

# FOREIGN CORRUPT PRACTICES LAWS: IMPLICATIONS FOR THE CANADIAN NATURAL RESOURCES SECTOR

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#### I. INTRODUCTION

The foreign corrupt practices laws of Canada, and of other relevant jurisdictions – particularly in the United States and the United Kingdom – have implications for all industries, being laws of general application. But, they have particular impact on natural resource industries and, for Canada, mining in particular. By natural resources, we essentially mean: oil and gas, mining, and forestry. The reason we single out these industries for consideration is twofold. Firstly, and as will be explored below, these laws can and do have a practical impact on the resource industries. This impact is more significant than the laws' impact on other Canadian industries. Secondly, these industries are especially important to Canada.

Canadians are, classically, hewers of wood, and drawers of water.<sup>1</sup> The first great Canadian political economist, Harold Innes, in his seminal work on the Canadian economy, described Canadian foundational industries as a series of staples trades.<sup>2</sup> It is not merely bad luck that while other nations have

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<sup>1</sup> Joshua 9:23.

<sup>2</sup> See Harold A Innes, *A History of the Canadian Pacific Railway* (Toronto: McClelland & Stewart, 1923); and Harold A Innes, *The Cod Fisheries: The History of an International Economy* (New Haven: Yale University Press, 1940).

as their national animals such things as lions, eagles, elephants or dragons, Canada has a large toothed, flat tailed waddling rodent. Beaver hats were the fashion, and beaver pelts had to come from somewhere. One of the great merchant trading companies in the history of the world, one which has continuing corporate existence in Canada today - The Hudson's Bay Company - was chartered by Prince Rupert, in 1670, for this purpose.

Since the fur trade, Canada has had staples trades in a variety of commodities, including fish, forest products, grains, oil and gas, and base and precious metals. While Canada has a modern economy with significant manufacturing and service sectors, the resource industries remain very important. Canada's total GDP is approximately \$2.1 trillion and its exports are approximately \$480 billion. Total forestry output represents approximately \$37.6 billion, or 1.8% of output, and approximately \$33.7 billion, or 7% of exports. Mining represents approximately \$94.6 billion, or 4.6% of total GDP, and approximately \$72 billion, or 15% of exports. Oil and gas represents \$206.2 billion, or 10% of the Canadian economy, and \$111 billion or 24% of exports.<sup>3</sup>

These figures understate the importance of resource industries, particularly of the mining sector, to the Canadian economy. Canadian mining companies have interests in more than 8,000 properties in more than 100 countries.<sup>4</sup> A host of Canadian mining companies have head offices in Toronto, Vancouver, or somewhere else in Canada, with assets in far flung corners of the world. These companies are in Canada because of the opportunity to finance projects in Canada and to access mining management expertise. If you want to buy a Mongolian, West African, or Australian mining property, you may well be doing so in Toronto. The Canadian stock exchanges have the highest concentration of both mining and energy listings in the world.<sup>5</sup> Globally, extractive industries generate \$3 trillion in exports

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<sup>3</sup> Canada, Statistics Canada, *Gross domestic product at basic prices, primary industries* (31 July 2014), online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/prim03-eng.htm>> (all statistics current to 2013); and Canada, Statistics Canada, *Exports of goods on a balance-of-payments basis, by product* (6 August 2014), online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/gblec04-eng.htm>>; and The World Bank, "Data - Canada" (2015) <<http://data.worldbank.org/country/canada>> (GDP for 2013).

<sup>4</sup> Rob Colapinto, "A Double Dose of Transparency" *Listed* (16 September 2013), online: *Listed Magazine* <<http://listedmag.com/2013/09/a-double-dose-of-transparency/>>.

<sup>5</sup> Combined, the TSX and the TSXV have approximately 400 pure oil and gas companies listed; its nearest rival is the Australian Stock Exchange with about 224 companies; the New York Stock Exchange together with the junior NYSE market list about 163 companies; the London Stock Exchange and its Alternative Investment Market have together 147 energy firms. See Yadullah Hussain, "Canada's financial markets emerge as global leader in energy listings" *Financial Post* (10 January 2013) online: PostMedia Network Inc

and almost 60% of the world's mining companies seek listings on the Toronto Stock Exchange (the "TSX") or its junior TSX Venture Exchange (the "TSXV"),<sup>6</sup> with over 75% of global public mine financings being conducted by the TSX alone.<sup>7</sup> These figures make Canada's stock exchanges world leaders in mine finance and contribute to extractive industries being material for Canada's economic well being.

Mining companies go, like Willie Sutton, where the relevant commodities are, with the result that Canadian mining companies operate in a host of jurisdictions, some of which rank poorly in the areas of transparency and corruption. The impact of foreign corrupt practices laws on these industries are therefore economically important to Canada. Below we explore the relevant legal regimes and offer some comments as to their implications for Canada's natural resources industries.

## II. THE LEGAL REGIMES

### (a) International Conventions

#### (i) *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

The Organisation for Economic Co-operation and Development (the "OECD") enacted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions<sup>8</sup> (the "OECD Convention") in 1997. The *OECD Convention* came into force in 1999 and has been ratified by 41 countries.<sup>9</sup> The *OECD Convention* serves as a template for signatory

<[http://business.financialpost.com/2013/01/10/canadas-financial-markets-emerge-as-global-leader-in-energy-listings/?\\_\\_lsa=db54-0907](http://business.financialpost.com/2013/01/10/canadas-financial-markets-emerge-as-global-leader-in-energy-listings/?__lsa=db54-0907)>.

<sup>6</sup> TSX and TSXV Market Intelligence Group "Strength in Mining" *Listed* (figures as they were on 31 December 2012) online: *Listed Magazine* <[http://listedmag.com/res\\_img/Strength\\_in\\_mining.pdf](http://listedmag.com/res_img/Strength_in_mining.pdf)>.

<sup>7</sup> Claire Woodside et al, "Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments" *The Resource Revenue Transparency Working Group* (16 January 2014) online: Publish What You Pay Canada <[http://www.pwyp.ca/images/M\\_images/Working\\_Group\\_Transparency\\_Recommendations\\_Eng.pdf](http://www.pwyp.ca/images/M_images/Working_Group_Transparency_Recommendations_Eng.pdf)> at 3 [Transparency Working Group].

<sup>8</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, online: OECD <[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)> [OECD Convention].

<sup>9</sup> OECD, "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014" *OECD Convention* (21 May 2014), online: OECD <<http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>>.

countries to establish their own anti-corruption laws, and has been implemented by Canada, the United States, and the United Kingdom, amongst others.

Implementation of the *OECD Convention* requires a country to create a criminal offence for the bribery of foreign public officials<sup>10</sup> which has extra-territorial jurisdiction over its nationals who commit bribery offences abroad. The *OECD Convention* is written broadly to cover a wide scope of activity: including direct and indirect bribery;<sup>11</sup> attempts and conspiracies to bribe a foreign public official;<sup>12</sup> bribes to take advantage of any use of a public official's position, whether or not the position is within the official's authorized competence;<sup>13</sup> and any activity in the public interest, delegated by a foreign country, such as the performance of a task in connection with public procurement.<sup>14</sup>

The definitions of "foreign public official"<sup>15</sup> and "foreign country" are also written broadly. The definition of a "foreign country" is notable in that it includes all levels and subdivisions of government, from national to local.<sup>16</sup> The definition also includes any organized foreign area or entity, such as an autonomous territory or a separate customs territory<sup>17</sup> and a "public enterprise" as any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.<sup>18</sup> This broad definition of "foreign country" accounts for the fact that many parts of the developing world do not have defined borders or

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<sup>10</sup> *OECD Convention*, *supra* note 8, art 1 sets out the offence of bribery of foreign public officials as follows:  
1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

<sup>11</sup> *Ibid*, art 2 states: Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*, art 1(4)(c).

