Addressing the Corruption of Foreign Public Officials: Developments and Challenges within the Canadian Legal Landscape

—

La lutte contre la corruption d'agents publics étrangers: Développements et défis dans le paysage juridique canadien

JOANNA HARRINGTON

Abstract

With 2018 marking the twentieth anniversary of Canada's *Corruption of Foreign Public Officials Act*, an opportunity presents itself to take stock of both developments and challenges for the legislative scheme. As demonstrated by a review of the parliamentary record, the desire to enact legislation to criminalize the offering of an inducement to a foreign public official to secure a business advantage was decidedly international in nature, with Canada aiming to bolster the efforts of others to create a level playing field for companies operating abroad. Yet, despite good intentions, as well as amendments to strengthen the Act in 2013 and the passage of additional transparency obligations in 2014, Canada's legislative scheme has not kept pace with the international and multi-jurisdictional realities of the

Résumé

Le vingtième anniversaire, en 2018, de la *Loi sur la corruption d'agents publics étrangers* du Canada offre l'occasion de faire le point sur les développements et les défis de ce régime législatif. Comme en témoigne le bilan parlementaire, le désir d'adopter une loi criminalisant l'offre d'incitation à un agent public étranger afin de garantir un avantage commercial revêtait un caractère résolument international, le Canada cherchant à renforcer les efforts d'autres pour créer des conditions équitables pour les entreprises opérant à l'étranger. Malgré de bonnes intentions, ainsi que des amendements visant à renforcer la Loi en 2013 et l'adoption d'obligations de transparence supplémentaires en 2014, le régime législatif canadien n'a pourtant pas suivi le rythme des réalités internationales et multi-juridictionnelles du problème

Joanna Harrington, Professor, Faculty of Law, University of Alberta, Edmonton, Canada (joanna.harrington@ualberta.ca). The author is grateful to Robert Currie, John Law, and Steven Penney for helpful comments on an earlier draft and to law students Leigh Stauffer and Jisoo Vis for research assistance funded by Canada's Social Sciences and Humanities Research Council. This article is written solely in the author's academic capacity.

Vol. 56 [2018], doi:10.1017/cyl.2019.3

problem to be addressed. Renewed interest needs to be paid to the demand side of a foreign bribery transaction. In addition, the confiscation or forfeiture of any ill-gotten gains must become a priority, with the touting of success in securing the voluntary payment of sizeable fines failing to provide for a sufficient accounting for the wrongs done, particularly if the victims of corruption, even as a class that needs clearer definition, are to be made a true concern of the Act. The challenges posed by matters of immunity and the need to improve matters of multi-jurisdictional cooperation also need further attention.

Keywords: Canada; corruption; foreign bribery; foreign public officials; Griffiths Energy International; immunities; proceeds of crime; SNC-Lavalin; victims of crime; World Bank Group.

à traiter. Un intérêt renouvelé doit être versé du côté de la demande d'un pot de vin par un agent public étranger. En outre, la confiscation de tout gain mal acquis doit devenir une priorité, étant donné que les paiements volontaires d'amendes (souvent avancés comme preuve de succès du régime) n'assurent pas une responsabilité suffisante pour les torts causés — surtout si les victimes de la corruption, catégorie toujours mal-définie, doivent devenir une véritable préoccupation de la Loi. Les défis posés par les questions d'immunité et l'amélioration de la coopération multi-juridictionnelle doivent également faire l'objet d'une plus grande attention.

Mots-clés: Agents publics étrangers; Canada; corruption étrangère; Griffiths Energy International; Groupe de la Banque mondiale; immunités; pots de vin; produits de la criminalité; SNC-Lavalin; victimes d'actes criminels.

Introduction

Canada's contribution to the global effort to address the problem of foreign corruption has led to both developments and challenges. On the development side, Canada has enacted legislation to criminalize the offering of bribes by individuals or companies to foreign public officials to secure a business advantage. Taking stock in its twentieth anniversary year, it is clear that the enactment of the *Corruption of Foreign Public Officials Act* (*CFPOA*) has brought forth change in both Canadian law and policy,[1] although the impetus for reform was decidedly international in nature, having been prompted by efforts undertaken within the Organisation for Economic Cooperation and Development (OECD)[2] and later within the Group of Eight (G8), now known once again as

[1] SC 1998, c 34 [*CFPOA*].

[2] Established in 1961, the Organisation for Economic Co-operation and Development (OECD) is an intergovernmental forum that brings together thirty-six developed states with advanced economies to focus on setting standards and sharing best practice with a view to promoting economic progress. See generally <https://www.oecd.org>.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

the Group of Seven (G7).[3] These efforts centred on the adoption of a multilateral treaty, the OECD *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* (known generally as the OECD *Anti-Bribery Convention*),[4] which marked its twentieth anniversary in 2017 and which in turn had been inspired by the enactment twenty years earlier of the world's first statute to address such matters, the US *Foreign Corrupt Practices Act* of 1977.[5]

The often-stated rationale for criminalizing acts of foreign bribery was, and remains, a desire to ensure a level playing field for companies operating abroad, with Canada's contribution to the cause also fostering a domestic compliance industry among business lawyers and accountants offering anti-corruption advice and auditing services. Indeed, as a transnational crime suppression regime, the *CFPOA* receives much support from the corporate sector precisely because its prohibitions serve its interests. Much of the Canadian legal literature on the *CFPOA* also consists of contributions by lawyers who advise transnational corporations,[6] albeit there are exceptions,[7] and some corporate lawyers have also engaged in investigation work,

[3] First formed in 1975 as the Group of Six, with Canada joining in 1976, and Russia joining in 1998, the Group of Eight is a group of eight highly industrialized states that meets annually to foster consensus on global issues of pressing concern. Russia was ejected from the Group in 2014, following the annexation of Crimea, resulting in a return to the Group of Seven (G7) nomenclature. See generally, the "G7 Information Centre" maintained by the Munk School of Global Affairs at the University of Toronto, online: <http://www.g7.utoronto.ca/>.

[4] 17 December 1997, OECD Doc DAFFE/IME/BR(97)20 (1997), 37 ILM 1 (1998) (entered into force 15 February 1999; ratified by Canada 17 December 1998) [*Anti-Bribery Convention*].

[5] Pub L 95-213, 91 Stat 1496; codified and later amended 15 USC §§ 78dd-1 *et seq* [*FCPA*].

[6] See e.g. Neil Campbell, Elizabeth Preston, and Jonathan O'Hara, "Foreign Corrupt Practices: The Growth and Limitations of Canadian Enforcement Activity" (2013) 23:1 Ind Intl & Comp L Rev 35; Norm Keith, "Is Canada's Anti-Corruption Law in Step with International Trends?" (2014) 15:3 Bus L Intl 223; Monica Podgorny and James B Musgrove, "Foreign Corrupt Practices Laws: Implications for the Canadian Natural Resources Sector" (2014) 14 Asper Rev Intl Bus & Trade L 161; Stephanie Stimpson, Jay Todesco, and Amy Maginley, "Strategies for Risk Management and Corporate Social Responsibility for Oil and Gas Companies in Emerging Markets" (2015) 53:2 Alta L Rev 259; Milos Barutciski and Sabrina A Bandali, "Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption, and Canada's Anti-Corruption Efforts to Date" (2016) 52 Osgoode Hall LJ 231; see also Norm Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Markham, ON: LexisNexis Canada, 2017).

[7] Gerry Ferguson, *Global Corruption: Law, Theory and Practice*, 3rd ed (Victoria: self-published, 2018), online: <https://dspace.library.uvic.ca/handle/1828/9253> and <https://icclr.law.ubc.ca/resources/global-corruption-law-theory-and-practice/>; see also Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (New York: Oxford University Press, 2014); Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (New York: Oxford University Press, 2015).

even though concerns may arise when private actors replace the police in interactions with those suspected and later accused of criminal wrongdoing.[8] Suspicions remain, however, that acts of foreign bribery continue to take place, particularly in the natural resources sector of the economy.

Statistics do not help to allay these suspicions, with Canada's record to date of four convictions under the *CFPOA* now lower than the number of acquittals and stayed proceedings, although this metric does not take into account the Act's deterrence function nor the impact of the educational outreach and capacity-building activities carried out by the anti-corruption units of the Royal Canadian Mounted Police (RCMP). Nevertheless, the conviction count is often mentioned in any appraisal of Canada's record under the *CFPOA*, with the four convictions concerning three Alberta-based companies operating in the natural resources sector (Hydro-Kleen Systems, Niko Resources, and Griffiths Energy International),[9] and one Ottawa-based individual working within the technology sector (Nazir Karigar).[10] The acquittals and stayed proceedings are less well known, being of a more recent vintage, and concern five individuals associated with the Montreal-based engineering and construction firm, the SNC-Lavalin Group, in relation to the Padma bridge development project in Bangladesh.[11]

There may, however, be ongoing cases. Indeed, in October 2017, the government noted in its annual report to Parliament about the *CFPOA* that there were "four ongoing cases in which charges have been laid but not yet concluded."[12] A year later, this tally was reduced to three.[13] Nevertheless, both

[8] A civil action against corporate counsel for alleged legal breaches committed while acting as an investigative proxy for government agencies within the context of an alleged case of foreign bribery has been lodged with the Alberta courts. *Bechir v Gowling Lafleur Henderson LLP*, 2017 ABQB 214 at para 23; *Bechir v Gowling Lafleur Henderson LLP*, 2017 ABQB 667 at paras 14–16, 63–67.

[9] *R v Watts and Hydro-Kleen Systems Inc*, [2005] AJ No 568 (QB); *R v Niko Resources Ltd*, [2011] AJ No 1586, 101 WCB (2d) 118 (Alta QB) [*Niko Resources*]; *R v Griffiths Energy International Inc*, [2013] AJ No 412 (QB) [*Griffiths Energy*].

[10] *R v Karigar*, 2013 ONSC 5199, 108 WCB (2d) 210 [*Karigar* (2013)], appeal dismissed 2017 ONCA 576 [*Karigar* (2017)], application for leave to appeal to the Supreme Court of Canada dismissed 15 March 2018, No 37784. On sentencing, see *R v Karigar*, 2014 ONSC 3093, 113 WCB (2d) 373 [*Karigar* (2014)].

[11] *Chowdhury v The Queen*, 2014 ONSC 2635; *R v Wallace*, 2017 ONSC 132.

[12] Global Affairs Canada, *Canada's Fight against Foreign Bribery: Eighteenth Annual Report to Parliament (September 2016–August 2017)* (6 October 2017), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng> [*Eighteenth Annual Report*].

[13] Global Affairs Canada, *Canada's Fight against Foreign Bribery: Nineteenth Annual Report to Parliament (September 2017-August 2018)* (5 October 2018), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>.

government and press reports confirm that separate foreign corruption charges were lodged in February 2017 against the SNC-Lavalin Group, two of its subsidiaries, and three individuals in relation to activities taking place in Libya.[14] Charges have also been laid against three more individuals in relation to a bribery scheme involving Indian officials that had come to light with the conviction of Nazir Karigar.[15] There was also an individual charged in 2016 with offering a bribe to Thai officials,[16] but the charges were withdrawn a year later.[17]

Little is stated publicly about ongoing investigations, with recent reports to Parliament emphasizing that "allegations of corruption … are treated with the utmost confidence for reasons of privacy and ensuring the integrity of investigations."[18] However, in the previous year, the annual report to Parliament had advised that there were "currently 10 active investigations";[19] two less than the "12 active investigations" that were reported in 2015.[20] (Reports tabled in 2012, 2013, and 2014 advise of thirty-four, thirty-six, and twenty-seven ongoing investigations respectively.[21]) Of course, not all

[14] *Eighteenth Annual Report*, *supra* note 12; see also Royal Canadian Mounted Police, "RCMP Charges SNC-Lavalin," news release (19 February 2015) (no longer available online); SNC-Lavalin, "SNC-Lavalin Contests the Federal Charges by the Public Prosecution Service of Canada and Will Enter a Non-Guilty Plea," press release (19 February 2015), online: <http://www.snclavalin.com/en/snc-lavalin-contests-the-federal-charges-february-19-2015>.

