribing an official in a foreign state, Canada may not have the jurisdictional capacity to prosecute that Canadian citizen without some other significant factor tying the offence to Canada. Canada’s lack of jurisdiction over the offence of foreign bribery was both alarming and perplexing, since the entire purpose of the CFPOA was to punish and deter foreign bribery. The idea of outlawing foreign bribery while having a severely limited ability to punish offenders if the bribery is committed in a foreign state is incongruous. The only real impact that the CFPOA had on multinationals contemplating bribery was ensuring that they commit the offence overseas and not in Canada. This implication amounted to, at most, a minor inconvenience.

Lacking jurisdiction over foreign bribery offences that occur in foreign states was an embarrassment to Canada. Canada was also rightfully criticized for this by other organizations. The OECD Phase Reports, as discussed above, continually criticized Canada for refusing to implement national jurisdiction over foreign bribery offences. In the Phase 3 Report, the

¹⁰³ David Samuel-Strausz Vernon, “A Partnership With Evil: Money Laundering, Terrorist Financing and Canadian Financial Institutions” (2004) 20:1 Banking & Finance Law Review 89 at 105.

¹⁰⁴ Michael G Osborne, “Canada Gets Tough on Foreign Corruption”, *The Litigator* (25 June 2013), online: <www.thelitigator.ca/2013/06/canada-gets-tough-on-foreign-corruption>.

¹⁰⁵ *Libman v The Queen*, [1985] 2 SCR 178 at para 74, 1985 CanLII 51; Osborne, *supra* note 104.

lead examiners stated their belief “that the absence of nationality jurisdiction leaves a substantial loophole in the coverage of the CFPOA, and needlessly poses a substantial hurdle to investigation and prosecution in obliging authorities to prove a “real and substantial link” to the territory of Canada.”¹⁰⁶ Transparency International deemed the absence of national jurisdiction as a “significant inadequacy”.¹⁰⁷ The President of Transparency International Canada also wrote a letter to Stephen Harper requesting the enactment of national jurisdiction, assessing that it was “the minimum required to help rebuild Canada’s reputation as a full participant in the global fight against bribery and corruption.”¹⁰⁸ In the Phase 3 Report, the Working Group concluded that Canada “should establish nationality jurisdiction over the offence of bribing a foreign public official as a matter of urgency”.¹⁰⁹ It believed that territorial jurisdiction under Canadian law was not “broad enough to enable the effective application of the offence under the CFPOA.”¹¹⁰

Since the amendments to the CFPOA introduced by Bill S-14 cannot be retroactive, Canada will not have the ability to utilize national jurisdiction until they are prosecuting offences that occur after the amendments were officially passed into Canadian law (June 19th, 2013). As a result, the effects of possessing national jurisdiction over foreign bribery offences will likely not be apparent for a number of years. However, having national jurisdiction will likely increase the number of active CFPOA related investigations in the future. Since more bribes overseas will fall within the scope of Canada’s jurisdiction, the RCMP anti-corruption units will be able to investigate additional offences. More investigations should lead to more prosecutions and more convictions. Additionally, offences that are being investigated will be easier to prosecute. In the past, a prosecutor may have decided against

¹⁰⁶ Phase 3 report, *supra* note 56 at 40.

¹⁰⁷ Fritz Heimann and Gillian Dell, Transparency International, Progress Report 2010: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (28 July 2010), online: Transparency International <www.transparency.org/whatwedo/pub/progress_report_2010_enforcement_of_the_oecd_anti_bribery_convention> at 25.

¹⁰⁸ Letter from James M Klotz, Chair and President of Transparency International Canada Inc, to The Right Honourable Stephen Harper, Prime Minister of Canada (28 June 2011) Re: Enforcement of Canadian law against corruption, online: Transparency International Canada Inc <www.transparency.ca/9-Files/Older/2011-New/201107%20TI%20Bill%20C-31%20Letter%20to%20Prime%20Minister.pdf>.