<sup>14</sup> *Ibid* at 15.

<sup>15</sup> *Ibid*, art 1(4)(a): Foreign public official means, "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."

<sup>16</sup> *Ibid*, art 1(4)(b).

<sup>17</sup> *Ibid* at 16.

<sup>18</sup> *Ibid* at 14.

Western-recognized governments. Thus a foreign public official under the *OECD Convention* includes any person exercising a public function for any level and type of government regardless of whether that function is within the scope of that person's authority.

The *OECD* mandates that non-compliance with foreign anti-corruption laws result in "effective, proportionate and dissuasive"<sup>19</sup> penalties "comparable to [those] applicable to the bribery of the [country's] own public officials."<sup>20</sup> Furthermore, the *OECD Convention* requires that "monetary sanctions of comparable effect are applicable."<sup>21</sup>

To give effect to the *OECD Convention's* extra-territorial requirement, the foreign anti-corruption law must "include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition,"<sup>22</sup> thus deeming the offence of bribing a foreign public official to be an extraditable offence.<sup>23</sup> Further, the *OECD Convention* may be used as the legal basis for extradition should a country requesting the extradition of an individual from a signatory state with which there is no extradition treaty require the benefit of an extradition treaty.<sup>24</sup> The *OECD Convention* also requires signatory countries to "provide prompt and effective legal assistance to [other signatories] for the purpose of criminal investigations and proceedings."<sup>25</sup> If one signatory "makes mutual legal assistance [to another signatory] conditional upon dual criminality," then dual criminality is deemed to exist.<sup>26</sup>

The broad scope of the *OECD Convention* and the requirement for international cooperation in preventing and responding to foreign corruption gives effect to the *OECD Convention's* intention to prevent the solicitation "of bribes from individuals and enterprises in international business transactions."<sup>27</sup>

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<sup>19</sup> *Ibid.*, art 3(1).

<sup>20</sup> *Ibid.* The penalty imposed under the Canadian *Corruption of Foreign Public Officials Act* is comparable to the maximum penalty for domestic bribery found in sections 121 and 123 of the *Criminal Code*, RSC 1985, c C-46.

<sup>21</sup> *Ibid.*, art 3(3).

<sup>22</sup> *Ibid.*, art 3(1).

<sup>23</sup> *Ibid.*, art 10(1).

<sup>24</sup> *Ibid.*, art 10(2).

<sup>25</sup> *Ibid.*, art 9(1). The RCMP's Commercial Crime Branch offers this assistance. According to its website, "[t]he Commercial Crime Program has developed strategic partnerships with the financial and banking communities, computer professionals, credit card manufacturers, government agencies and departments, and law enforcement agencies, both nationally and internationally." See Royal Canadian Mounted Police, "Commercial Crime" (4 June 2012), online: RCMP <<http://www.rcmp-grc.gc.ca/ccb-sddc/index-eng.htm>>.

<sup>26</sup> *OECD Convention*, *supra* note 8, art 9(2).

<sup>27</sup> *Ibid.* at 6.

(ii) *United Nations Convention Against Corruption*

The *United Nations Convention against Corruption*<sup>28</sup> (the “UN Convention”) followed the *OECD Convention* and entered into force in 2005. The initial form of the UN Convention was adopted in 1996 as the *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, which called on member states to enact and enforce foreign anti-corruption laws which criminalize bribery of foreign officials in international business transactions and to ensure that bribes were not tax deductible.<sup>29</sup> It has been ratified by 171 member states.<sup>30</sup>

The operative provision of the *UN Convention* is Article 16 which requires member states to criminalize the “promise, offering or giving” of an undue advantage to a foreign public official, or an official of a public international organization, in order to obtain or retain business or some other advantage in relation to the conduct of international business.<sup>31</sup> It also requires that states consider adopting legislation that would make it illegal for a foreign public official to solicit or accept such bribes.<sup>32</sup>

The *UN Convention* and the *OECD Convention*, together, are the templates for domestic statutes for foreign anti-corruption laws of signatory countries.

(iii) *Extractive Industries Transparency Initiative*

The Extractive Industries Transparency Initiative (“EITI”) is a global coalition of governments, companies and civil society organizations whose objective is to promote openness and accountability in the management of revenues from natural resources. Following a global movement of non-governmental organizations (“NGOs”) advocating for enforcement of

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<sup>28</sup> United Nations Convention Against Corruption, 9 December 2003, GA res 58/4, 43 ILM 37 [UN Convention].

<sup>29</sup> United Nations Declaration against Corruption and Bribery in International Commercial Transactions, UNGAOR, 1997, A/RES/51/191.

<sup>30</sup> United Nations Office on Drugs and Crime, “United Nations Convention against Corruption Signature and Ratification Status as of 2 April 2014” *The United Nations* (4 April 2014), online: The United Nations Document Centre <<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

<sup>31</sup> *UN Convention*, *supra* note 28, art 16.

<sup>32</sup> Susan Hutton and Paul Beaudry, “Canada Steps up the Fight Against Foreign Corruption” *Lexpert* (2014), online: Lexpert online/American Lawyer <[http://www.stikeman.com/2011/en/pdf/ALM500\\_ForeignCorruption.pdf](http://www.stikeman.com/2011/en/pdf/ALM500_ForeignCorruption.pdf)> [Canada Steps Up].

corporate social responsibility,<sup>33</sup> the buzz-phrase “Publish What You Pay”<sup>34</sup> was born in a 1999 Global Witness report called “A Crude Awakening”,<sup>35</sup> which called on operating oil companies in Angola to adopt a policy of full transparency and government accountability.<sup>36</sup> In 2002, the then-U.K. Prime Minister, Tony Blair, outlined the concept of the EITI in a speech to be delivered at the World Summit on Sustainable Development in Johannesburg.<sup>37</sup> Prime Minister Blair convened an international conference<sup>38</sup> in London in June 2003 to agree on a Statement of Principles and Agreed Actions to increase transparency over payments and revenues in the extractive sector.<sup>39</sup> Over the following decade the EITI evolved from a vague initiative which encouraged voluntary corporate transparency, to providing additional enforcement impetus for globally accepted and legislated reporting standards for government payments made by large extractive companies<sup>40</sup> and reporting by governments of revenues. The collected figures are audited independently to detect any discrepancies and an EITI report is published per country.

Currently, 35 countries have produced EITI reports with 29 compliant countries<sup>41</sup> (all developing countries). Over 80 large oil, gas, and

<sup>33</sup> Extractive Industries Transparency Initiative, “History of EITI” online: Extractive Industries Transparency Initiative <<http://eiti.org/eiti/history>> [EITI Website].