[15] Daniel Leblanc, "RCMP Lays Corruption Charges after Landmark Bribery Case," *Globe and Mail* (4 June 2014); Dave Seglins, "RCMP Charges U.S., U.K. Execs in Air India Foreign Bribery Case," *CBC News* (4 June 2014); see also *R v Barra and Govindia*, 2017 ONSC 6088; *R v Barra and Govindia*, 2018 ONSC 2659; *R v Barra and Govindia*, 2019 ONSC 229.

[16] "Canadian General Aircraft President Charged with Conspiring to Bribe Thai Officials in Plane Deal," *CBC News* (24 November 2016).

[17] Meghan Grant, "Charges Dropped against Calgary Man Accused of Conspiring to Bribe Thai Officials in Jet Deal," *CBC News* (6 December 2017).

[18] *Eighteenth Annual Report*, *supra* note 12.

[19] Global Affairs Canada, *Canada's Fight against Foreign Bribery: Seventeenth Annual Report to Parliament (September 2015–August 2016)* (7 October 2016), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>.

[20] Global Affairs Canada, *Canada's Fight against Foreign Bribery: Sixteenth Annual Report to Parliament (September 2014–August 2015)* (4 February 2016), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>.

[21] Two of these reports are on file with the author but no longer made available online. The third report, covering 2013–14, is available. Global Affairs Canada, *Canada's Fight against Foreign Bribery: Fifteenth Annual Report to Parliament (September 2013–August 2014)* (3 October 2014), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>.

investigations lead to charges, with media sources indicating that at least two investigations conducted by the RCMP have resulted in a lack-of-evidence assessment. The first involved a fourth Alberta-based natural resources company known as Blackfire Exploration, which appears to have been under investigation since at least August 2011.[22] In February 2015, the RCMP gave notice of its assessment that the complaints made did not support criminal charges.[23] Then, in early 2016, the RCMP closed a second foreign bribery investigation involving the Ottawa-based biotechnology company Nordion (Canada), ostensibly due to a lack of evidence,[24] but also due to efforts from elsewhere given that Nordion had agreed to pay civil penalties to the US Securities and Exchange Commission.[25] As such, the *Nordion* case illustrates not only the multi-jurisdictional dimension of many foreign bribery cases but also the potential for forum shopping between jurisdictions and between criminal, civil, and administrative proceedings.[26] Indeed, the US Securities and Exchange Commission thanked no less than six different national financial markets regulators, in addition to the RCMP, for their help in the *Nordion* case.[27]

Whether or not it is a fair assessment, the perception of a weak record of enforcement, alongside criticisms from the OECD's Working Group on

[22] Stephane Massinon, "RCMP Probe Calgary Mining Company over Bribery Allegations," *National Post* (29 August 2011); Greg McArthur, "RCMP Raid Calgary Miner over Bribery Allegations," *Globe and Mail* (29 August 2011).

[23] For criticism, see MiningWatch Canada, "Mexican Network Deplores Conclusion of Canadian Investigation into Blackfire in Chicomuselo, Chiapas," media release (11 March 2015), online: <https://miningwatch.ca/news/2015/3/11/mexican-network-deplores-conclusion-canadian-investigation-blackfire-chicomuselo>.

[24] Julius Melnitzer, "Damned If You Do, Damned If You Don't: The Perils of Self-Reporting Corporate Misdeeds," *Financial Post* (19 April 2016). The Royal Canadian Mounted Police (RCMP) investigation was prompted by a voluntary disclosure by the company in 2012, with Nordion (Canada) being the successor company to Nordion, which traded on the New York Stock Exchange from 2004 to 2011, when the alleged bribery of Russian officials occurred.

[25] *In the Matter of Nordion (Canada) Inc*, Securities Exchange Act of 1934 Release no 77290 and Administrative Proceeding File no 3-17153 (both dated 3 March 2016), online: <https://www.sec.gov/litigation/admin/2016/34-77290.pdf>.

[26] In contrast with the United States, foreign bribery can only be pursued as a criminal matter in Canada, which also lacks a national securities regulator to pursue a case through administrative proceedings.

[27] The financial market regulators were from Latvia, Estonia, Cyprus, the British Virgin Islands, Liechtenstein, and Finland. US Securities and Exchange Commission, "SEC Charges Engineer and Former Employer with Bribe Scheme in Russia," Administrative Summary (3 March 2016), online: <https://www.sec.gov/litigation/admin/2016/34-77288-s.pdf>.

Bribery and its peer reviewers,[28] has had an impact within Canada.[29] Six key amendments were made to the Canadian legislative scheme in 2013,[30] and, in 2014, new transparency measures were imposed on those working in the extractive sector.[31] Nevertheless, there remain challenges in addressing crimes that by their nature occur "behind the scenes" and often across multiple borders, with greed and self-interest exerting a primal motivational force in a competitive marketplace. There are also concerns about the broader societal implications of bribery and foreign corruption, including the potential diversion of funds from needed public services, and its corrosive effects on norms of good governance and respect for the rule of law.[32] Corruption may also have enabled some of the world's deadliest conflicts.[33]

Viewed in this light, the continued touting of success within Canada with regard to the voluntary disclosure of corporate wrongdoing, followed by the conclusion of a plea agreement and the payment of a fine, raises concern. Corporate plea agreements divert attention away from examining the benefits bestowed on the individuals involved and on any successor corporate entities that gain stock market increases through the assets obtained by way of the bribe. Indeed, in a recent annual report to Parliament, the government of Canada continues to describe the fine paid by Griffiths Energy International as "the largest to date under the *CFPOA*," without any mention of the English Court of Appeal's appraisal that this was a "relatively modest sum" in light of later developments.[34] As will be

[28] Within the OECD, the Working Group on Bribery in International Business Transactions tracks each country's performance in addressing foreign bribery through a mandatory four-phased system of peer review monitoring. See generally OECD, "Corruption," online: <http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm>.

[29] On the domestic influence of the Working Group on Bribery generally, see Rose, *supra* note 7, ch 2.

[30] *Fighting Foreign Corruption Act*, SC 2013, c 26 [*FFCA*].

[31] *Economic Action Plan 2014 Act, No 2*, SC 2014, c 39, s 376, bringing into existence the *Extractive Sector Transparency Measures Act* [*ESTMA*].

[32] On the social costs of bribery, see e.g. Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6:1 Annual Review of Law and Social Science 217 at 218–19. On the economic, cultural, and political costs of corruption generally, see Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd ed (New York: Cambridge University Press, 2016).

[33] See e.g. the investigative work of The Sentry, a non-governmental organization (NGO) examining the link between corruption and mass atrocities in several African states. The Sentry, "About Us," online: <https://thesentry.org/about/>.

[34] *Saleh v Director of the Serious Fraud Office*, [2017] EWCA Civ 18 at para 22 [*Saleh* (2017)].

discussed herein, a fuller analysis of the *Griffiths Energy* case, including the subsequent proceedings in the United Kingdom, casts doubt on whether such plea agreements can provide for a sufficient accounting for the wrong done, at least when matters of proceeds of crime, forfeiture and disgorgement remain in need of further attention.

This article consists of two parts. The first part examines the development of the Canadian legislative framework for addressing the offering of a reward to a foreign public official to secure a business advantage. It also provides a detailed examination of the parliamentary record as a means to gauge both legislative intentions and the information available to parliamentarians on the nature and extent of the problem to be addressed. The second part then makes use of several cases of Canadian involvement in cases of alleged corruption of foreign public officials to examine key areas of significant challenge for the Canadian legislative framework, with this analysis suggesting that there are downsides in having focused on foreign bribery laws as matters of level playing fields and international commerce.

Bribery is also a criminal law matter. It is a crime with a supply side and a demand side, with this review suggesting that the demand side of a foreign bribery transaction is in need of equal attention. There is also a need to address the complexities of securing proof, while also respecting legal rights, in what are increasingly multi-jurisdictional cases involving evidence collection through cooperation with both criminal and administrative enforcement agencies in other states and, increasingly, through cooperation with international organizations involved in the financing of major infrastructure projects.[35] In addition, bribery with a foreign dimension may face additional complexities raised by basic considerations of public international law, including issues of jurisdictional immunity for both individuals and international organizations, as will be illustrated by reference to both the *Griffiths Energy* case and the recent Supreme Court of Canada decision in *World Bank Group v Wallace*,[36] which concerns allegations of bribery by former employees of the SNC-Lavalin Group. The analysis contained within also draws attention to the proceeds-of-crime aspects of foreign bribery, with further work needed on improving the mechanisms for facilitating inter-state cooperation to secure the seizure and forfeiture of

[35] On the intersection between national anti-corruption enforcement efforts and the sanctions regimes of multilateral development banks, see Juan G Ronderos, Michelle Ratpan, and Andrea Osorio Rincon, "Corruption and Development: The Need for International Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities" (2016) 52 Osgoode Hall LJ 334; see also Sope Williams-Elegbe, *Public Procurement and Multilateral Development Banks: Law, Practice and Problems* (Oxford: Hart, 2017) at 171–216.

[36] 2016 SCC 15, [2016] 1 SCR 207 [*Wallace*].

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

any ill-gotten gains. Greater clarity is also needed as to the definition of victims of corruption, being a class that might well comprise society as a whole, the entirety of the citizenry of a foreign country, or, more narrowly, those in need of the public services affected by any diversion of funds in the foreign state caused by acts of bribery.[37]

The Development of a Canadian Legal Framework

Corruption has various definitions and may take a variety of forms, but it is most widely understood as "the abuse of public office for private gain."[38] Although corruption need not be synonymous with bribery, it is bribery that has become the standard offence for addressing corruption within the public sphere.[39] Bribery has long been recognized as a crime, with the common law having prohibited the offering of undue rewards to influence the behaviour of office holders, such as judges and the police.[40] Today, statutory prohibitions make clear that it is illegal to offer or give an undue reward or benefit to any public official in Canada to secure an advantage from government, with the *Criminal Code*[41] also addressing additional aspects such as influence peddling, municipal corruption, and breach of trust. Many of these offences are found codified in Part IV of the *Criminal Code*, aptly described as "Offences against the Administration of Law and Justice."

Part IV, however, does not apply to the offering of a reward or inducement to influence the behaviour of a foreign government official, with the practice of making payments to foreign officials once seen as simply the means for getting business done in a foreign country with foreign customs. It was also a practice widely supported by the availability of a tax deduction for the expense incurred, as evidenced by an OECD call on member states

[37] A desire to focus greater attention on the victims of corruption has led some to espouse a human rights approach, an approach that has been ably critiqued in Cecily Rose, "The Limitations of a Human Rights Approach to Corruption" (2016) 65 ICLQ 405.

[38] *Helping Countries Combat Corruption: The Role of the World Bank* (Washington, DC: World Bank, 1997) at 8.

[39] Corruption within the private sector, sometimes referred to as private-to-private corruption or purely private sector conduct, may also take place but is beyond the chosen scope of this article.

[40] Opinions differ as to whether bribery at common law was a general offence or a collection of several offences each designed to address different types of office holders. Monty Raphael, *Bribery: Law and Practice* (Oxford: Oxford University Press, 2016) at 2.15–2.27; see also Law Commission, *Reforming Bribery* (London: Her Majesty's Stationery Office, 2008) at 5-6.

[41] RSC 1985, c C-46 [*Criminal Code*].

in 1996 to bring this practice to an end.[42] Remarkably, kickbacks, bribes, and other illegal payments paid to Canadian officials were tax deductible until the 1990s,[43] with Canada coming fully into line with respect to payments to foreign officials in 1999.[44] In the sections below, I discuss the development of the Canadian legislative scheme to address the corruption of foreign public officials, covering first its initial enactment in 1998 and then its subsequent amendment in 2013 and ending with a brief mention of a related recent initiative to impose revenue-related transparency obligations on those working in the natural resources extractive sector.

THE *CFPOA* OF 1998

The enactment for Canada of the *CFPOA* in 1998 was somewhat unusual. Although there was clearly no emergency, the legislation came forth as a fast-tracked initiative, originating in the Senate rather than in the elected House of Commons, at the behest of a then Liberal Party-led federal government. Indeed, Parliament spent only two days considering the provisions of the new law. A bill was introduced in the Senate on 1 December 1998 and underwent its three stages of consideration in the Senate on 3 December 1998. It then sailed through all phases of consideration in the House of Commons on 7 December 1998, with its link to international developments, and general support for those developments, providing the explanation for its speedy passage through Parliament in under a week.