¹⁰⁹ Phase 3 report, *supra* note 56 at 40.

¹¹⁰ *Ibid.*

laying charges if he or she was unsure whether a “real and substantial link” to Canada could be proven. Now, the same prosecutor will be more likely to prosecute since he or she does not have to prove a nexus from the crime to Canada. This knowledge will likely create a greater inclination to prosecute. This, in turn, should lead to recording more convictions against companies committing the offence of foreign bribery. Nationality jurisdiction should also help make investigating *CFPOA* offences simpler. Enforcement officials will no longer have to employ resources to discover ties between the offence and Canada. This will allow enforcement agencies to investigate other cases more thoroughly. Thus, it is probable that the national jurisdiction amendment will lead to simpler and substantially more effective enforcement of *CFPOA* offences. Eliminating the jurisdictional problems that the *CFPOA* originally posed will significantly enhance Canada’s ability to fight corruption.

Prosecutorial Discretion Factors

Canada has not completed its reworking of the FPS Deskbook.¹¹¹ It is unknown if the new Deskbook will explicitly prohibit “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.¹¹² This issue has drawn significant criticism and attention from the Working Group.¹¹³ However, the Working Group likely overstated the significance of this issue in its phase reports. While the Deskbook does not state that the considerations deemed improper by the Working Group should never be considered, it also does not assert that they should be considered.¹¹⁴ The area of the Deskbook in question is section V Chapter 15.¹¹⁵ It lists eighteen public interest considerations to be evaluated of an an alleged crime should be prosecuted.¹¹⁶ Neither “considerations of national economic interest”,¹¹⁷

¹¹¹ *Follow-up to Phase 3 Report, supra* note 78 at 3.

¹¹² *OECD Anti-Bribery Convention, supra* note 5, art 5.

¹¹³ *Follow-up to Phase 3 Report, supra* note 78 at 3-4; *Follow-up on Phase 2 Report, supra* note 51 at 5.

¹¹⁴ Canada, Public Prosecution Service of Canada, “The Federal Prosecution Service Deskbook” (24 December 2008) at Part V Chapter 15, online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/fpd/ch15.html> [*Deskbook*].

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, chapters 15.3.2.

¹¹⁷ *OECD Anti-Bribery Convention, supra* note 5, art 5.

“the potential effect upon relations with another State”,¹¹⁸ nor “the identity of the natural or legal persons involved”¹¹⁹ are listed among these eighteen considerations.¹²⁰ However, they are also not explicitly specified as “irrelevant criteria”, as four other possible considerations are.¹²¹

While making it clear that improper considerations are irrelevant criteria could help ensure prosecutors do not take into account these considerations, it is unlikely that they currently would, given that it is not a listed consideration. The Working Group is correct that if, for instance, national economic interest was taken into account by Canada, the fight against corruption would certainly be harmed. Any successful prosecution by the Canadian government warns Canadian business not to engage in bribery. The disappointing reality of not engaging in bribery is there will be a loss of business for Canadian companies, at least in the short term. Thus it could be argued any successful prosecution in Canada is not aligned with its economic interests. This scenario illustrates the Working Group’s concern about the possibility of such “improper considerations” being taken into account. However their concern is likely unwarranted. Although not explicitly prohibited, these considerations are highly unlikely to be employed by prosecutors since they are blatantly not relevant. However, if it would please the Working Group, there would certainly be no harm in listing the “improper considerations” under “Irrelevant Criteria”.

Imposition of Appropriate Sanctions

At the time the Phase 3 Report was issued, Canada only had one conviction under the CFPOA in the case of *R v Watts*.¹²² In *R v Watts*, the company Hydrokleen made illegal payments totalling \$28, 299.88 to a rogue US immigrations officer’s private consulting company in order to learn how to cross the border more easily.¹²³ This practice is illegal, as an immigration officer cannot simultaneously work for the immigration department as well as a privately held company.¹²⁴ Hydrokleen was aware that the officer (*i.e.*,

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Deskbook*, *supra* note 114.