<sup>34</sup> See Publish What You Pay, online: <<http://www.publishwhatyoupay.org/>>.

<sup>35</sup> Global Witness, “A Crude Awakening: The role of the oil and banking industries in Angola’s Civil War and the plunder of state assets” (1 December 1999), online: Global Witness <<http://www.globalwitness.org/sites/default/files/pdfs/A%20Crude%20Awakening.pdf>> [Crude Awakening].

<sup>36</sup> EITI Website, *supra* note 33, citing *Crude Awakening*, *supra* note 35.

<sup>37</sup> EITI Website, *supra* note 33.

<sup>38</sup> Some 140 delegates representing 70 governments, companies, industry groups, international organisations, investors and NGOs attended a conference in Lancaster House, London, on 17 June 2003. See Department for International Development, “Report of the Extractive Industries Transparency Initiative (EITI) London Conference” *Government of the UK, DFID* (17 June 2003), online: <<http://collections.europarchive.org/tna/20070701080507/http://www.dfid.gov.U.K./news/files/eitireportconference17june03.asp>> [Report of the EITI].

<sup>39</sup> *Ibid.*

<sup>40</sup> Under the EU Directive, the reporting threshold for large undertakings is those companies that exceed two of the three following criteria: turnover €40 million, total assets €20 million and employees 250 and the following payments must be reported: production entitlements, taxes, royalties, dividends, bonuses, licence fees, rental fees or payments for infrastructure improvements. Under the EU Directive, the reporting threshold is €100,000 for payments made in a single year, including one-off payments and series of payments. EC, *Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC* [2013] OJ, L 182/19.

<sup>41</sup> A country is designated as EITI Compliant when the EITI Board considers that it meets all of the EITI Requirements. Compliant countries must undergo validation every three years or upon the request from the EITI Board. To be EITI Compliant does not necessarily mean a country’s extractive sector is fully



mining companies have committed to supporting the EITI. There are also 16 candidate countries,<sup>42</sup> including the United States and the United Kingdom.<sup>43</sup> Although Canada has not applied for candidacy, Prime Minister Stephen Harper announced in October 2012 that Canada would provide \$20 million over four years in support to developing countries through the World Bank's Extractive Industries Technical Advisory Facility<sup>44</sup> to "contribute to teaching the negotiation skills and policy expertise necessary to manage the mining, oil and natural gas industries in a responsible and transparent manner."<sup>45</sup> Canada's domestic foreign anti-corruption compliance initiative is discussed in the next section below.

(iv) *Mandatory Disclosure of Payments from Canadian Mining Companies to Governments: "Publish What You Pay"*

On June 12, 2013, Prime Minister Stephen Harper announced Canada's commitment to joining other members of the G8<sup>46</sup> in establishing a mandatory disclosure regime for the resource industry requiring extractive industry firms to publically disclose any payments made to foreign governments.<sup>47</sup> In an effort to give effect to Canada's commitment, the

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transparent, but that there are satisfactory levels of disclosure and openness in the management of the natural resources, as well as a functioning process to oversee and improve disclosure. See EITI, "The EITI Glossary" *EITI Candidate*, online: <http://eiti.org/glossary> [*EITI Glossary*].

<sup>42</sup> An EITI candidate is a country that has fully, and to the satisfaction of the EITI Board, completed the four sign-up steps set out in the EITI Standard. EITI Candidature is a temporary state which is intended to lead, in a timely fashion, to compliance with the EITI Standard. When the EITI Board admits an EITI Candidate, it establishes deadlines for publishing the first EITI Report and undertaking Validation. The first EITI Report must be published within 18 months and Validation must commence within two and a half years. *Ibid.*

<sup>43</sup> EITI, "EITI Countries", online: <<http://eiti.org/countries>>.

<sup>44</sup> Department of Foreign Affairs, Trade and Development, "Harper Government Launches Cross-Country Extractive-Sector Consultations" *Government of Canada* (18 September 2013), online: <<http://www.international.gc.ca/media/comm/news-communicues/2013/09/18a.aspx?lang=eng>>.

<sup>45</sup> Office of the Prime Minister of Canada, "PM Announces New Support to Help Developing Countries Manage their Natural Resources" *Government of Canada* (14 October 2012), online: <<http://www.pm.gc.ca/eng/node/21945>>.

<sup>46</sup> Canada is following the lead of several other countries, such as the United States, those in the European Union and Hong Kong which already require the extractive industry to report taxes, royalties and other fees paid to foreign governments. See Elisabeth Preston, "Canada introduces law requiring extractive companies to publicly disclose payments to foreign governments" *McMillan LLP Business Law Bulletin* (June 2013), online: McMillan <<http://mcmillan.ca/Canada-introduces-law-requiring-extractive-companies-to-publicly-disclose-payments-to-foreign-governments>>.

<sup>47</sup> Office of the Prime Minister of Canada, "Canada commits to enhancing transparency in the extractive sector" *Government of Canada* (12 June 2013), online: <<http://pm.gc.ca/eng/news/2013/06/12/canada-commits-enhancing-transparency-extractive-sector>>.

Resource Revenue Transparency Working Group<sup>48</sup> (the “Transparency Working Group”) published a report entitled *Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments*<sup>49</sup> on January 16, 2014. The report’s primary recommendation is to require all public companies listed on Canadian stock exchanges to publically disclose all payments made to foreign governments for all stages of the project life cycle.

On October 23, 2014, the Federal Government introduced legislation to implement the *Extractive Sector Transparency Measures Act* (the “ESTMA”)<sup>50</sup>, which received Royal Assent on December 16, 2014. The purpose of ESTMA (as established in section 6) is “to implement Canada’s international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities.”

ESTMA is drafted to complement the corruption provisions of the *Criminal Code* and the *Corruption of Foreign Public Officials Act* and applies to the following range of companies involved in the exploration and extraction of oil, gas and minerals and companies acquiring or holding rights to these resources:

1. a company that is listed on a stock exchange in Canada; or
2. a company that has a place of business, does business or has assets in Canada and, for at least one of its two most recent financial years, meets at least two of the three thresholds below:
  - a. it has at least \$20 million in assets;
  - b. it has generated at least \$40 million in revenue; and/or
  - c. it employs an average of at least 250 employees.

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<sup>48</sup> A joint working group comprised of the Mining Association of Canada, the Prospectors & Developers Association of Canada, Publish What You Pay Canada, and the Revenue Watch Institute jointly formed the Resource Revenue Transparency Working Group (Canada’s two main mining industry organizations and two watch-dog organizations, collectively the “Transparency Working Group”). See Transparency Working Group, *supra* note 7.

<sup>49</sup> The Working Group suggests that equivalence be determined based on objective criteria, including: scope of reporting; definition of control; payment categories; minimum payment threshold; project definition; exemptions; format of disclosure; regularity of reporting; and standard of verification. See Transparency Working Group, *ibid* at 5.

<sup>50</sup> Contained within Bill C-43, *A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*.