As noted in the introduction, the *CFPOA* was designed to support Canadian ratification of the 1997 OECD *Anti-Bribery Convention*. This convention was an international initiative itself influenced by domestic legislation enacted by the United States to criminalize the giving of foreign bribes,[45]

[42] *Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials*, OECD Doc C(96)27/FINAL (17 April 1996), reprinted in (1996) 35 ILM 1311.

[43] See Jinyan Li, Joanne E Magee, and J Scott Wilkie, *Principles of Canadian Income Tax Law*, 9th ed (Toronto: Thomson Reuters Canada, 2017) at 232–33, s 8.5(d)(i), citing *United Color & Chemicals Ltd v Minister of National Revenue*, [1992] 1 CTC 231, 92 DTC 1259 (TCC).

[44] See *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 67.5(1), introduced by *An Act to Amend the Income Tax Act*, SC 1991, c 49, s 46(1), and then extended to apply to foreign bribery by the *CFPOA*, *supra* note 1, s 10, when that Act entered into force in 1999. See also *An Act to Amend the Taxation Act and Other Legislative Provisions*, SQ 2004, c 8, s 91(1), with s 91(2) directing that the change has effect from 14 February 1999.

[45] It was President Jimmy Carter who brought the US *FCPA*, *supra* note 5, into existence, in the wake of the Watergate investigations, after widespread disclosure that hundreds of American companies made payments to foreign officials and political parties. See e.g. *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the U.S. Senate, Committee on Banking, Housing and Urban Affairs, May 1976* (Washington, DC: US Government Printing Office, 1976).

although the OECD convention was not the first so-called "ABC" convention to tackle "anti-bribery and corruption." That distinction belongs to the 1996 *Inter-American Convention against Corruption*, later ratified by Canada in 2000.[46] Nevertheless, the link between Canada's *CFPOA* and the *Anti-Bribery Convention* was widely acknowledged, both within and outside Parliament and within and outside Canada.

The OECD convention itself was also a fast-tracked initiative, with the call for negotiating a binding treaty to address the bribery of foreign public officials having been made at an OECD ministerial meeting in May 1997, with the recommendation that "Member States submit legislative proposals to their national legislatures to criminalize such bribery and seek their enactment by the end of 1998."[47] By November 1997, a convention text was in place, open for signature and ratification. In May 1998, Canada and other G8 states announced that they would make every effort to ratify the OECD *Anti-Bribery Convention* by the end of 1998,[48] leading to Canada's enactment of the *CFPOA* in December 1998. Canada would later announce that it would be the state whose actions brought the convention into force, with Canada's ratification, after that of Germany, Japan, the United States, and the United Kingdom,[49] being, in the words of Canada's then minister of foreign affairs, "the key which will unlock the door."[50]

The *Anti-Bribery Convention* requires its states parties to establish a domestic criminal law offence of bribery for the offering of undue rewards to foreign public officials to obtain improper advantages in the conduct of international business[51] and to take measures to establish the liability of legal persons for this crime.[52] The convention also requires the imposition of appropriate punishment and penalties and that states parties take action to ensure that the proceeds of foreign bribery can be seized and confiscated.[53] However, it is a convention that focuses on what is often

[46] 29 March 1996, OASTS No B-58 (entered into force 6 March 1997, ratified by Canada 1 June 2000) [*Inter-American Convention against Corruption*].

[47] Acknowledged by Canada in *The Corruption of Foreign Public Officials Act: A Guide* (Ottawa: Department of Justice, 1999) at 1 [*CFPOA: A Guide*].

[48] G8 Birmingham Summit, *Final Communiqué* (17 May 1998) at para 7, online: <http://www.g8.utoronto.ca/summit/1998birmingham/finalcom.htm>.

[49] Entry into force was dependent on ratification by five of the top ten trading countries in the OECD. *Anti-Bribery Convention*, *supra* note 4, art 15(1). This meant that the convention had to "be ratified by five of the ten countries with the largest share of OECD exports, representing among them at least 60 percent of the combined total exports of the ten." *CFPOA: A Guide*, *supra* note 47 at 2.

[50] *Debates of the Senate*, 36-1, vol 137, No 100 (3 December 1998) at 2301 (Lloyd Axworthy).

[51] *Anti-Bribery Convention*, *supra* note 4, art 1(1).

[52] *Ibid*, art 2.

[53] *Ibid*, art 3.

called active, rather than passive, bribery, focusing on the supply side of foreign bribery, even though this distinction may fail to accord appropriate recognition to the role of a bribe recipient in soliciting or arranging for the bribery to take place. Indeed, after a thorough review of domestic bribery laws, the Law Commission for England and Wales has concluded that "there should be two general offences of bribery: one concerned with the conduct of the payer, and the other concerned with the conduct of the recipient."[54]

The *CFPOA* is the implementation vehicle for Canada's obligations under the OECD *Anti-Bribery Convention*. As such, the *CFPOA* has made the bribery of a foreign public official to obtain or retain an advantage in the course of business an indictable offence, subject to a maximum term of five (now fourteen) years of imprisonment.[55] Offering a bribe, however, is not the only offence of relevance, with the Act (and later the *Criminal Code*) making clear that the possession of property, or the proceeds of property, obtained through foreign bribery, and the laundering of such property or proceeds, are also offences under Canadian law.[56] Canadian law also enables the prosecution of a conspiracy or an attempt to commit these offences and also applies to situations of aiding and abetting. Corporations, as well as individuals, may be charged, without regard to nationality, with the Act's reference to "person" intended to include corporations, using the same principles of corporate criminal liability as apply to Canadian *Criminal Code* offences.[57] As noted in a Department of Justice guide to the *CFPOA* circulated in 1999, "[c]orporations, of course, cannot be subject to imprisonment, but they can be fined. The amount of any fine would be at the discretion of the judge, and there is no maximum."[58]

In introducing the proposed legislation, the government's designated spokesperson identified the bribery of public officials as "one of the major problems encountered in international trade and investment," while also making a brief mention of corruption's corrosive effect on "the rule of law,

[54] Law Commission, *supra* note 40 at para 3.33.

[55] *CFPOA*, *supra* note 1, s 3.

[56] *Ibid*, ss 4–7. These *CFPOA* provisions were later repealed, along with similar provisions in other federal statutes, leading to reliance on the *Criminal Code* provisions on possession and laundering, rather than individualized federal statutes. *An Act to Amend the Criminal Code (Organized Crime and Law Enforcement) and to Make Consequential Amendments to Other Acts*, SC 2001, c 32, s 58 [*Act to Amend the Criminal Code*].

[57] *CFPOA*, *supra* note 1, s 2 defines "person" to mean a person as defined in section 2 of the *Criminal Code*, *supra* note 41, which makes clear that references to "person" include an organization and that "organization means (a) a … body corporate." See also *CFPOA: A Guide*, *supra* note 47 at 4.

[58] *CFPOA: A Guide*, *supra* note 47 at 7.

democracy and human rights."[59] She also drew attention to the support of the Canadian business community for the *Anti-Bribery Convention*, describing their views as supportive of "an opportunity to create an environment in which Canadian companies will be able to compete on the basis of quality, price and service."[60] The official opposition was also supportive of the bill, although somewhat critical of the government's use of a fast-tracking procedure ordinarily reserved for the passage of emergency legislation.[61]

Later that same day, the details of the proposed legislation were considered by a Committee of the Whole, with the then minister of foreign affairs, Lloyd Axworthy, appearing in person to answer questions. In his opening statement, the minister once again emphasized the link between an effective business climate, good governance, and the rule of law, while also noting that the export of goods and services served as an opportunity to export our values.[62] He explained that it was his responsibility to shepherd the bill through Parliament because of its treaty implications, but recognized that the law's enforcement would be a matter for the federal minister of justice and for provincial attorneys general.[63] A number of questions were asked about the legislation's scope, including its ability to address incidences of both indirect and direct bribery as well as its non-application to non-profit corporations. A question was also raised as to whether Canadian businesses would be disadvantaged by the imposition of high standards. The opposition, however, was supportive of both the legislation and the *Anti-Bribery Convention*, with the only amendment being the inclusion of a reporting to Parliament provision, which prompted the minister to predict "it would be a short report," given his assessment that few prosecutions were likely to occur in Canada.[64]

The most obvious non-governmental body with an interest in tackling foreign corruption is Transparency International, founded in 1993 by Peter Eigen and nine others, to promote greater accountability in international economic development, with Eigen having served as a former program manager with the World Bank.[65] Two representatives from the

[59] *Debates of the Senate*, 36-1, vol 137, No 100 (3 December 1998) at 2298 (Céline Hervieux-Payette).

[60] *Ibid.*

[61] *Ibid* at 2299 (John Lynch-Staunton).

[62] *Ibid* at 2300–01 (Lloyd Axworthy).

[63] *Ibid* at 2301–02.

[64] *Ibid* at 2308 (Lloyd Axworthy), 2321 (for acceptance of the amendment, which is still in existence as s 12 of the *CFPOA*).

[65] See further Transparency International, online: <https://www.transparency.org/>.

Canadian chapter of Transparency International also testified before the Senate's Committee of the Whole, with both individuals having ties to Canada's business community.[66] Their comments focused on the importance of undertaking anti-corruption efforts and the role to be played by the *Anti-Bribery Convention*, although mention was also made of an association between human rights and corruption, with it being recognized by the chapter's then president that "companies that engage in corruption show considerable contempt for the rights and status of the people who are being corrupted."[67]

Upon the conclusion of the committee's proceedings, the bill was immediately read a third time and adopted by the Senate on 3 December 1998. It was introduced in the House of Commons on 7 December 1998 and then went immediately to Second Reading, shepherded by the parliamentary secretary to the minister of foreign affairs, Julian Reed. Reed repeated many of the points made previously by the minister, noting corruption's distorting effects on international trade and competition as well as public policy and the public interest.[68] He also embraced the goal of implementing the *Anti-Bribery Convention* as a means to "enhance Canada's reputation as a world leader in fighting corruption."[69] The bill was then fast-tracked through its committee stage, and then Third Reading,[70] so as to be adopted that same day.[71] The new law received royal assent on 10 December 1998, enabling Canada to ratify the *Anti-Bribery Convention* a week later. The *CFPOA* came into effect on 14 February 1999,[72] a day before the *Anti-Bribery Convention* entered into force on the international legal plane.[73]

[66] Transparency International Canada was represented by its then president, Wesley Cragg, a professor with the School of Business at York University, and Michael Davies, then vice-president, General Counsel and Secretary of General Electric Canada. *Debates of the Senate*, 36-1, vol 137, No 100 (3 December 1998) at 2311. Transparency International Canada was incorporated in 1996 and became a registered charity in 2009. See further Transparency International, online: <http://www.transparencycanada.ca/>.

[67] *Debates of the Senate*, 36-1, vol 137, No 100 (3 December 1998) at 2315 (Wesley Cragg).

[68] *House of Commons Debates*, 36-1, vol 135, No 167 (7 December 1998) at 10967 (Julian Reed).

[69] *Ibid.*

[70] *Ibid* at 10988.

[71] *Ibid* at 10999.

[72] Order Fixing February 14, 1999 as the Date of the Coming into Force of the Act, SI/99-13.

[73] See also OECD, "OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2017," online: <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

THE *FFCA* OF 2013

Fourteen-and-a-half years later, Canada's legislative scheme for addressing the corruption of foreign public officials underwent substantial amendment,[74] this time at the initiative of a Conservative Party-led government. Again, the legislation was introduced first in the Senate and then the House of Commons, although, on this occasion, a bit more time was allocated within each house for consideration at the committee stage. The bill was introduced on 5 February 2013, underwent Senate committee consideration in late February and early March, and received Third Reading on 26 March 2013. A day later, it was introduced in the House of Commons, underwent House of Commons committee consideration in early June, and received Third Reading on 18 June 2013. The Act, to be cited as the *Fighting Foreign Corruption Act* (*FFCA*), received royal assent the next day.[75]

As with the *CFPOA*, the *FFCA* had widespread support from parliamentarians of all political affiliations. The accepted, and often stated, aim of the legislative scheme remained the continued creation of a level playing field for international business,[76] with the amendments best viewed as an effort to update Canada's foreign bribery law in response to criticisms from within the OECD[77] and others,[78] including Transparency International Canada.[79] Legislative change was therefore needed, in the words of

[74] Amendments of a consequential nature were made in 2001 concerning primarily the proceeds of crime aspects as well as the removal of a blanket immunity for police officers engaged in unlawful acts during an investigation, such as when posing as offenders. *Act to Amend the Criminal Code*, *supra* note 56.