¹²¹ *Ibid.*, chapter 15.4.

¹²² *HydroKleen*, *supra* note 73.

¹²³ *Ibid* at paras 20-22, 47-53.

¹²⁴ *Ibid* at 58.

Garcia) was in fact a U.S. immigrations officer.¹²⁵ Garcia also made it difficult for Hydrokleen's competitors' employees to cross the border, without Hydrokleen's knowledge or instruction.¹²⁶ Hydrokleen plead guilty and was fined \$25, 000.¹²⁷ No other sanctions were imposed.

Despite the strange facts of the *HydroKleen* case, it seems self-evident that the fine did not reach a magnitude that would deter other Canadian companies from bribing public officials. The fine was less than the bribe itself. Another factor which negated any perceived severity of the fine is that Hydrokleen did not have to pay for the advantages they gained through paying the bribe. In a victim impact statement, a CEO of one of Hydrokleen's rival companies stated that the harm inflicted on them almost caused them to go out of business.¹²⁸ Such a statement leads to the conclusion that Hydrokleen's additional profits arising from the bribe likely outweighed the costs stemming from the sentence and bribe.

It would be naïve to think the Hydrokleen sentence served as any type of warning to billion dollar multinational corporations. If anything, the sentence made Canada's anti-corruption program appear merely as a façade used to placate the OECD. The Working Group was not pleased with the sentence. In the Phase 3 Report they lamented the fact that "no proceeds obtained from the bribery act were forfeited, no restitution appears to have been paid to the victim company, and the Court did not consider whether measures were taken by the company to prevent further foreign bribery acts".¹²⁹ They summarized their disappointment by stating that they found it "difficult to see how the penalty imposed in Hydro Kleen could be an effective general or specific deterrent".¹³⁰ The Working Group expressed their belief that Canada needed to ensure that sufficient sanctions would be imposed on CFPOA violators in the future.¹³¹

Since the Phase 3 Report was released several more convictions have been recorded. In *Niko*, the company Niko Resources, and oil and natural gas exploration company, used their subsidiary Niko Bangladesh to bribe the

¹²⁵ *Ibid* at para 52.

¹²⁶ *Ibid* at paras 61-65.

¹²⁷ *Ibid* at paras 21-22, 189.

¹²⁸ *Ibid* at para 123.

¹²⁹ *Phase 3 Report, supra* note 56 at 22 [footnote omitted].

¹³⁰ *Ibid*.

¹³¹ *Ibid* at 22, 25.

Bangladeshi State Minister for Energy and Mineral Resources with the use of a \$190,000 car.¹³² Additionally, Niko Canada paid \$5,000 for the Minister to fly to Chicago and New York to visit family.¹³³ The purpose of the bribes was to influence the Minister to advance the company's business interests in the region. After multiple explosions at Niko work sites, an investigation commenced and the bribes were discovered. Niko Resources was fined \$9.5 million.¹³⁴ They were also subject to a probation order which put them under the court's supervision for three years. During this time regular audits of the company will be completed to ensure their compliance with the CFPOA.¹³⁵

In *Niko* the court exemplified Canada's determination to finally take the bribery of foreign public officials seriously. The fine of \$9.5 million was significant and served as both general and specific deterrence. It sent a serious warning to Canadian multinational corporations by showing that bribing a foreign public official could result in considerable financial punishment. Justice Brooker also demonstrated Canada's newfound abhorrence of corruption by stating the offence was "an embarrassment to all Canadians" and "tarnishes the reputation of Alberta and of Canada."¹³⁶ He determined that the sentence imposed "must have as its priority the objectives of demonstrating the court's strong denunciation of such conduct and providing meaningful deterrence for others who might be tempted to commit the same offence."¹³⁷ The sentence in *Niko* fulfilled this objective and has led to an increase in CFPOA compliance programs by at risk companies.