Companies with reporting obligations under ESTMA will be required to publicly report payments made to all levels of domestic and foreign governments, including institutions established by two or more governments, Aboriginal governments, and entities that have been established to exercise government functions, such as trusts, boards, commissions, or corporations. Under the Act, companies will be required to disclose single or cumulative payments amounting to at least \$100,000, unless there is a specific threshold prescribed by regulation. The categories of payment include:

1. taxes, other than consumption taxes and person income;
2. royalties;
3. fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concession;
4. production of entitlements;
5. bonuses, including signature, discovery and production bonuses;
6. dividends other than dividends paid as ordinary shareholders;
7. infrastructure improvement payments; and
8. any other prescribed category of payment.

ESTMA does not yet stipulate how or what information will be made public. However the provincial securities administrators, such as the Ontario Securities Commission, are the recommended regulators given that they already have the statutory powers, experience, and resources for collecting and regulating disclosures. There would also be a parallel initiative to harmonize the provincial securities regulators to ensure consistency.<sup>51</sup> It is recommended that the annual disclosures are fully publically accessible and filed on SEDAR (System for Electronic Document Analysis and Retrieval). The annual disclosures should include the following information: total amount of payments made by category, currency used, financial period, business segment, government that received the payment, and the project to which the payment relates. Failing to comply with reporting requirements under ESTMA, for making false or misleading statements, or for structuring payments to avoid reporting requirements may result in criminal charges and monetary fines. Notably, the offences are structured as continuing offences whereby a separate offence is counted on each day on which the offence is

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<sup>51</sup> Transparency Working Group, *supra* note 7 at 4.

continued;<sup>52</sup> this has the potential to result in onerous accumulated charges and penalties.

Canada's ESTMA follows the lead of several other countries, and is aligned with the extractive industry reporting frameworks already in place in the European Union (the E.U. amendments to its Accounting Directives) and the United States (based on the U.S. *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "Dodd-Frank Act")). ESTMA provides for jurisdictional substitution where a company has achieved the reporting requirements under ESTMA through its report submitted in another country. This will allow companies operating in multiple markets to generate one report, thus reducing the administrative burden for firms with multiple listings. Jurisdictional equivalency is a significant consideration so as to not duplicate the reporting obligations of extractive companies. As more than 100 of the largest Canadian resource extraction companies are listed on U.S. stock exchanges and are already required to publically disclose foreign payments for commercial development activities over \$100,000,<sup>53</sup> a dual listing would not be burdensome for these companies in meeting their disclosure obligations in both countries.

There is broad support in the resources industry for the concept "in the hope that it will level the playing field in dealing with different governments around the world".<sup>54</sup> The resources industry further hopes that mandatory disclosure of payments will positively impact local communities by making the substantial sums of money flowing to their governments transparent.<sup>55</sup> The Act comes into force on the day or days to be fixed by order of Governor in Council at a time currently unknown, although the government's stated intent is to have the legislation in force by April 1, 2015.<sup>56</sup>

(b) **Canadian Statute: *Corruption of Foreign Public Officials Act***

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<sup>52</sup> At section 24.

<sup>53</sup> See Transparency Working Group, *supra* note 7.

<sup>54</sup> Drew Hasselback, "Mining Industry Embraces Transparency" *Financial Post* (31 July 2013) online: Postmedia Network Inc <<http://business.financialpost.com/2013/07/31/canadian-mining-industry-embraces-transparency-initiative/>>.

<sup>55</sup> Ashley Renders, "Money is disappearing into someone's pocket': Canadian miners push for disclosure on foreign payments" *Financial Post* (16 January 2014) online: Postmedia Network Inc <<http://business.financialpost.com/2014/01/16/miners-disclosure-2014/>>.

<sup>56</sup> Government of Canada, "Consultation - Mandatory Reporting Standards for the Extractive Sector" (14 January 2015), online: <<http://open.canada.ca/en/forms/consultation-mandatory-reporting-standards-extractive-sector>>.

The Canadian government implemented the *OECD Convention* by enacting the *Corruption of Foreign Public Officials Act*<sup>57</sup> (the “CFPOA”), which came into force on February 14, 1999. This statute creates a criminal offence for bribing a foreign public official and applies to Canadian individuals and corporations, whether acting directly or indirectly (such as through an agent or third party) regardless of whether the conduct took place in Canada or in a foreign jurisdiction.

The CFPOA is broadly drafted in order to capture a wide scope of conduct to further the Canadian government’s objective of strengthening Canada’s foreign anti-corruption enforcement. The CFPOA applies to all Canadian citizens, permanent residents and Canadian companies (public body, corporation, society, company, firm or partnership) regardless of whether the offence is committed in Canada or in a foreign jurisdiction. The key operative provision of the CFPOA is found in section 3(1) which reads:

s 3(1): Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

(a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

This offence includes the conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to the bribery of a foreign public official.<sup>58</sup> On June 19, 2013, the CFPOA was amended to include the following:

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<sup>57</sup> Corruption of Foreign Public Officials Act, RSC 1998, c 34 [CFPOA].

<sup>58</sup> *Ibid.*, s 5.

- a) expand the definition of “business” to capture all kinds of business or undertakings carried on in Canada or elsewhere, whether or not for profit;<sup>59</sup>
- b) increase the maximum sentence of imprisonment applicable to the offence of bribing a foreign public official from 5 to 14 years imprisonment;<sup>60</sup>
- c) eliminate the previous facilitation payments<sup>61</sup> exception to that offence;
- d) create a new criminal offence prohibiting the misrepresentation of books and records which conceal bribery of a foreign public official;<sup>62</sup>
- e) establish nationality jurisdiction in addition to territoriality jurisdiction in respect of all of the offences under the Act, enabling Canadian authorities to prosecute Canadian nationals and companies regardless of where the conduct took place;<sup>63</sup> and
- f) grant the RCMP exclusive authority to lay charges under the Act.<sup>64</sup>

These amendments have not yet been considered by a court.

(c) **U.S. Statute: *Foreign Corrupt Practices Act***

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<sup>59</sup> *Ibid.*, s 2.

<sup>60</sup> *Ibid.*, s 3(2).

<sup>61</sup> Facilitation payments include payments made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions, including the issuance of a permits or licences, the processing of official documents, and the provision of services normally offered to the public (such as mail pick-up and delivery, telecommunication services and power and water supply).

<sup>62</sup> *CFPOA*, *supra* note 57, s 4. This offence is found in section 4 which reads: 4(1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,

- (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
- (b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
- (c) records non-existent expenditures in those books and records;
- (d) enters liabilities with incorrect identification of their object in those books and records;
- (e) knowingly uses false documents; or
- (f) intentionally destroys accounting books and records earlier than permitted by law.

<sup>63</sup> *Ibid.*, s 5.

<sup>64</sup> *Ibid.*, s 6.

In the United States, the *Foreign Corrupt Practices Act*<sup>65</sup> (the “FCPA”) was enacted in 1977 in the wake of the Watergate political scandal and in response to the widespread global corruption uncovered by the Securities and Exchange Commission (the “SEC”).<sup>66</sup> The SEC had discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas.

The anti-bribery provisions of the FCPA prohibit “issuers, domestic concerns, and any person from making use of interstate commerce corruptly, in furtherance of an offer or payment of anything of value to a foreign official, foreign political party, or candidate for political office, for the purpose of influencing any act of that foreign official in violation of the duty of that official, or to secure any improper advantage in order to obtain or retain business.”<sup>67</sup> This offence also imposes liability for conspiring to commit or for aiding and abetting violations of the anti-bribery provisions.