[75] *FFCA*, *supra* note 30.

[76] *Debates of the Senate*, 41-1, vol 148, No 136 (12 February 2013) at 3247 (Janice G Johnson); *Debates of the Senate*, 41-1, vol 148, No 140 (27 February 2013) at 3339 (David P Smith); *House of Commons Debates*, 41-1, vol 146, No 272 (18 June 2013) at 18510 (Bob Dechert).

[77] See the peer review process reports concerning Canada, approved and adopted by the OECD Working Group on Bribery in International Transactions, including *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (March 2011), online: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf> [*Phase 3 Report*].

[78] Repeated references were made during the Act's passage to a consultation undertaken in January 2012 with "over 30 expert stakeholders from Canadian businesses, law firms, academic institutions and non-governmental organizations." *Debates of the Senate*, 41-1, vol 148, No 136 (12 February 2013) at 3248 (Janis G Johnson); *Debates of the Senate*, 41-1, vol 146, No 149 (26 March 2013) at 3602 (Janis G Johnson); *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16964 (Bob Dechert).

[79] See further the responses for Canada, prepared by Milos Barutciski, director, Transparency International Canada and Partner, Bennett Jones LLP, to Transparency International's annual questionnaires to national expert respondents on enforcement against foreign bribery, identifying, for example, a need for nationality jurisdiction, dated

the parliamentary secretary to the minister of foreign affairs, "to answer the call for enhanced vigilance," but not to secure a radical overhaul or introduce a new scheme.[80]

This "call for enhanced vigilance" was also reinforced by additional international developments, including Canada's ratification in 2000 and 2007 of the leading treaties of regional and universal application on anti-bribery and corruption — the *Inter-American Convention against Corruption*[81] and the *United Nations Convention against Corruption*.[82] However, these new treaties did not prompt any overhaul of the *CFPOA*. Canada took the position that it could rely on existing domestic law for the performance of its international obligations,[83] although both the inter-American and UN conventions aim to address both active and passive foreign bribery.[84] There is one aspect found codified in both conventions, however, that Canada has stated it cannot accept. This aspect concerns an obligation to consider establishing an offence of "illicit enrichment" to criminalize "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."[85] This treaty obligation, however, is one of consideration, which is also made subject to a state party's constitution and the fundamental principles of its legal system, with Canada having lodged statements of understanding with each treaty depositary to explain that it would not be establishing such an offence on the grounds that it would be contrary to the presumption of innocence guaranteed by Canada's Constitution.

---

9 February 2011 and 15 March 2012, online: <http://www.transparencycanada.ca/tica-publication/oecd-convention-enforcement-progress/>. Transparency International Canada's support for the amendments was also referenced at various times during the Act's passage. See e.g. *House of Commons Debates*, 41-1, vol 146, No 272 (18 June 2013) at 18511 (Bob Dechert), 18529 (Colin Carrie), 18530 (Djaouida Sellah); see also the testimony of Janet Keeping, chair and president of Transparency International Canada and leader of the Green Party of Alberta. House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 87 (13 June 2013) at 4–5.

[80] *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16963 (Bob Dechert).

[81] *Inter-American Convention against Corruption*, *supra* note 46 (thirty-four states parties).

[82] 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005, ratified by Canada 2 October 2007; 186 states parties) [*UN Convention against Corruption*].

[83] Certain technical amendments were made to the corruption and offence-related provisions of the *Criminal Code* to implement the United Nations treaty. *An Act to Amend the Criminal Code in Order to Implement the United Nations Convention against Corruption*, SC 2007, c 13.

[84] *UN Convention against Corruption*, *supra* note 82, art 15(b); *Inter-American Convention against Corruption*, *supra* note 46, art VI.

[85] *UN Convention against Corruption*, *supra* note 82, art 20; see also *Inter-American Convention against Corruption*, *supra* note 46, art IX.

As for the content of the *FFCA*, there were six changes made to Canada's legislative scheme for addressing foreign bribery. This Act amended the *CFPOA* to increase the maximum sentence of imprisonment from five to fourteen years,[86] to create a new "books-and-records" offence specific to foreign bribery to prohibit the use of deceptive or "off-the-books" accounts,[87] and to extend the legislation's application to all bribes paid in the course of business, whether a business was earning a profit or not.[88] (Canada had been the only OECD country to add this "for-profit" qualification in its domestic law, with the *Anti-Bribery Convention* drawing no distinction between "for-profit" and "not-for-profit" business transactions.[89]) The 2013 changes also expanded the jurisdictional reach of the *CFPOA* and centralized the Act's enforcement, while also removing a defence to a foreign bribery charge for what are known in law as "facilitation payments" or, more colloquially, "grease payments." This last change, however, was made contingent on a federal Cabinet decision to bring this particular amendment, as distinct from the Act as a whole, into force.[90]

Of these changes, the most noteworthy was that concerning jurisdictional reach and the use of nationality as a basis for asserting jurisdiction so as to give the Canadian legislative scheme a degree of extraterritorial effect.[91] Ordinarily, Canadian criminal law deals with offences that take place in Canada,[92] with territoriality having long been recognized under international law as a valid basis for prescribing crime.[93] However, it is also well recognized that a state may choose to exercise its jurisdiction over its

[86] *FFCA*, *supra* note 30, s 3(1).

[87] *Ibid*, s 4. For similar offences, but ones not specific to foreign bribery, see *Criminal Code*, *supra* note 41, s 397, as well as ss 361–63, 380, 426; see also OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), para X(A)(i), online: <http://www.oecd.org/daf/anti-bribery/44176910.pdf> [*2009 Recomnendation*].

[88] *FFCA*, *supra* note 30, s 2(3); see further *House of Commons Debates*, 41-1, vol 146, No 262 (4 June 2013) at 17685–86 (Larry Miller).

[89] The OECD Working Group on Bribery had recommended that Canada remove its "for-profit" qualification, as noted in *Phase 3 Report*, *supra* note 77 at 11–13 and as acknowledged before Parliament in House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 86 (11 June 2013) at 4 (Alan Kessel).

[90] *FFCA*, *supra* note 30, s 5.

[91] *Ibid*, s 4.

[92] See *Criminal Code*, *supra* note 41, s 6(2), codifying the presumption against extraterritoriality.

[93] *Case of the S.S. Lotus (France v Turkey)* (1927), PCIJ Ser A, No 10 at 20; see also John H Currie et al, *International Law: Doctrine, Practice, and Theory*, 2nd ed (Toronto: Irwin Law, 2014) at 488–91.

nationals, wherever they are located,[94] with the nationality principle providing support for the prosecution of Canadians who commit certain prescribed crimes abroad, including treason, terrorism, and child sex tourism.

However, in enacting the *CFPOA* in 1998, Canada had decided not to embrace a nationality approach for the offence of foreign corruption, later explaining to its OECD peer reviewers that territorial jurisdiction is very broadly interpreted by Canadian courts and that it was Canadian policy to not take extraterritorial jurisdiction unless required to do so by a treaty obligation.[95] Later, Canada would also lodge a declaration upon ratifying the *UN Convention against Corruption* in 2007, stating explicitly that there was "effective and broad territorial jurisdiction over corruption offences" in Canada.[96] The OECD peer reviewers, however, had their doubts about the effectiveness of relying solely on territorial jurisdiction, apparently supported through meetings with the Ontario Provincial Police and the Ontario Ministry of the Attorney General.[97] Canada's assessment later received judicial support in the successful prosecution of an Ottawa businessman named Nazir Karigar for offering bribes to officials in India, including an Indian cabinet minister, with a view to securing a multi-million dollar contract with Air India to provide biometric facial recognition technology.[98] The defence challenged the matter of jurisdiction, and, since the facts of the case took place when the *CFPOA* only provided for territorial jurisdiction, the Crown was required to prove the existence of a real and substantial link between the offence and Canada in keeping with the test that had been long established by the Supreme Court of Canada in *Libman v The Queen*.[99] Neither the trial judge nor the Ontario Court of Appeal had any difficulty in concluding that territorial jurisdiction was "clearly established."[100] Nor was it difficult to find guilt, with the bribery

[94] See further Currie et al, *supra* note 93 at 499–508.

[95] See *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* (25 March 2004) at paras 75–76, online: <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf> [*Canada: Phase 2 Report*].

[96] Canada's declaration in relation to art 42(2) of the *UN Convention against Corruption*, *supra* note 82, which is the provision concerning nationality jurisdiction, reads as follows: "Given that Canada has effective and broad territorial jurisdiction over corruption offences, Canada does not intend to extend its jurisdiction in the case of an offence committed by a Canadian national beyond that existing territorial basis of jurisdiction."

[97] *Canada: Phase 2 Report*, *supra* note 95 at para 77.

[98] *Karigar* (2013), *supra* note 10 at paras 34–41.

[99] [1985] 2 SCR 178 [*Libman*].

[100] *Karigar* (2013), *supra* note 10 at para 39; *Karigar* (2017), *supra* note 10 at paras 23–33.

arrangement having come to light through an unindicted co-conspirator's cooperation with the police.

Outside pressure, however, can lead to change, notwithstanding an *ex post facto* confirmation of the legal strength of Canada's arguments favouring the status quo, with Canada having been singled out by the OECD in 2006 as the only party to the *Anti-Bribery Convention* that had not established nationality jurisdiction for foreign bribery.[101] Three years later, Canada attempted to change this statistic. In May 2009, Canada's minister of justice brought forward a proposal to add a nationality jurisdiction clause to the *CFPOA*; however, the bill died on the order paper as a result of the 2009 prorogation of Parliament.[102] The change was eventually made in 2013, with its supporters making the argument that nationality jurisdiction removes the burden on the Crown of having to prove the required "real and substantial link" between the offence and Canada, allowing the Crown to focus its efforts and resources on proving the bribery. Of course, by definition, nationality jurisdiction does not extend the *CFPOA*'s jurisdiction to address the situation of a non-national, who has committed no specific acts in Canada's territory, as confirmed by the court's dismissal of an effort to prosecute a Bangladeshi politician who was alleged to have made efforts to influence the award of the Padma bridge project to SNC-Lavalin.[103] Territorial jurisdiction, however, does support the charging of non-nationals under the *CFPOA* for acts taking place in Canada, with two Americans and one British national currently facing charges in relation to the same Air India bribery case discussed above.[104]

The other amendment of note in 2013 was that to remove the exception for facilitation payments so as to make clear that such payments are considered bribes,[105] an amendment that has, at last, been brought into force on 31 October 2017.[106] Facilitation payments are those made to expedite

[101] See *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* (21 June 2006) at para 9, online: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/36984779.pdf>.

[102] See *Bill C-31: An Act to Amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to Make a Consequential Amendment to Another Act*, introduced in the House of Commons on 15 May 2009, clause 38.

[103] *Chowdhury v The Queen*, 2014 ONSC 2635 [*Chowdhury*].

[104] Leblanc, *supra* note 15; Seglins, *supra* note 15.

[105] *FFCA*, *supra* note 30, s 3(2).

[106] Order Fixing October 31, 2017 as the Day on which Subsection 3(2) of the Act Comes into Force, SI/2017-69; see also Global Affairs Canada, "Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act," news release (30 October 2017), online: <https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html>.

or secure the performance by a foreign public official of any act of a routine nature, such as the issuance of a permit or licence, the processing of official documents such as visas and work permits or the provision of normal public services.[107] Some view such payments as a lesser concern, with the then minister of foreign affairs, John Baird, who was taking the lead with respect to the 2013 amendments, referring to facilitation payments as "the younger sister of a bribe."[108] It has also been noted that Canada's statutory defence for such payments was "virtually identical to a defence in the U.S. *Foreign Corrupt Practices Act*,"[109] and, as noted in a report by the OECD Working Group, many Canadian companies in the extractive sector are aware of the US exception for facilitation payments due to their listing on a US stock exchange.[110] However, following this logic, Canadian companies trading on the London Stock Exchange should be aware that facilitation payments attract liability under British law and, in any event, changing views now cast the US position as being contrary to current best practice.[111] While it is true that in 1997, within the OECD, the criminalization of small facilitation payments had not been considered practical or effective,[112] by 2009, the OECD was recommending that countries review their policies and approach and that companies prohibit or discourage their use.[113] By the time the Canadian Parliament was considering amendments to the *CFPOA* in 2013, thirty-six of the forty parties to the *Anti-Bribery Convention* had no provision in their domestic laws to

[107] *CFPOA*, *supra* note 1, s 3(4)–(5).