Ironically, *Niko* perfectly exemplifies the importance of Canada's institution of nationality jurisdiction over the offence of foreign bribery. In that case, Canada's jurisdiction over the offence had to be established by demonstrating a real and substantial link to Canada.¹³⁸ If Niko Resources had not bribed the Bangladeshi Minister in Canada (by paying for his flights out of Canada), the prosecution would likely have been unable to establish a "real and substantial" link to Canada. After this case, other companies could have responded by simply ensuring that their acts of bribery were being

¹³² *Niko*, *supra* note 84 at para 21 (see number 4 under "The Charges").

¹³³ *Ibid* (see number 5 under "The Charges").

¹³⁴ *Ibid* at para 21.

¹³⁵ *Ibid* at para 59.

¹³⁶ *Ibid* at paras 12-13.

¹³⁷ *Ibid* at 17.

¹³⁸ *Ibid* at para 21 (see number 56 under "Conclusion of Facts Supporting the Offences").

committed overseas to avoid a strong link between the offence and Canada. However, with the establishment of nationality jurisdiction over the offence, Niko Resources would nonetheless be found guilty of bribery, even if the car in Bangladesh was the only bribe. This example vividly illustrates how this amendment to the CFPOA (giving Canada jurisdiction over the bribery offence in foreign countries) makes it more difficult to avoid being found guilty.

As previously mentioned, Griffiths Energy International pleaded guilty to a charge of foreign bribery on January 22nd, 2013.¹³⁹ Griffiths pledged \$2 million CDN to a company owned by the wife of Ambassador Mahamoud Adam Bechir in order to acquire exclusive rights to resources in certain regions in Chad.¹⁴⁰ Despite taking into account Griffith's voluntary disclosure of their actions and their full cooperation with investigators, the Alberta Court of Queen's Bench sentenced the corporation to a fine of \$10.35 million CDN.¹⁴¹ In addition, the prosecutor in charge "initiated forfeiture proceedings in relation to the shares purchased by three of the bribe recipients."¹⁴² These two cases exhibit Canada's willingness to levy serious punishments against CFPOA violators. In addition, Canada now has 35 investigations open under the CFPOA.¹⁴³

Canada has, however, achieved its first conviction of an individual under the CFPOA in the recent case of *Karigar*.¹⁴⁴ As the first trial under the CFPOA, *Karigar* set important precedents for future trials. The case was watched closely, as SNC-Lavalin's former executives (Ramesh Shah and Mohammad Ismail) are preparing for their own trial.¹⁴⁵ *Karigar* was found to have attempted to bribe an Air India official US\$200,000 in order to ensure that Cryptometrics (a company which *Karigar* worked for) and IPCON (owned by *Karigar*) were the only two companies in the bidding process for a

¹³⁹ Griffiths, *supra* note 86 at para 5.

¹⁴⁰ *R v Griffiths Energy International Inc*, Agreed Statement of Facts, online: Canadian Bar Association at para 20 <www.cba.org/CBA/advocacy/PDF/Griffiths_Amended_Statement_of_Facts.pdf>.

¹⁴¹ *Ibid* at para 49.

¹⁴² *Follow-up to Phase 3 Report*, *supra* note 78 at 18.

¹⁴³ *Ibid* at 3, 5.

¹⁴⁴ *Karigar*, *supra* note 94.

¹⁴⁵ Tyler Hodgson, "Nazir Karigar Convicted in First Trial under Corruption of Foreign Public Officials Act R v Karigar, 2013 ONSC" (16 July 2013), online: Borden Ladner Gervais <www.blg.com/en/newsandpublications/publication_3458>.

facial recognition software contract.¹⁴⁶ The purpose of having a second company bid was because a “competitive bidding situation provided Cryptometrics with certain procedural advantages in the bidding process over a sole sourcing scenario which would involve a more complicated and closely scrutinized process.”¹⁴⁷ Karigar also attempted to bribe an Air India official US\$250,000 to secure the contract.¹⁴⁸ Far more significant bribes (running into the millions of dollars) were expected to be made once the contract was obtained.¹⁴⁹