The FCPA’s anti-bribery provisions apply to conduct both inside and outside the United States. Issuers and private companies – as well as their officers, directors, employees, agents, or shareholders – may be prosecuted for using the U.S. mail, telecommunication or any other means of interstate (including between foreign countries) commerce in furtherance of a corrupt payment to a foreign official.<sup>68</sup> There is a narrow exception for “facilitating or expediting payments” made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further “routine governmental action” that involves non-discretionary acts.<sup>69</sup>

The FCPA also contains accounting offences applicable to all public companies, regardless of whether a company’s conduct falls within a bribery-related offence. The FCPA’s accounting provisions operate in conjunction with the anti-bribery provisions and prohibit off-the-books accounting.<sup>70</sup> The accounting provisions consist of two primary components: 1) the “books and records” provision requires issuers to keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer’s transactions and

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<sup>65</sup> Foreign Corrupt Practices Act, 15 USC § 78dd-1 (1977). [US FCPA]

<sup>66</sup> United States Department of Justice, “A Resource Guide to the US Foreign Corrupt Practices Act” *Criminal Division and Securities and Exchange Commission*, (14 November 2012) online: <<http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>> at 10 [US Resource Guide].

<sup>67</sup> Anthony Tarantino, *Essentials of Risk Management in Finance* (New Jersey: John Wiley & Sons, Inc, 2011) at 111.

<sup>68</sup> US Resource Guide, *supra* note 66 at 11-12.

<sup>69</sup> *Ibid* at 25.

<sup>70</sup> *Ibid* at 38.

dispositions of an issuer's assets; and 2) the "internal controls" provision requires issuers to devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets.<sup>71</sup> As with the FCPA's anti-bribery provisions, liability may be imposed for conspiring to commit, or for aiding and abetting violations of the accounting provisions.<sup>72</sup>

The FCPA is administered by the Department of Justice for criminal and civil violations under the Act and by the SEC for civil enforcement against issuers. However, most prosecutions are settled without trial on the basis of a Deferred Prosecution Agreement (a "DPA") without an admission of guilt, but with both civil and criminal penalties being levied.<sup>73</sup>

The United States is in the lead in terms of enforcement of foreign corrupt practice laws, with 270 civil or criminal enforcement proceedings initiated since 2007.<sup>74</sup> The fines imposed under the FCPA have also been notable including USD\$800 million against Siemens AG, after it pleaded guilty to criminal and civil FCPA violations in December 2008, USD\$579 million against KBR/Halliburton in February 2009, USD\$400 million against BAE in March 2010, USD\$338 million against Technip in June 2010, USD\$365 million against ENI in July 2010, and USD\$398 million against Total S.A. in May 2013.<sup>75</sup>

The scope of the FCPA extends to Canadian companies with American ties. Canadian companies that trade on any U.S. stock exchange, have a U.S. bank account and/or have an American director, officer, employee or agent are expected to be aware of the obligations under the FCPA.<sup>76</sup> This stems from the application of the FCPA to "issuers, domestic concerns, and any person" that may "make use of interstate commerce corruptly". Therefore Canadian public and private companies with indicia of American ties may be liable under the FCPA.

(d) U.K. Statute: *Bribery Act*

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* at 45.

<sup>73</sup> Gordon Kaiser, "Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations" (2013) 34 Energy Law Journal 193 at 203 [*Corruption in the Energy Sector*].

<sup>74</sup> *Canada Steps Up*, *supra* note 32.

<sup>75</sup> United States Securities and Exchange Commission, "SEC Enforcement Actions: FCPA Cases" *Government of the United States* (29 May 2013), online: <<http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>.

<sup>76</sup> *US Resource Guide*, *supra* note 66 at 27.



The United Kingdom's *Bribery Act*<sup>77</sup> came into force on July 1, 2011. Previously, the United Kingdom's bribery law was based on a non-comprehensive combination of legislation and jurisprudence.<sup>78</sup> Like Canada, the United Kingdom enacted its *Bribery Act* to ratify its commitment to the *OECD Convention*. However, unlike Canada and the United States, the *Bribery Act* captures both private and commercial bribery in addition to bribery of foreign public officials. The U.K.'s previous patchwork of common law and statutory law is now replaced by the *Bribery Act*'s two general offences: active bribery, covering the offering, promising or giving of a bribe (section 1); and passive bribery, the requesting, agreeing to receive or accepting of a bribe (section 2). The *Bribery Act* also includes the offence against bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business (section 6), and a corporate liability offence of failing to prevent bribery on behalf of a commercial organization (section 7).

The *Bribery Act* grants the U.K. extra-territorial jurisdiction over section 1, 2 and 6 offences committed outside the U.K. where the person committing these offences has a close connection with the U.K. by virtue of being a British national or ordinarily resident in the U.K., a body incorporated in the U.K., or a Scottish partnership.<sup>79</sup> The *Bribery Act* grants an even greater extension of jurisdictional reach for the purposes of section 7, capturing not only U.K.-based companies, but also foreign companies carrying on business in the U.K.<sup>80</sup> The extensive scope of section 7, which has greater extraterritorial reach than the *CFPOA* and the *FCPA*,<sup>81</sup> ensnares foreign companies for failing to prevent bribery "even where the bribery takes place wholly outside the U.K. and the benefit or advantage to the company is intended to accrue outside the U.K."<sup>82</sup> Thus the *Bribery Act* applies to Canadian companies doing business in the U.K., regardless if the prohibited

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<sup>77</sup> *Bribery Act 2010 (U.K.)*, 2010, c 23 [Bribery Act].

<sup>78</sup> *Canada Steps Up*, *supra* note 32 at A-3.

<sup>79</sup> *Bribery Act*, *supra* note 77 at s 12; Ministry of Justice, "The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)" *The Government of the U.K.* (March 2011), online: <<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>> at para 15 [Bribery Act Guidance].

<sup>80</sup> *Bribery Act*, *supra* note 77, s 7(5).

<sup>81</sup> *Corruption in the Energy Sector*, *supra* note 73 at 36.

<sup>82</sup> Transparency International UK, "The Bribery Act", online: <<http://www.transparency.org.uk/our-work/business-integrity/bribery-act>>.

act is committed in the U.K., the benefit of the prohibited act accrues in the U.K., or whether the act is committed by a person connected with the U.K.<sup>83</sup>

The *Bribery Act* contains a maximum penalty of ten years in prison, and/or fines in the discretion of the court. It is a full defence for an organization to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.<sup>84</sup> Further, the *Bribery Act* creates an exemption for “bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations.”<sup>85</sup> For example, the provision by a U.K. mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company’s installations and operating systems are expenditures which fall outside the intended scope of the offence.<sup>86</sup> However, facilitation payments are prohibited under the *Bribery Act*.<sup>87</sup>

### III. APPLICATION OF THE LAW TO CANADIAN RESOURCE FIRMS

The extractive industries are particularly affected by anti-bribery legislation given their operations in various developing jurisdictions.