[108] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 22 (28 February 2013) at 22:21 (John Baird).

[109] *CFPOA: A Guide*, *supra* note 47 at 8, referring to the US *Foreign Corrupt Practices Act* of 1977, as amended, 15 USC §§ 78 dd-1(c)(2), 78 dd-2(c)(2), 78 dd-3(c)(2).

[110] See *Phase 3 Report*, *supra* note 77 at para 36. This statement does not take into account that US enforcement agencies may accord a very narrow interpretation to the exception under US law.

[111] As explained by Raphael, *supra* note 40 at 8.02: "The law of England and Wales has never recognized 'facilitation payments' as a distinct category, e.g. a form of bribery worthy of being excepted from the general law of criminalizing such behaviour; the Bribery Act 2010 did not alter that situation." The specialist prosecutorial authority responsible for investigating corruption in the United Kingdom has also issued clear guidance, making clear that "[a] facilitation payment is a type of bribe and should be seen as such." United Kingdom, Serious Fraud Office, "Bribery Act: Guidance on Adequate Procedures, Facilitation Payments and Business Expenditure" (revised October 2012), online: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/>.

[112] See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (21 November 1997), art 1 at para 9 [*Commentaries*].

[113] *2009 Recommendation*, *supra* note 87, s VI.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

allow facilitation payments,[114] and under the *UN Convention against Corruption*, the default position from the perspective of a treaty of universal application is that facilitation payments are considered a form of bribery, unless a defence is made available by a state's domestic law.[115]

As for the views of those working at the coalface, peer reviewers with the OECD Working Group had noted that "representatives of the legal profession in Canada [had] expressed a high level of concern about the defence for 'facilitation payments', believing it would create a 'large area of uncertainty', and some felt that it should be repealed."[116] Nevertheless, the Canadian Bar Association's self-described anti-corruption team, in its testimony in 2013 before the Senate, and then the House of Commons, took the position that the time was not yet ripe to require the criminalization of facilitation payments made to foreign officials.[117] The anti-corruption team was described by an association staff lawyer as "comprising lawyers in private practice and in-house counsel across Canada, who are experts in the field of anti-bribery and anti-corruption."[118] However, its submissions failed to generate much support, likely as a result of its representative's repeated use of a hypothetical example of the prospect of fourteen years of imprisonment for paying CDN $20 to secure an exit visa. Indeed, one senator later wondered aloud, and, thus, on record, if this was a case of "very little input from members of the bar association" before the representatives presented the association's position.[119] Clearly, very little weight had been accorded by the association's representative to the likely exercise of prosecutorial discretion in the face of such a *de minimis* infraction.[120]

[114] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 23 (6–7 March 2013) at 23:45 (Wendell Sanford). The outliers were Australia, Canada, New Zealand, and the United States. The *Anti-Bribery Convention*, *supra* note 4, has attracted ratification from all OECD member states and several non-member states.

[115] *UN Convention against Corruption*, *supra* note 82, art 30(9).

[116] *Phase 3 Report*, *supra* note 77 at para 30.

[117] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 23 (6–7 March 2013) at 23:8 (Michael Osborne). The speaker subsequently identified himself as a practitioner with expertise in competition law (at 23:18 and 23:24); see also House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 87 (13 June 2013) at 2 (Michael Osborne).

[118] House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 87 (13 June 2013) at 1 (Noah Arshinoff).

[119] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 23 (6–7 March 2013) at 23:45 (David Smith).

[120] Guidelines issued by the director of public prosecutions affirm that *CFPOA* prosecutions may be instituted or refused on a principled basis, including public interest grounds. *Public Prosecution Service of Canada Deskbook* (Ottawa: Attorney General of Canada, 2014), 5.8.

On the proposed increase in the maximum prison sentence, the Canadian Bar Association was also critical, drawing attention to the fact that offences that carry a maximum sentence of fourteen years are not eligible for discharges, either absolute or conditional, or for conditional sentences, such as sentences served in the community.[121] On this aspect, however, the association received no support from Transparency International Canada, which viewed the prospect of a lengthy sentence as a deterrent to the commission of corruption.[122] There was also little guidance available from the case law,[123] although testimony from civil servants made clear that the change to a maximum of fourteen years would bring the sentencing regime for foreign bribery in line statutorily with that for the bribery of a Canadian public official.[124] Article 3(1) of the *Anti-Bribery Convention* provides support for making such a comparison. In Canada, there are different maximum sentences in use for domestic corruption offences, but the bribery of a judge, police officer, and others employed in the criminal justice system is subject to a maximum sentence of fourteen years.[125] A lower maximum of five years' imprisonment applies to those who commit fraud on the government through the bribery of other officials.[126]

The *FFCA* also centralized (and unified) Canada's enforcement effort by granting the RCMP the exclusive authority to lay charges under the *CFPOA*,[127] thus eliminating the potential for overlap with the Ontario Provincial Police and the Sûreté du Québec, among others. Several comments were made during the debates on the establishment of a RCMP International Anti-Corruption Unit in January 2008, comprising a team based in Ottawa, being the nation's capital, and another team in Calgary, being a

[121] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 23 (6–7 March 2013) at 23:9 (Michael Osborne), presumably relying upon *Criminal Code*, *supra* note 41, ss 730, 742.1; see also House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 87 (13 June 2013) at 2, 5 (Michael Osborne).

[122] House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 87 (13 June 2013) at 4 (Janet Keeping).

[123] As discussed in note 98 above, it was not until May 2014 that the first prison sentence was awarded in Canada for a *CFPOA* offence, with that prosecution proceeding under the pre-2013 Act and, thus, subject to a five-year maximum term. The Crown had sought a four-year term, while the defence had asked for a conditional sentence. Dave Seglins, "Air India Bribe Plotter Nazir Karigar Gets 3 Year Sentence," *CBC News* (23 May 2013).

[124] House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), Evidence, 41-1, No 86 (11 June 2013) at 3 (Alan Kessel).

[125] *Criminal Code*, *supra* note 41, ss 119–20.

[126] *Ibid*, s 121(3).

[127] *FFCA*, *supra* note 30, s 6.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

key location for Canada's extractive industries.[128] A member of the Public Prosecution Service of Canada (PPSC) is assigned to advise the two RCMP teams on ongoing anti-corruption investigations,[129] and the training for RCMP liaison officers serving in international posts has also been broadened to include issues of foreign bribery and the *CFPOA*.[130] The RCMP's website advises that it has liaison officers working in twenty-six locations outside Canada.[131]

As for the wider context in which this legislation was brought forward, the proposed amendments were announced just weeks after a Calgary-based company, then known as Griffiths Energy International, had agreed to pay a CDN $10.35 million fine as part of a guilty plea to a charge of paying bribes to secure oil concessions in Chad.[132] Parliamentarians were also aware, or made aware during the debates,[133] that Canada's largest engineering and construction firm, SNC-Lavalin, was facing charges of corruption in both Canada and abroad[134] and that Niko Resources, another

[128] *Debates of the Senate*, 41-1, vol 148, No 136 (12 February 2013) at 3247 (Janice G. Johnson); *Debates of the Senate*, 41-1, vol 148, No 140 (27 February 2013) at 3340 (David Smith); *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16964 (Bob Dechert).

[129] *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16964 (Bob Dechert).

[130] *Ibid.*

[131] Royal Canadian Mounted Police, "International Policing: Liaison Officers and Analysts" (31 July 2017), online: <http://www.rcmp-grc.gc.ca/en/liaison-officers-and-analysts>.

[132] Jen Gerson, "Judge Approves $10.35M fine for Griffiths Energy in Chad Bribery Case," *National Post* (25 January 2013); Brian Hutchinson, "Calgary Oil Company Paid $2M Bribe for Access to Oil Fields in Chad, Court Told," *National Post* (28 January 2013). This case is discussed in detail in the second part of this article.

[133] See e.g. *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16970 (John McKay); *House of Commons Debates*, 41-1, vol 146, No 262 (4 June 2013) at 17684 (Dean Allison), 17696 (Don Davies).

[134] SNC-Lavalin had announced on 28 February 2012 that its audit committee was investigating CDN $35 million of payments made on certain construction projects, with the audit committee reporting one month later that between 2009 and 2012, SNC-Lavalin had paid US $56 million to agents in violation of its internal policies, including its Code of Ethics and Business Conduct. The announcements led to a significant decline in the market value of SNC-Lavalin's shares, which in turn led to the commencement of several class-action lawsuits by shareholders to recoup millions in losses. See further *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2012 ONSC 5288, [2012] 112 OR (3d) 569. Media reports also covered the 2012 execution of search warrants at SNC-Lavalin's Montreal headquarters by the RCMP, the results of which later led to a guilty plea to corruption charges in Switzerland in 2014 by SNC-Lavalin's former head of global construction, Ben Aissa. "SNC-Lavalin Hit with $1.65 Billion Class-Action Lawsuit," *Canadian Press* (9 May 2012); Graeme Hamilton and Nicolas Van Praet, "Ben Aissa Pleads Guilty to Corruption Charges," *Financial Post* (1 October 2014). Fraud charges had also been made against SNC-Lavalin executives,

Calgary-based oil and gas company, had been fined CDN $9.5 million in 2011 after pleading guilty to bribing a former energy minister with the provision of an expensive car and paid travel expenses to secure concessions in Bangladesh.[135] The House of Commons was still considering the proposed legislation when it became known that SNC-Lavalin had been debarred from bidding on contracts with the World Bank for a ten-year period, following allegations of bribery involving the Padma bridge project in Bangladesh.[136] It was later announced that this sanction would also bar SNC-Lavalin from bidding on projects sponsored by Canada's own international development agency.[137] Parliamentarians were also advised that the government had announced that, with effect on 11 July 2012, the bribing of a foreign public official under the *CFPOA* would render that individual or company ineligible to bid on contracts with the federal government's Department of Public Works and Government Services,[138] a policy that would be extended in 2014 to include bribery convictions under foreign laws.[139]

On Canada's record of activity under the *CFPOA*, the minister of foreign affairs had stated during his appearance before the Senate that there

and others, concerning a Montreal University Health Centre hospital project, following investigations by the Quebec police task force on corruption. Greg McArthur, Les Perreaux, and Colin Freeze, "Police Probe McGill Hospital Contract Awarded to SNC Lavalin," *Globe and Mail* (18 September 2012); Nicolas Van Praet, "Will Montreal Mega-hospital Scandal Haunt SNC-Lavalin?" *Financial Post* (1 March 2013).

[135] Greg McArthur, "Calgary-Based Oil and Gas Firm to Admit to Bribing Bangladeshi Minister," *Globe and Mail* (23 June 2011); see further *Niko Resources*, *supra* note 9.

[136] World Bank, "World Bank Debars SNC-Lavalin Inc. and Its Affiliates for 10 Years," press release (17 April 2013), online: <http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years> [World Bank, "World Bank Debars"].

[137] Greg McArthur, "CIDA Bars SNC-Lavalin from Bidding on Projects," *Globe and Mail* (26 April 2013).

[138] *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16965 (Bob Dechert); *House of Commons Debates*, 41-1, vol 146, No 272 (18 June 2013) at 18509 (Bob Dechert). Note, however, that ineligibility was linked to proceedings under the *CFPOA* and not to sanctions imposed by the World Bank, with a SNC-Lavalin affiliate subsequently securing a Canadian government defence contract. Les Whittington and Bruce Campion-Smith, "SNC-Lavalin Subsidiary Wins Government Contract Despite World Bank Ban," *Toronto Star* (13 August 2013). Past and current versions of the "Ineligibility and Suspension Policy" are online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>.