In his judgement, Justice Hackland interpreted two major *CFPOA* issues of law that had never been tried before. Hackland interpreted Section 3(1) of the Act, which makes it a criminal offence to “agree” to give or offer a bribe to a foreign public official.¹⁵⁰ Karigar argued that the Crown was required to prove that there was an agreement to bribe between the person paying the bribe and the person receiving the bribe.¹⁵¹ The Crown contended that the offence could be two people agreeing to bribe a third person.¹⁵² Justice Hackland rejected Karigar’s argument by declaring that an agreement in the context of s 3(1) of the act could be between co-conspirators, which the crown proved occurred.¹⁵³ The court’s ruling on who had to “agree” for the offence to have been committed could clearly affect defendants in future cases.

Justice Hackland also had to determine whether there was a “real and substantial” connection between Canada and the offence since the offence occurred prior to the 2013 amendments to the *CFPOA*.¹⁵⁴ The court appeared to have adopted “a very liberal interpretation of territorial jurisdiction.”¹⁵⁵ Interestingly, “the court found that no substantial element of an offence need occur in Canada for the court to take jurisdiction over crimes

¹⁴⁶ Karigar, *supra* note 94 at paras 1, 13-14, 42.

¹⁴⁷ *Ibid* at para 13.

¹⁴⁸ *Ibid* at para 15.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid* at para 21; *CFPOA*, *supra* note 34, s 3(1).

¹⁵¹ Karigar, *supra* note 94 at para 22.

¹⁵² *Ibid* at para 24.

¹⁵³ *Ibid* at paras 28-30.

¹⁵⁴ *Ibid* at paras 35-36.

¹⁵⁵ Hodgson, *supra* note 145.

of foreign corruption”.¹⁵⁶ It was held that Karigar’s ties to Canada, combined with the fact that much of the work would have been done in Canada if the contract had been completed, was sufficient to establish a real and substantial connection to Canada.¹⁵⁷ Such a liberal interpretation is likely to affect future defendants being tried for offences which occurred prior to the amendments to the CFPOA.

The sentencing in *Karigar* was highly anticipated as it was the first time an individual had been sentenced under the CFPOA. Karigar was sentenced to three out of a possible five years in prison (since the offence occurred before the new amendments).¹⁵⁸ The court found a relatively strict sentence appropriate due to “(i) the sophisticated nature of the bribery scheme; (ii) attempts at concealment by the creation of a fake competitive bid to create an illusion of a competitive bidding process; (iii) Mr. Karigar’s ‘sense of entitlement’ which led to him openly tell a Canadian trade commissioner of the bribes; and (iv) Mr. Karigar’s deep personal involvement in the scheme.”¹⁵⁹ The sentence was not as severe as it could have been due to the following: “(i) Mr. Karigar’s cooperation in the prosecution, which avoided a lengthy trial; (ii) his prior clean criminal record; and ... (iii) ... the bribery scheme was a ‘complete failure’.”¹⁶⁰ The strong sentence imposed on Karigar should have a powerful deterrent effect on others considering bribing foreign public officials. While individuals may be willing to bribe officials for their company when the main risk is the company being fined, it is less likely that individuals will bribe for their company’s benefit when they are personally at risk of going to prison.

Canada has greatly strengthened its position in the fight against international corruption. While Canada did not address all of the Phase 3 recommendations put forth by the Working Group, it strongly and decisively addressed the most important issues. Due to enhanced legislation and a determined approach towards combating bribery, Canada’s CFPOA conviction total will likely grow in the coming years.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Karigar*, *supra* note 94 at para 40.

¹⁵⁸ Anthony Cole and Emily McCartney, “Case Bulletin: R v Karigar, 2014 ONSC 3093” (2 June 2014), Dentons (blog), online: <www.securitiesmininglaw.com/author/emccartney>.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*