The operations are frequently in emerging countries, often with high levels of domestic corruption and government control. They also frequently employ agents and contractors, and engage as joint venture partners. Further, the business transactions involve large capital expenditures and constant negotiations with foreign governments for exploration and production rights, which can provide occasions for improper conduct.<sup>88</sup>

As a result of the ramping-up of enforcement regimes, many mining and energy corporations have enacted internal anti-corruption compliance programs as an essential element of their corporate governance. Most

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<sup>83</sup> *Corruption in the Energy Sector*, *supra* note 73.

<sup>84</sup> *Bribery Act*, *supra* note 77, s 7; *Bribery Act Guidance*, *supra* note 79 at para 33.

<sup>85</sup> *Bribery Act Guidance*, *ibid* at para 26.

<sup>86</sup> *Ibid* at para 31.

<sup>87</sup> *Ibid* at paras 44-45.

<sup>88</sup> Ian E Marshall, “A Survey of Corruption Issues in the Mining and Mineral Sector” *IIED* (2001) online: Transparency International MMSD Project <[http://iacconference.org/documents/10th\\_iacc\\_workshop\\_A\\_SURVEY\\_OF\\_CORRUPTION\\_ISSUES\\_IN\\_THE\\_MINING\\_\\_MINERAL\\_SECTOR.pdf](http://iacconference.org/documents/10th_iacc_workshop_A_SURVEY_OF_CORRUPTION_ISSUES_IN_THE_MINING__MINERAL_SECTOR.pdf)> at 3.

corporations also now have chief compliance officers that report directly to the board of directors.<sup>89</sup> These internal compliance programs result in part from jurisprudence which shows that courts acknowledge steps taken by firms to implement anti-corruption compliance programs to prevent bribes and have factored this into their sentencing decisions.<sup>90</sup> Until recently, there was little Canadian enforcement activity, however that has changed. Enforcement under the Canadian legislation is gearing up significantly. Below we explore some of the recent cases.

**(a) Hydro-Kleen Group Inc.**

In January 2005, the Hydro Kleen Group Inc, an Alberta-based pipeline maintenance company (“*Hydro Kleen*”) was the first company to be convicted under the *CFPOA*. It received a relatively light sentence in comparison to the judgments enforced in the United States. As part of a guilty plea agreement, *Hydro Kleen* pleaded guilty to paying a bribe of \$30,000 to a United States immigration officer working at the Calgary International Airport. It received a fine of \$25,000 and a stay of charges against a director and an officer of the company. Hydro Kleen Group Inc. had paid the immigration officer \$2,000 a month to facilitate the entry of its employees into the United States. The immigration officer also delayed competitors at the border. The officer also pleaded guilty, so the case did not offer analysis of the scope of offences under the *CFPOA*. The lengthy sentencing decision did, however, provide more guidance on sentences under the *CFPOA*<sup>91</sup>, which was further analyzed in *Karigar* (below).

**(b) Niko Resources Ltd.**

On June 23, 2011, Calgary-based oil and gas exploration and production company, Niko Resources Ltd. (“*Niko*”) was the next company that was sentenced under the *CFPOA*. This time, the Canadian courts imposed a more substantial penalty for the bribe of a Bangladeshi Energy Minister with a \$190,000 Toyota Land Cruiser for the Minister’s personal

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<sup>89</sup> See generally Erica Salmon-Byrne & Jodie Frederickson, “The Business Case for Creating a Standalone Chief Compliance Officer Position” *Ethisphere Institute* (25 May 2010), online: Ethisphere Institute <<http://ethisphere.com/the-business-case-for-creating-a-standalone-chief-compliance-officer-position/>>.

<sup>90</sup> See for example, the *Niko Resources* and *Griffiths Energy* cases, *infra* notes 92 and 93, respectively.

<sup>91</sup> *R v Watts*, [2005] AJ No 568.

use, as well as trips to Calgary, New York and Chicago as compensation for an explosion at one of Niko's natural gas fields which contaminated Bangladeshi villagers' water supplies and caused other environmental concerns. Despite the fact that the Crown was unable to prove that any influence was obtained as a result of providing the benefits to the Minister, the court imposed a sentence of \$9.5 million and a three-year probation order which required Niko to implement a detailed compliance program subject to review by an independent auditor. In imposing this sentence, the Court considered the following factors:<sup>92</sup>

- The degree of planning and duration and complexity of the offence;
- Niko did not attempt to conceal its assets, or convert them to show it was unable to pay the fine or comply with the Probation Order;
- Steps already taken by Niko Canada to reduce the likelihood of it committing a subsequent related offence;
- The company had never been convicted of a similar offence nor has it been sanctioned by a regulatory body for a similar offence;
- Niko cooperated with the investigation when it became aware that it was the subject of an RCMP investigation, and by virtue of the Probation Order will continue to be cooperative with any further aspects of the prosecution or investigation;
- The Probation Order put Niko under the Court's supervision for the following three years to ensure audits were done to examine Niko's compliance with the *CFPOA*; and
- The company agreed to enter a plea prior to charges formally being laid, and agreed to enter a guilty plea without the requirement of a preliminary hearing or trial.

The Court acknowledged Niko's cooperation and efforts to implement an internal anti-corruption compliance program in its sentencing decision.

**(c) Griffiths Energy International Inc.**

In 2013, Griffiths Energy International Inc. ("Griffiths", recently renamed Caracal Energy Inc.) became subject to the *CFPOA* and entered into a guilty plea arrangement.

Griffiths' senior management discovered evidence of bribes committed by its former chairman and co-founder, who had accidentally

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<sup>92</sup> *R v Niko Resources Ltd* (23 June 2011), Calgary E-File No CCQ 11 (Agreed Statement of Facts) (Alta QB) at paras 61-66 [Niko].

drowned, when the management of the company was undergoing reorganization following the death. Griffiths decided to retain external legal counsel and a forensic accounting firm to conduct an internal investigation into the bribes, supervised by special committee of independent members of the firm's board of directors.

The results of the investigation were voluntarily disclosed to the RCMP International Anti-Corruption Unit, the Public Prosecution Service of Canada and the U.S. Department of Justice. The disclosure stated that between August 2009 and February 2011 Griffiths entered into three production sharing contracts with the government of the Republic of Chad involving exclusive rights to explore and develop reserves and resources over a combined area of 26,103 km<sup>2</sup> in southern Chad. The contracts covered two oil basins for potential development, oil discoveries, and numerous exploration prospects. Griffiths' previous management negotiated and executed these three contracts with two entities owned and controlled by a foreign public official and his spouse, and had made a \$2 million payment to a company owned by the wife of the Chad Ambassador to Canada under the guise of a consulting contract.

Similarly to *Niko*, the Court considered the following factors in its decision to impose a fine of \$10.35 million:<sup>93</sup>

- The degree of planning, duration and complexity of the offence;
- That Griffiths' lack of attempt to conceal its assets or convert them to show that it was unable to pay the fine;
- The steps already taken by Griffiths to reduce the likelihood of it committing a subsequent related offence;
- The robust anti-corruption compliance program implemented by Griffiths to strengthen its existing internal controls, many of which steps were already initiated by Griffiths' new management and were well underway at the time the bribes were discovered by Griffiths;
- Griffiths' lack of prior similar offences;
- The full and extensive cooperation shown by Griffiths in bringing the matter to the attention of the authorities and disclosing the detailed findings of its comprehensive internal investigation; and
- Griffiths' agreement to enter into a plea agreement prior to charges being formally laid, without the requirement of a preliminary hearing or trial.