[139] Barutciski & Bandali, *supra* note 6 at 253, referring to a government backgrounder that is no longer available. Export Development Canada (EDC) also has policies in place to refuse to provide support where there is credible evidence that bribery was involved in a transaction. See further "EDC's Anti-Corruption Policy Guidelines" (undated), online: <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/anti-corruption-guidelines.pdf>.

were thirty-five ongoing investigations,[140] a number later repeated in the House of Commons by his parliamentary secretary.[141] But Canada's record at that time of only three convictions, albeit with a fourth soon to follow,[142] was viewed as weak, with media reports having drawn attention to external assessments of Canada's record as being the worst within the G7.[143] Indeed, as a senior government official confirmed in his testimony before the Senate in 2013, "[t]here have been only five cases, and they have either been decided by the court or are currently before the court."[144] But, for some, "numbers tell the tale," with one parliamentarian noting that "227 cases [had been] prosecuted in the United States, 135 in Germany, 35 in Switzerland, 24 in France and in Italy and the United Kingdom 18 and 17 respectively."[145]

THE *EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT* OF 2014

A year later, in 2014, the federal Parliament bolstered its efforts to deter and detect corruption by enacting legislation requiring companies operating in the oil, gas, and mineral sectors to disclose details of payments made to domestic and foreign governments. Known as the *Extractive Sector Transparency Measures Act*,[146] the Act received royal assent in December 2014 and entered into force on 1 June 2015. There is, however, no guidance to be gleaned from the parliamentary record as the Act was buried within an omnibus bill of some 580 pages concerning the government's economic action plan and thus received little mention.[147] Luckily, though,

[140] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 22 (28 February 2013) at 22:30 (John Baird); see also 22:27 (Daniel Lang).

[141] *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16964 (Bob Dechert).

[142] *Karigar* (2013), *supra* note 10.

[143] On the OECD's assessment of Canada as a state with "little or no enforcement," see Julian Sher, "OECD Slams Canada's Lack of Prosecution of Bribery Offences," *Globe and Mail* (28 March 2011). On Transparency International's subsequent ranking of Canada as the worst within the G7, see Julian Sher, "Canada Ranked Worst of G7 Nations in Fighting Bribery, Corruption," *Globe and Mail* (24 May 2011); see also Julian Sher, "Canada Loses Ground on Bribery Ranking," *Globe and Mail* (1 November 2011).

[144] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 23 (6–7 March 2013) at 23:43 (Wendell Sanford, Director, Criminal, Security and Diplomatic Law Division, Department of Foreign Affairs and International Trade).

[145] *House of Commons Debates*, 41-1, vol 146, No 255 (24 May 2013) at 16971 (John McKay).

[146] *ESTMA*, *supra* note 31; see further Natural Resources Canada, "Extractive Sector Transparency Measures Act (ESTMA)" (5 October 2018), online: <http://www.nrcan.gc.ca/mining-materials/estma/18180>.

[147] See Bill C-43, *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures*, introduced by the Minister of Finance on 23 October 2014.

a purpose clause has been included as section 6 of the Act, which makes express the connection to the *CFPOA*, with the purpose clause advising the "measures that enhance transparency and … impose reporting obligations … are designed to deter and detect corruption including any forms of corruption under [the *Criminal Code* and the *CFPOA*]."

As with the enactment of the *CFPOA* in 1998 and the *FFCA* in 2013, international developments reflecting the desire for a level playing field were again a key motivating factor for Canadian legislative action, with the G8 leaders promising to take action to "rais[e] global standards of transparency in the extractive sector" and, thus, "reduce the space for corruption and other illicit activities" at their 2013 summit at Lough Erne.[148] The European Union (EU) has also adopted similar measures, requiring EU entities active in the extractive and logging sectors, and all companies in these sectors trading securities on a EU regulated market, to report payments made to governments in the countries in which they operate.[149] The inspiration for these measures comes from a voluntary effort known as the Extractive Industries Transparency Initiative (EITI),[150] which was developed by governments, companies, and civil society organizations as a means to promote the timely and accurate publication of information on key aspects of natural resources management, including how licenses are allocated and the amount of revenue generated by tax and social contributions. The EITI was launched by then UK Prime Minister Tony Blair in 2002 and endorsed by the G8 in 2004,[151] with the founder of Transparency International, Peter Eigen, appointed its first chair in 2006.[152]

Challenges for the Canadian Legal Landscape

The investigation and prosecution by Canadian authorities of the corruption of foreign public officials faces several challenges, with critics often citing Canada's record of so few cases as an indication of a need for greater dedication to the cause. There are, however, other challenges to be addressed

[148] G8 Lough Erne Summit, *Leaders Communiqué* (18 June 2013) at paras 34-42, especially para 35, but also paras 30–31, online: <http://www.g8.utoronto.ca/summit/2013lougherne/lough-erne-communique.html>.

[149] Directive 2013/50/EU amending Directive 2004/109/EC, OJ L294, 13 (22 October 2013); Directive 2013/34/EU amending Directive 2006/43/EC, OJ L182, 19 (26 June 2013).

[150] See further Extractive Industries Transparency Initiative, online: <https://eiti.org/>. See also Rose, *supra* note 7, ch 4.

[151] G8 Sea Island Summit, "Fighting Corruption and Improving Transparency" (10 June 2004), online: <http://www.g8.utoronto.ca/summit/2004seaisland/corruption.html>.

[152] Extractive Industries Transparency Initiative, "Factsheet" (May 2017), online: <https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf>.

that exist separate from questions of effort, the ever-present plea for the dedication of more resources, and the deployment of specialized expertise. These challenges include those arising as a result of the law of immunities for certain foreign officials and organizations, albeit that no mention was made of immunities during Parliament's enactment of the *CFPOA* in 1998 nor during its subsequent amendment in 2013. The speed of proceedings, particularly in 1998 as well as in 2013, may be one explanation, but this omission may also result from Parliament's focus, the OECD's focus, and the focus of expert testimony on the supply side of foreign corruption and the goal of punishing those in Canada who offer bribes.

But bribery can also have a demand side, where the payment of the bribe is solicited or induced by the foreign public official involved, leading to a need to consider the status of that official. If that official is a diplomat, questions of immunity should immediately come to mind, although questions of immunities also arise with the involvement of international organizations in the investigation of acts of foreign corruption, as will be discussed later in this article. Immunities also pose problems in addressing the proceeds-of-crime aspect, with the recovery of the payment and the forfeiture of the benefits of a bribe also being topics that received little attention throughout Parliament's discussions. Lastly, there is the need to consider further the wider impact of foreign corruption, particularly on its victims, with Canadian parliamentarians having focused their efforts, and discussions, on the goal of securing a level playing field for Canadian businesses operating abroad. These challenges will be discussed below, drawing on Canadian examples for illustration.

DIPLOMATIC IMMUNITIES

There is an inherent international dimension to activities under the *CFPOA*, although this conduct need not cross borders to attract sanction under the Act. This inherent international dimension contains elements of both international relations and international law, as one would expect given the Act's focus on conduct *vis-à-vis* a foreign public official. Within both the *CFPOA* and its international precursor, the *Anti-Bribery Convention*, a foreign public official is defined to include those exercising public functions on behalf of both foreign states and international organizations.[153] The OECD convention also makes clear the international connection by stating expressly that domestic enforcement activities "shall not be influenced by … the potential effect upon relations with another State or the identity of the natural or legal persons involved."[154] And, yet, at no time

[153] *CFPOA*, *supra* note 1, s 2; *Anti-Bribery Convention*, *supra* note 4, art 1(4).

[154] *Anti-Bribery Convention*, *supra* note 4, art 5.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

during Parliament's speedy passage of the *CFPOA* in 1998, or during its consideration of amendments to the Act in 2013, was mention made, or a question asked, about the prospects for interaction between the *CFPOA* and the law of immunities for both foreign officials and organizations.

Immunity law, by definition, carves out certain exceptions to jurisdiction, even within a state's own territory and before a state's own courts. The classic example of a state official who is protected by immunity is that of a foreign diplomat,[155] but there are others who benefit from immunities under international law, including consular officials, the agents and officials of organizations created by states and governments to operate on the international legal plane, and the organizations themselves.[156] These rules of diplomatic, consular, and organizational immunity are also rules of Canadian law, having been given "the force of law in Canada" by virtue of legislation such as the *Foreign Missions and International Organizations Act*.[157] These rules of immunity ensure that a foreign diplomat is immune from the criminal, civil, and administrative jurisdiction of the host state[158] and immune from measures of execution if a judgment is given against a diplomat.[159] A foreign diplomat is also under no obligation to give evidence as a witness,[160] with diplomatic

[155] See generally Linda S Frey & Marsha L Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press, 1999); see also Sir Ivor Roberts, ed, *Satow's Diplomatic Practice*, 6th ed (Oxford: Oxford University Press, 2009) at 97–101, 121–41.

[156] See generally C Wilfred Jenks, *International Immunities* (London: Stevens & Sons, 1961); Philippe Sands & Pierre Klein, eds, *Bowett's Law of International Institutions*, 6th ed (London: Sweet & Maxwell, 2009), especially 15-033–15-064, 15-073–15-084; Jan Klabbers, *Introduction to International Institutional Law*, 2nd ed (Cambridge, UK: Cambridge University Press, 2009) at 131–52; Niels Blokker & Nico Schrijver, eds, *Immunity of International Organizations* (Leiden: Brill Nijhoff, 2015); see also August Reinisch, ed, *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (Oxford: Oxford University Press, 2016).

[157] SC 1991, c 41, ss 3, 12, with regulations made under the Act identifying the specific international organizations that have privileges and immunities under Canadian law. Specific legislation can also be enacted, following the model established by the *Privileges and Immunities (United Nations) Act*, SC 1947, c 69, which gave Canadian legal effect to the *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 UNTS 15, Can TS 1948 No 2 (entered into force 17 September 1946); see further Philip M Saunders, "Canada" in August Reinisch, ed, *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press, 2013) at 75–101.

[158] See generally Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed (Oxford: Oxford University Press, 2016) at 232–59.

[159] *Ibid* at 264–65.

[160] *Ibid* at 260–63.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

immunities also extending to family members,[161] diplomatic premises,[162] and documents.[163] As a result, a foreign public official who solicits a bribe while serving as a diplomat will be immune from proceedings under the *CFPOA*, unless the foreign state waives the protections of diplomatic immunity.

This scenario is not so far-fetched as to warrant no discussion in Parliament, with the facts surrounding Griffiths Energy International (GEI) becoming public knowledge just weeks before Parliament's consideration of the *FFCA*. GEI was a small, privately held, Calgary-based company, formed by the Toronto investment banker Brad Griffiths, along with energy company executives (and brothers) Naeem Tyab and Parvez Tyab.[164] As set out in an agreed statement of facts, GEI engaged in the bribery of a foreign public official to help secure oil and gas concessions in the central African country of Chad. The foreign public official involved was the ambassador of Chad to the United States and Canada, who along with his wife, plus the wife of the deputy chief of Chad's diplomatic mission and one other, received certain benefits in return for providing assistance to secure the concessions in Chad. GEI later underwent a change of management; a change that led to the discovery of the bribes and the company's subsequent cooperation with law enforcement officials. GEI's admission of guilt can be found in the agreed statement of facts filed by GEI and the Crown prosecutor with the Court of Queen's Bench in Calgary on 14 January 2013.[165]

According to the agreed statement of facts, GEI had entered into an agreement in August 2009 with the ambassador, on behalf of a Maryland-registered company called Ambassade de Tchad LLC, providing for the payment of a US $2 million fee if GEI was awarded the exclusive rights to explore and develop certain specified oil and gas reserves in southern Chad.[166] This agreement was later terminated after GEI received outside legal advice that such a benefit could not be given to a government official, and, in September 2009, GEI concluded a second agreement on identical

[161] *Ibid* at 319–27.

[162] *Ibid* at 111–48.

[163] *Ibid* at 156–68.

[164] Carrie Tait & Kelly Cryderman, "The Canadian Energy Executive at the Centre of the Griffiths Corruption Scandal," *Globe and Mail* (24 January 2013).