**(d) Karigar**

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<sup>93</sup> *R v Griffiths Energy International Inc* (14 January 2013) Calgary E-File No CCQ 51 (Agreed Statement of Facts) (Alta QB) at paras 52-26.

On May 23, 2014, Nazir Karigar became the first individual to be tried in a contested matter, and sentenced under the *CFPOA*. He now faces three years imprisonment. In August 2013, Mr. Justice Hackland of the Ontario Superior Court ruled that Karigar, an Indian-Canadian CryptoMetrics executive director acting as an agent, conspired to bribe Indian public officials in exchange for a contract to use a security technology system to be procured from CryptoMetrics.<sup>94</sup>

CryptoMetrics transferred a total of USD\$1.1million to Karigar's bank account in Mumbai on the understanding that it would be paid to a state-owned Air India official and to the Indian Minister of Civil Aviation. Karigar also incorporated a shell company to submit a competing and higher bid to give the illusion of competition. Despite lack of evidence that the Minister actually received the money, and despite the fact that the company was not awarded the contract, the Court ruled that there was a sufficient paper trail to demonstrate Karigar's intention to make improper payments. Karigar was convicted for the conspiracy to bribe a foreign public official, although there was no proof that money was actually transferred. In the context of a failed attempt to receive the contract, the Court determined that the word "agrees" in section 3(1) of the *CFPOA*<sup>95</sup> "imports the concept of conspiracy into the act. In doing so, it meets Canada's obligations under the *OECD Convention* to criminalize conspiracies to give or offer bribes to foreign public officials."<sup>96</sup> The Court rejected the arguments that proof of the bribe and the identity of the recipient are required under the *CFPOA*, stating that such requirements would unduly restrict the scope and objectives of the act and "would require evidence from a foreign jurisdiction, possibly putting foreign nationals at risk and would make the legislation difficult if not impossible to enforce and possibly offend international comity."<sup>97</sup>

As the first case involving the conviction of an individual, the case set a sentencing precedent. The sentencing decision was complicated by the fact that the case began in 2011 before the amendments to the *CFPOA* were introduced in June 2013. Thus the maximum penalty Karigar faced was five years in prison, instead of the fourteen year maximum under the current

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<sup>94</sup> *R v Karigar*, 2013 ONSC 5199, 108 WCB (2d) 210 [*Karigar*].

<sup>95</sup> Section 3 (1) of the *CFPOA*, *supra* note 57, criminalizes the act of one who "... directly or indirectly gives, offers or agrees to give or offer ... an advantage or benefit of any kind". See *Karigar*, *supra* note 94 at para 21.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* at para 29.

legislation. The court had a range of sentencing options, including discharge, suspended sentence with probation, a fine, or a custodial sentence. The Crown sought a four-year prison term, with aggravating factors including: the fact that Karigar orchestrated a sophisticated and carefully-planned bribery scheme, the large sum of money, the potential profits that could have been made from the contract, and the number of people who were drawn into the conspiracy. In sentencing Karigar to three years in jail, Justice Hackland noted that the CFPOA implements the OECD *Convention* requirement that the penalty under the CFPOA is to be similar to the penalty of domestic bribery of public officials, which in Canada is typically a range of three to five years.<sup>98</sup> Justice Hackland said that although Karigar's co-operation with the investigation, his age and the fact that the scheme was unsuccessful were mitigating factors in his sentencing, foreign corruption crimes are serious and the principles of denunciation and deterrence must be enforced.<sup>99</sup> This case indicates clearly that CFPOA offences will be taken very seriously by the courts.

(e) **Ongoing Investigations**

In 2008, the RCMP Commercial Crime Program established a national Anti-Corruption Unit, with two anti-corruption investigative teams (in Ottawa and in Calgary) that specialize in enforcing the CFPOA. At the time of writing, the RCMP had announced that it was investigating up to 35 ongoing cases for possible CFPOA offences.<sup>100</sup> Two cases, in particular, have attracted some significant public attention. Those involve Blackfire Exploration Ltd. and SNC-Lavalin. It should be noted that while these investigations have captured public notice, there is no current finding of impropriety with respect to these firms.

(i) *Blackfire Exploration Ltd.*

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<sup>98</sup> Michael G Osborne, "Deterrence Main Objective Behind Three Year Corruption Sentence" *Litigator: Comelling Commentary on Law Affecting Business* (27 May 2014), online: Affleck Greene McMurtry <http://www.thelitigator.ca/2014/05/deterrence-main-objective-behind-three-year-corruption-sentence/>.

<sup>99</sup> *R v Karigar*, 2014 ONSC 3093, 240 ACWS (3d) 938 [Karigar Sentencing].

<sup>100</sup> OECD, Anti-Bribery and Corruption, *Canada: Follow up to the Phase 3 Report & Recommendations* (May 2013), online: <<http://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>>; Government of Canada, "Strengthening Canada's Fight Against Foreign Bribery" (5 February 2013), Foreign Affairs, Trade and Development, online: <<http://www.international.gc.ca/media/aff/news-communicues/2013/02/05b.aspx?lang=eng>>.

Blackfire Exploration Ltd. (“Blackfire”) has been the subject of an ongoing RCMP investigation under the *CFPOA*, since July 2011. The investigation pertains to Blackfire’s mining operations in Mexico, and alleged payments to a local mayor in exchange for protection from anti-mining protesters concerned with the environmental damage caused by the Blackfire mine.<sup>101</sup> The company has explained that it thought the money was being used for the benefit of the citizens of the town and that it stopped the payments as soon as it became aware that the funds were possibly being used for other purposes.

This case became high profile in 2010 when a group of nine Canadian mining watchdog groups publically urged the RCMP to investigate Blackfire under the *CFPOA*.<sup>102</sup> A group composed of the United Steelworkers, Common Frontiers-Canada, the Council of Canadians and Mining Watch Canada published a report in May 2013 titled “Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy.”<sup>103</sup> This report highlighted Canada’s prominent role in Mexico’s mining sector.<sup>104</sup> This also provides an illustration of the reach of Canadian-based mining operations around the world. Blackfire has not yet been charged and is co-operating with the RCMP investigation.

(ii) SNC-Lavalin

The RCMP is currently pursuing investigations into SNC-Lavalin’s alleged payments to foreign (and domestic) public officials to win infrastructure contracts. There are now seven individuals facing charges under

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<sup>101</sup> Greg McArthur, “RCMP raid Calgary miner over bribery allegations,” *The Globe and Mail* (29 August 2011) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/rcmp-raid-calgary-miner-over-bribery-allegations/article542841/>>.

<sup>102</sup> MiningWatch Canada, “Groups File Documentation With RCMP on Canadian Mining Company’s Involvement in Mexican Corruption Case (10 March 2010), online: <<http://www.miningwatch.ca/en/groups-file-documentation-with-rcmp-canadian-mining-company-sinvolvement-mexican-corruption-case>>.

<sup>103</sup> Jennifer Moore and Gillian Colgrove, “Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy” *Common Frontiers* (May 2013), online: <[http://www.commonfrontiers.ca/Single\\_Page\\_Docs/PDF\\_Docs/May05\\_13\\_Blackfire\\_Embassy\\_Report\\_2013-05-02\\_ENG%20%20final.pdf](http://www.commonfrontiers.ca/Single_Page_Docs/PDF_Docs/May05_13_Blackfire_Embassy_Report_2013-05-02_ENG%20%20final.pdf)> [Blackfire Report].

<sup>104</sup> Canada’s Office of the Extractive Sector Corporate Social Responsibility (the “CSR”) Counselor reported that in 2010, 204 of 269 foreign-owned companies in Mexico’s mining sector were Canadian. *Ibid* at ii.



the CFPOA in connection with SNC-Lavalin's foreign bribery allegations. These allegations include payments related to the construction of a 6 kilometre bridge in Bangladesh, alleged procurement corruption in North Africa, and in connection with the construction of power plants in India.<sup>105</sup> Those charged include four former SNC-Lavalin executives and a dual Bangladeshi-Canadian citizen who was not an employee of SNC-Lavalin. One of the senior executives was charged under both the CFPOA and under the *United Nations Special Economic Measures Act* related to Libya.<sup>106</sup>

In addition to the CFPOA charges, on April 17, 2013, SNC-Lavalin settled with the World Bank Group in connection to the foreign corruption allegations in Bangladesh. It agreed to a 10 year ban from bidding on and being awarded World Bank Group-financed projects (the longest debarment period that has ever been agreed to in a World Bank settlement). This debarment also resulted in cross-debarment by other Multilateral Development Banks under the Agreement of Mutual Recognition of Debarments that was signed on April 9, 2010. Subsequently, the Canadian International Development Agency ("CIDA") barred SNC-Lavalin from bidding on its contracts, as bidders are required to provide certification that they are not under sanction by a government or development organization providing development assistance in order to be eligible for the request for proposal process.<sup>107</sup>

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<sup>105</sup> Greg McArthur, "Businessman charged in SNC-Lavalin probe turns himself in to RCMP," *The Globe and Mail* (December 3, 2013) online: <<http://www.theglobeandmail.com/report-on-business/rcmp-lay-new-corruption-charges-in-probe-of-snc-lavalins-bangladesh-contract/article15747111/>> [McArthur, Businessman charged]; Greg McArthur, "Two former SNC-Lavalin executives charged with bribery, other criminal offences," *The Globe and Mail* (January 31, 2013) online: <<http://www.theglobeandmail.com/news/national/former-snc-lavalin-executive-charged-with-seven-criminal-offences/article16640145/>>; TRACE International Inc, "TRACE compendium SNC-LAVALIN", (2014) online: <SNC-LAVALIN - traceinternational2.org>.

<sup>106</sup> The Canadian Press, "SNC Lavalin Former Executives Charged with Fraud, Bribery" *Huff Post Business* (4 March 2014), online: [http://www.huffingtonpost.ca/2014/02/01/sami-abdallah-bebawi-snc-lavalin\\_n\\_4710064.html](http://www.huffingtonpost.ca/2014/02/01/sami-abdallah-bebawi-snc-lavalin_n_4710064.html); The Canadian Press, "2 former SNC-Lavalin execs face criminal charges" *CBC News* (2 February 2014), online: <<http://www.cbc.ca/news/canada/montreal/2-former-snc-lavalin-exec-faces-criminal-charges-1.2520367>>; Allan Woods, "RCMP charges former SNC-Lavalin executive in alleged Bangladeshi bribery scheme" *The Star* (18 September 2013), online: [http://www.thestar.com/news/canada/2013/09/18/rcmp\\_charges\\_former\\_snclavalin\\_executive\\_in\\_alleged\\_bangladeshi\\_bribery\\_scheme.html](http://www.thestar.com/news/canada/2013/09/18/rcmp_charges_former_snclavalin_executive_in_alleged_bangladeshi_bribery_scheme.html) [Woods]; Julie DiMauro, "More SNC-Lavalin execs face charges in ongoing corruption probe" *The FCPA Blog* (3 February 2014), online: <<http://www.fcablog.com/blog/2014/2/3/more-snc-lavalin-exec-faces-charges-in-ongoing-corruption-pr.html#>> [DiMauro]; McArthur, Businessman charged, *supra* note 105.

<sup>107</sup> Woods, *supra* note 106; DiMauro, *supra* note 106.

The effect of SNC-Lavalin's World Bank listing is significant. As a World Bank listing of a corporation includes all of its affiliates, once SNC-Lavalin was listed, so were 115 of its affiliates. An additional 89 of its affiliates were given a conditional non-debarment by the World Bank for 10 years, as these companies had demonstrated concrete internal anti-corruption compliance controls. As a result, in one fell swoop 115 Canadian firms found themselves on the World Bank debarment list, out of a total 250 companies listed.<sup>108</sup> Although only two other unrelated Canadian companies were listed, Canada's new status prompted headlines around the world labeling "Canada as being home to the most corrupt companies in the world."<sup>109</sup> However, Canada's stepped-up enforcement of the *CFPOA* and the amendments to the *CFPOA* in 2013 may have raised the perception that Canada takes measures to establish efforts for anti-corruption compliance, with Canada now ranking 9<sup>th</sup> in the world (out of 177 countries).<sup>110</sup>

#### IV. CONCLUDING THOUGHTS

Enforcement of anti-bribery/anti-corruption statutes is on the increase, in Canada and elsewhere in the world. Transparency International moved Canada from the "little enforcement" category, which includes countries that have only brought minor cases or only have investigations, up to the "moderate enforcement" category, which includes countries that have at least one major case and one active investigation. Both the United States and United Kingdom fall under the "active enforcement" category as being capable of providing effective deterrents to foreign bribery.

The heightened level of anti-corruption enforcement affects extractive industries, whose natural course of business places them in frequent dealings with foreign public officials, often in jurisdictions with poor levels of transparency. Given the reach of Canadian-based mining and resource operations around the world, Canadian extractive companies need to be aware of their obligations under the *CFPOA*, the impending mandatory disclosure regime and the anti-bribery/anti-corruption statutes in countries with which they are connected, either by doing business in those countries,

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<sup>108</sup>Armina Ligaya, "Canada now dominates World Bank corruption list, thanks to SNC-Lavalin" *Financial Post* (18 September 2013), online: <<http://business.financialpost.com/2013/09/18/canada-now-dominates-world-bank-corruption-list-thanks-to-snc-lavalin/>>.

<sup>109</sup>*Ibid.*

<sup>110</sup>Transparency International, "Corruption by Country/Territory: Canada" (2014), online: <<http://www.transparency.org/country#CAN>>.

being listed on foreign stock exchanges and/or employing foreign-based persons. Further, given Canada's leading role in public mine financings and its reliance on its own extractive sector, Canada faces an enhanced enforcement environment where its laws and anti-corruption enforcement activities not only affect Canada's domestic economy and international reputation, but also a multitude of countries where Canadian mines operate. Canadian courts and the RCMP are actively ensuring that Canada's anti-corruption legislation and policies are seriously enforced. As a result of the increased risk, all firms, but particularly firms in the extractive industry, need to ensure enhanced diligence in establishing and implementing effective internal compliance measures.