[165] *R v Griffiths Energy International Inc*, Agreed Statement of Facts (14 January 2013) at para 39 (Alta QB) [copy on file with the author] [*Griffiths Energy*, Agreed Statement of Facts]. The facts are also set out in detail in *Serious Fraud Office v Saleh*, [2015] EWHC 2119 (QB) at paras 11–23 [*Saleh* (2015)]; *Saleh* (2017), *supra* note 34 at paras 6–21; *Serious Fraud Office v Saleh*, [2018] EWHC 1012 (QB) at paras 14–51.

[166] *Griffiths Energy*, Agreed Statement of Facts, *supra* note 165 at para 20.

terms with a Nevada-registered company called Chad Oil Consulting LLC, which was wholly owned by the ambassador's wife.[167] A subscription agreement was also concluded, providing for the grant of four million so-termed "founders shares" in GEI, at a price of US $0.001 per share, to the ambassador's wife as well as to two others, one of whom was the wife of the deputy chief of Chad's embassy in Washington, DC.[168] In January 2011, GEI secured the desired production-sharing contract with the Republic of Chad. A renewed consulting agreement was also concluded, with the 2009 agreement having expired, and, in February 2011, Chad Oil Consulting LLC received its payment of the US $2 million fee.[169]

Six months later, an entirely new management team was in place at GEI, along with several new independent directors, with a plan for GEI to become a publicly traded company by the end of 2011. According to the agreed statement of facts, it was the preparations for the initial public offering that led to the discovery of the consulting agreements, which in turn led to an extensive internal investigation as well as voluntary disclosures to law enforcement authorities in both Canada and the United States.[170] By January 2013, a plea deal on corruption charges had been reached between GEI and the Canadian prosecutors, which included an agreement on sentencing. The agreed sentence was a fine, described as being in the amount of CDN $9 million, plus an additional 15 percent victim surcharge, for a total amount of CDN $10,350,000,[171] with it being jointly agreed that the sentence imposed "appropriately reflects the degree of planning, duration and complexity of the offence."[172] The deal was accepted by the Court of Queen's Bench, with Justice C. Scott Brooker suggesting that, had the company not voluntarily self-disclosed the wrong to law enforcement authorities, "this crime might never have been discovered."[173]

However, it was a deal reached between GEI and the Crown, pitched by GEI's lawyer to reporters "as a model for companies in future that find

[167] *Ibid* at paras 21–22.

[168] *Ibid* at paras 23–26. The shares to the third person were later transferred to the ambassador's wife.

[169] *Ibid* at paras 36, 38.

[170] *Ibid* at paras 41–45.

[171] *Ibid* at para 49.

[172] *Ibid* at para 52.

[173] *Griffiths Energy*, *supra* note 9, reported to the public in Gerson, *supra* note 132; Lauren Krugel, "Judge Approves $10.35-million Fine for Griffiths Energy in Bribery Case," *Canadian Press* (25 January 2013), online: <http://globalnews.ca/news/383889/judge-approves-10-35-million-fine-for-griffiths-energy-in-bribery-case-2/>.

themselves in a situation where ghosts are uncovered."[174] The deal did not include the individuals involved,[175] nor did it secure the return of the bribes. It did enable GEI to move on, with the company later shelving its plans for a Canadian initial public offering in favour of far better opportunities — opportunities made possible by the plea. In May 2013, GEI changed its name to Caracal Energy. By June, it had secured support from a major player — namely, the Anglo-Swiss resources giant Glencore Xstrata Plc,[176] now known simply as Glencore Plc — with which Caracal Energy traded a percentage share in its Chadian oil concessions in return for a cash infusion. By July 2013, Caracal Energy had begun trading its shares on the London Stock Exchange.[177] By August 2013, Caracal Energy was listed as a supportive company with the Extractive Industries Transparency Initiative,[178] suggesting it had successfully enhanced its reputational value. Then, in April 2014, Caracal Energy was acquired by Glencore for £807 million,[179] or US $1.3 billion,[180] leading to a surge in value for shareholders.[181] At £5.50 per share, those four million founders shares were now worth £22 million to those on the demand side of an identified foreign bribery transaction.

SEIZING AND FORFEITING THE PROCEEDS OF CORRUPTION

To be effective, the fight against foreign corruption must focus not only on the act of bribery but also on its ill-gotten gains, although admittedly, little was said about either confiscation or forfeiture during either Parliament's

[174] Reported in Gerson, *supra* note 132; Krugel, *supra* note 173.

[175] The judge was alive to this point, as he indicated in statements made at the sentencing hearing, and which has since been noted in *Saleh* (all cases), *supra* note 165 at para 27.

[176] Founded by the billionaire commodities broker Marc Rich in 1974, Glencore is ranked in the top echelon of *Fortune* magazine's Global 500 list of the world's largest companies. Glencore merged with Xstrata in 2013.

[177] Dan Healing, "Former Griffiths Energy Joins Transparency Initiative," *Calgary Herald* (29 August 2013).

[178] *Ibid.*

[179] Ashley Armstrong, "Glencore Gatecrashes Caracal Energy Deal with Rival £807m Cash Offer," *The Telegraph* (14 April 2014); Alexis Flynn, "Glencore Xstrata Buys Caracal Energy," *Wall Street Journal* (14 April 2014). A press release issued by the two companies announced the completion of the acquisition on 8 July 2014.

[180] Neil Hume & Xan Rice, "Glencore Xstrata Buys Chad-Focussed Oil and Gas Group Caracal," *Financial Times* (14 April 2014).

[181] *Ibid.*

passage of the *CFPOA* or its amendment in 2013.[182] As a state party to the *Anti-Bribery Convention*, Canada is required to take measures to provide that the bribe and the proceeds of foreign bribery are subject to seizure and confiscation.[183] However, the supply-side focus of the *Anti-Bribery Convention* suggests that the proceeds of interest are those derived by the briber from the transaction, assuming a passive recipient.[184] The *UN Convention against Corruption* takes a broader approach, addressing both supply-side and demand-side foreign bribery, and defines "proceeds of crime" so as to include "any property derived from or obtained, directly or indirectly, through the commission of an offence."[185] The *UN Convention against Corruption* also includes a specific chapter on asset recovery, with the return of assets taken through corruption identified as "a fundamental principle."[186]

When first enacted, the *CFPOA* did contain provisions drawing attention to both the possession and laundering of the proceeds of foreign bribery as specific crimes. However, since 2002,[187] Canada has opted to rely on the general provisions within its *Criminal Code*,[188] rather than an array of individualized federal statutes, to criminalize these activities, a policy choice that may be due for reassessment. Nevertheless, Canada's *Criminal Code* does provide for the search, seizure, and detention of the proceeds of crime,[189] with mutual legal assistance arrangements between Canada and other countries paving the way for the enforcement of foreign restraint

[182] On the last day of Parliament's 2013 deliberations, at Third Reading in the House of Commons, the minister's parliamentary secretary made a brief reference to a presentation by Canadian legal experts from the Department of Foreign Affairs to the 2011 Conference of the States Parties to the *UN Convention against Corruption* on legal mechanisms for freezing the assets of corrupt foreign officials and for combatting bribery. *House of Commons Debates*, 41-1, vol 146, No 272 (18 June 2013) at 18509 (Bob Dechert). This phrasing, however, suggests reference to the then recent enactment of a Canadian law permitting the freezing of assets believed to have been misappropriated by officials from foreign states in times of internal turmoil, notably without the underpinning of a criminal charge, rather than a focus on the forfeiture of the ill-gotten gains of bribery linked to Canada. See further *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10.

[183] *Anti-Bribery Convention*, *supra* note 4, art 3(3).

[184] According to the *Commentaries*, *supra* note 112 at para 21, adopted by the negotiating conference: "The 'proceeds' of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery."

[185] *UN Convention against Corruption*, *supra* note 82, art 2(e).

[186] *Ibid*, art 51.

[187] *Act to Amend the Criminal Code*, *supra* note 56.

[188] *Criminal Code*, *supra* note 41, ss 354, 462.31.

[189] *Ibid*, ss 462.3, 462.32–462.5.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

or forfeiture orders.[190] There are also cooperation incentives included within the scheme, with reciprocal sharing agreements enabling Canada to share the forfeited proceeds of crime with a foreign government where the latter's enforcement agencies participated in the investigation of the offences that led to a forfeiture or the imposition of a fine or assisted in locating the forfeited assets.[191]

Here again, however, a Canadian case of foreign bribery can be used to illustrate the challenges posed by the complexities involved as well as the need for further work from law- and policy-makers to secure the effectiveness of the Canadian legislative scheme. Many have described GEI's payment of a US $10 million fine as setting a new standard for *CFPOA* cases,[192] but few ask what happened to the US $2 million fee and the four million founders shares. And, yet, as is often the case with so-called white-collar crime, there is a need to "follow the money," with developments since having prompted the British courts to describe the US $10 million fine as a "comparatively"[193] and "relatively modest sum."[194]

After the plea deal was reached with GEI, and accepted by the court, forfeiture proceedings concerning the four million founders shares given by GEI to the wives of the Chadian diplomats were initiated by the Public Prosecution Service of Canada, leading to the seizure of the share certificates by the RCMP in June 2013 and the commencement of judicial proceedings on the forfeiture applications in August 2013.[195] Both the ambassador's wife, Nouracham Bechir Niam, and the wife of the deputy chief of mission, Ikram Mahamet Saleh, appeared for the first time through representation by counsel.[196] Views were exchanged about the extent of disclosure required, and the admissibility of evidence obtained from those benefiting from diplomatic immunities, but then, in April 2014, the chief federal prosecutor informed the court and counsel that it was withdrawing the applications for forfeiture. No reasons for the withdrawal were given. Indeed, when the US Department of Justice later made several attempts to find out why the Canadian prosecution authority had

[190] *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c 30 (4th Supp), ss 9.3, 9.4.

[191] *Seized Property Management Act*, SC 1993, c 37, s 11.

[192] See e.g. Tait & Cryderman, *supra* note 164.

[193] *Saleh* (2015), *supra* note 165 at para 24.

[194] *Saleh* (2017), *supra* note 34 at para 22.

[195] The details of the events can be found in the judgments of the English courts in *Saleh* (2015), *supra* note 165 at paras 29–36; *Saleh* (2017), *supra* note 34 at paras 22–32.

[196] In the interests of full disclosure, the author provided assistance on matters of international law to Saleh's counsel in relation to the proceedings in Canada.

withdrawn the proceeds-of-crime forfeiture applications, the Canadian authorities advised that they were unable to disclose without the signing of a non-disclosure letter, which the US authorities refused to do.[197] The British prosecutorial authority made a similar request to the same effect.[198]

Following the withdrawal of the Canadian actions, a draft order was prepared by defence counsel, approved as to form by the prosecuting counsel, and granted by the court,[199] the effect of which was to cancel the forfeiture of the shares as proceeds of crime- or offence-related property. As a result, the share certificates were returned and then surrendered in July 2014 to the stock transfer agent handling the acquisition of GEI (by then known as Caracal Energy) by the commodities giant Glencore. The proceeds for the sale of the four million founders shares were deposited in an account with the Royal Bank of Scotland, in the name of the stock transfer agent, Computershare Investor Services Plc. Both companies are British by registration, leading to the involvement of the United Kingdom's Serious Fraud Office (SFO), although it was the US Department of Justice, and not the Canadian authorities, that made the mutual legal assistance request to the SFO to take steps to freeze the proceeds.[200]

To explain further, the US Department of Justice had initiated proceedings in relation to the shares owned by the ambassador's wife, after the completion of her husband's posting to the United States and his appointment as Chad's ambassador to South Africa. However, with the deputy chief of mission still in his post, the United States had not taken action in relation to Mrs. Saleh's shares in light of the possible claims for diplomatic immunity.[201] Thus, the US request to the SFO concerned the shares transferred to the ambassador's wife, leading to the freezing of the proceeds of their sale by a UK court on 24 July 2014. Acting on its own initiative,[202] the SFO also issued proceedings against the Saleh shares, and, on 29 July 2014, the SFO secured a "property freezing order" under the British proceeds-of-crime legislation with respect to a sum of £4,400,000 plus interest, being the proceeds from the sale of the 800,000 shares that Saleh had acquired in 2009 for CDN $800.[203]

[197] This information is recorded in *Saleh* (2015), *supra* note 165 at para 112.

[198] *Ibid* at para 113.

[199] On the arguments and findings of mistakes in the order, see further *Saleh* (2015), *supra* note 165 at paras 37–52; *Saleh* (2017), *supra* note 34 at paras 35–39.

[200] *Saleh* (2015), *supra* note 165 at para 53.

[201] *Ibid* at paras 53–54.

[202] *Ibid* at para 55.

[203] *Saleh* (2017), *supra* note 34 at para 2.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

Saleh then went to court in the United Kingdom to seek the release of the funds, arguing that the Canadian court order of April 2014 had meant that she could dispose of the shares as she wished. The Queen's Bench division of the High Court of Justice for England and Wales disagreed, as did the English Court of Appeal, with the case raising an interesting question about the impact of a prosecutorial authority's decision to withdraw proceedings for forfeiture on the property, or its sale proceeds, when it comes into another jurisdiction. The Court of Appeal ruled that the Canadian order was not final and conclusive on the merits, nor a judgment *in rem* so as to bind the SFO and preclude any claim in the British proceedings, as no evidence had been tendered with respect to the assertion that Saleh was innocent of complicity. In the court's view, the Canadian order had been made without a substantive hearing and in circumstances without the judicial consideration of the relevant facts and principles of law.[204] As a result, the alleged proceeds of crime resulting from the Griffiths Energy bribe have been seized,[205] but not as a result of the actions taken by Canadian authorities, and, indeed, the British judgment suggests the actions of Canadian authorities posed an impediment that needs to be addressed.

As for proceedings in the United States, the US Department of Justice initiated on 30 June 2015 a civil forfeiture action for the cash value of the four million shares, now under restraint in the United Kingdom, on the grounds that the proceeds were traceable to bribery payments made to Chadian diplomats when they were stationed in Washington, DC.[206] In an earlier action, filed in 2014, the United States was also seeking the civil forfeiture of over US $100,000 in allegedly laundered funds traceable to the payment of the US $2 million consultancy fee through US bank accounts and real property.[207] These funds are already under restraint, as a result of the execution of a US warrant for arrest *in rem* against Bank of America

[204] *Ibid* at para 54.

[205] See *Serious Fraud Office v Saleh*, [2018] EWHC 1012 (QB).

[206] US Department of Justice, "Department of Justice Seeks Forfeiture of $34 Million in Bribe Payments to the Republic of Chad's Former Ambassador to the U.S. and Canada," Press Release No 15-824 (30 June 2015); see also the "Verified Complaint for Forfeiture In Rem" filed in the US District Court for the District of Columbia on 30 June 2015, online: <https://www.justice.gov/opa/file/624266/download>.

[207] United States, Department of Justice, "Department of Justice Seeks Recovery of Approximately $100,000 in Bribes Paid to Former Chad Ambassador," Press Release No 14-1240 (7 November 2014); see also the "Verified Complaint for Forfeiture In Rem" filed in the U.S. District Court for the District of Columbia on 7 August 2014, online: <https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/bechir_complaint.pdf>.

in September 2014.[208] The investigative and prosecutorial efforts undertaken by the US authorities in this case were part of the Kleptocracy Asset Recovery Initiative, launched by then US Attorney General Eric Holder in 2010[209] and designed to secure the forfeiture of the proceeds of foreign official corruption "and, where appropriate, return those proceeds to benefit the people harmed by these acts of corruption and abuse of office."[210]

MAKING VICTIMS A CLEARER CONCERN OF THE LEGISLATIVE SCHEME

Returning the proceeds of corruption is not, however, an easy task, with one World Bank study reporting that of the US $2.6 billion in assets recovered and frozen by OECD countries between 2006 and 2012, only about a sixth of the money seized was returned to victim countries.[211] This statistic would be just as stark if focused solely on returning the proceeds of foreign bribery rather than the proceeds of corruption writ large, since the explanation for the low rate of return rests in part with the difficulty in deciding to whom to return the funds. It is not easy to identify the victims of foreign corruption, nor is it easy to assess the quantum of damage suffered as a result of an act of corruption, with attempts to address what might be termed "general societal damage" suggesting a need to return the funds to a government, or government agency, for the support of public services. However, this option may in turn raise additional concerns, particularly if the foreign officials taking bribes are not merely a "few bad apples" but, rather, emblematic of a wider culture of corruption and cronyism within the foreign state. Concerns may also be raised about the intended use of the returned funds, with Chad, as a pertinent example, having used its oil revenues to buy weapons rather than relieve poverty in the face of an agreement with the World Bank that oil royalties be used for development purposes.[212] Such situations may in turn lead to a desire within the seizing

[208] "United States' Motion to Vacate Sealing Order," filed in the US District Court for the District of Columbia on 30 October 2014, online: <https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/bechir_motion_to_vacate.pdf>.

[209] Leslie Wayne, "Wanted by U.S.: The Stolen Millions of Despots and Crooked Elites," *New York Times* (16 February 2016). By 2016, twenty-five cases had been brought against twenty foreign officials under this initiative.

[210] US Department of Justice, *supra* note 206.

[211] Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington, DC: World Bank and OECD, 2014) at 21; see also Leslie Wayne, "Shielding Seized Assets from Corruption's Clutches," *New York Times* (30 December 2016).

[212] See further Annalisa M Liebold, "Aligning Incentives for Development: The World Bank and the Chad-Cameron Oil Pipeline" (2011) 36 Yale J Intl L 136.

state to hold off restoring or repatriating any funds until circumstances improve, albeit that, in relation to Africa, many of the continent's rulers are among the longest serving in the world.[213] Alternatively, a seizing state may consider using the funds to support development projects and charities in the foreign state that have been vetted by its own development aid agency.

Concern is often expressed for the victims of corruption, but the policy question of how best to ensure that the proceeds of foreign bribery are put to use for the benefit of the victims of the crime is one that needs further study. There is also a need for clarity as to the definition of a victim, with the recently adopted *Justice for Victims of Corrupt Foreign Officials Act* (also known as the *Sergei Magnitsky Law*),[214] offering no definition despite its title, with this law authorizing targeted measures to be imposed on individuals considered responsible for, or complicit in, gross human rights abuses as well as significant acts of corruption.[215] It may well be that society as a whole, or the society as a whole within a foreign country, are the victims of corruption, lending support to the link often made between corruption and development. Indeed, during the passage of the *CFPOA*, and its amendment in 2013, this link was made, with Canada's then minister of foreign affairs expressly recognizing in 2013 that "[e]very dollar that goes to a bribe is a dollar that does not benefit the people who desperately need a new school, or a new hospital, or what have you."[216] But there was little else said by either the minister or others in Parliament about how to remedy this situation by way of a successful prosecution under the *CFPOA*, and there was no time allocated for further consideration given the speedy timetable adopted for the parliamentary proceedings.

Academic commentary has also recognized the development imperative for tackling corruption,[217] as have Canada's courts, with the Supreme Court of Canada embracing the view in the opening lines of its judgment in *World Bank Group v Wallace* that "[c]orruption is a significant obstacle

[213] Geoffrey York, "Africa's Autocrats Find New Ways to Cling to Power," *Globe and Mail* (22 July 2017) at F3.

[214] SC 2017, c 21.

[215] See further Global Affairs Canada, "Justice for Victims of Corrupt Foreign Officials Act" (29 November 2018), online: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/victims_corrupt-victimes_corrompus.aspx?lang=eng>.

[216] *Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade*, 41-1, No 22 (28 February 2013) at 22:27 (John Baird).

[217] See e.g. David Kennedy, "The International Anti-Corruption Campaign" (1999) 14 Conn J Intl L 455 at 459: "[W]hatever one's theory of development … it seems indisputable that there would be more development if local corruption could be eliminated."

to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity."[218] Canadian courts have also recognized that white collar crime, in general, is neither a harmless, nor victimless, crime, explaining further that "[a]ll Canadians, and society as a whole, are the victims when public officials breach the trust placed in them."[219] It has also been accepted that "a fraud against a government agency is not a victimless crime as it results in a reduction in resources available to people who rely on government services,"[220] and our courts have made clear that having only foreign victims "does not make the activity any the less unlawful or mean that no crime has been committed in Canada when there exists a 'real and substantial link' or connection to this country."[221]

But even if society as a whole in the foreign country concerned can be considered the victim in a case of foreign bribery, the question remains as to how best to remedy the diversion of funds, with restitution requiring proof that the bribe caused such a diversion. The creation of victim trust funds to support the activities of charitable endeavours and development projects in the foreign state is one option worthy of further study, with the creation of a distribution mechanism for such funds being an improvement on the present situation. Although sizeable victim surcharges have been imposed in two of the three corporate convictions under the *CFPOA*,[222] no benefit flows to the victims of the crimes at issue in these cases. Brought into being in 1989,[223] the victim surcharge is a financial penalty imposed on convicted offenders at the time of sentencing that helps fund the provision of services to all victims of crime, rather than specific victims, in ways to be determined by provincial and territorial authorities.[224] As a result, in the foreign bribery cases of *Niko Resources* and *Griffiths Energy International*, the

[218] *Wallace*, *supra* note 36 at para 1, cited in *Karigar* (2017), *supra* note 10 at para 39.

[219] *R v Serré*, 2013 ONSC 1732, 105 WCB (2d) 769 at para 29, cited with approval in *Karigar* (2014), *supra* note 10 at para 34.

[220] *Karigar* (2014), *supra* note 10 at para 24, relying on *R v Bogart*, [2002] 61 OR (3d) 75, leave to appeal refused, [2002] SCCA 398 at para 23.

[221] *R v Stucky*, 2009 ONCA 151 at para 27, relying on *Libman*, *supra* note 99.

[222] As obliged by section 737 of the *Criminal Code*, *supra* note 41, with amendments having since increased the rate of the victim surcharge from 15 percent to 30 percent. *An Act to Amend the Criminal Code*, SC 2013, c 11, s 3(2).

[223] *An Act to Amend the Criminal Code (Victims of Crime)*, SC 1988, c 30.

[224] Section 747(7) of the *Criminal Code*, *supra* note 41, confirms that a victim surcharge "shall be applied for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time."

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

assessment of a 15 percent victim surcharge resulted in payments being made of CDN $1.239 million and CDN $1.35 million for the benefit of Alberta's victims of crime fund, without any mention of the use of these funds to carry out victim assistance activities of relevance in Chad or Bangladesh.[225] In both cases, the imposition of the fine and surcharge reflected the terms of a plea agreement reached between the Crown and corporate counsel that was accepted by the court as having taken into account all of the relevant factors for sentencing, including credit for saving prosecutorial resources through self-investigation and voluntary disclosure. However, in both cases, no mention was made of the foreign victims of the crimes, suggesting that further work needs to be done on how to factor in the victimization of foreign nationals through crimes of foreign bribery at the sentencing stage of a *CFPOA* proceeding.

ORGANIZATION IMMUNITIES AND THE INVESTIGATION OF CORRUPTION

In addition to posing obstacles for prosecution and restitution, immunities may also hamper investigation efforts, with the immunities bestowed on international organizations being of relevance given the need for their assistance in the investigation of many cases of foreign corruption. This aspect is well illustrated by reference to the recent judgment of the Supreme Court of Canada in *Wallace*. At issue in *Wallace* was the extent of immunity enjoyed by an international organization with respect to the disclosure of its records. The records at issue were those relating to a corruption investigation that had been carried out by the World Bank Group's Integrity Vice Presidency (known as INT) with respect to a World Bank-financed bridge construction project in Bangladesh valued at US $2.9 billion.[226] In 2011, the INT received information from tipsters advising that three employees of the Canadian firm SNC-Lavalin, along with another man, were conspiring with Bangladeshi officials to pay kickbacks in exchange for the award of a bridge construction supervision contract to SNC-Lavalin. The INT investigated the matter and encouraged Bangladesh to do so as well, later establishing a high-level panel of experts led by the former prosecutor of the International Criminal Court, Luis Moreno Ocampo, to conduct an assessment of the investigative efforts undertaken by Bangladesh.[227]

[225] *Niko Resources*, *supra* note 9 at para 21; *Griffiths Energy*, *supra* note 9 at paras 10, 28.

[226] *Wallace*, *supra* note 36 at para 3.

[227] The findings of the panel's review were later leaked to the media. Greg McArthur, "SNC-Lavalin in Bangladesh: World Bank Sees 'Conspiracy,'" *Globe and Mail* (22 February 2013); see also "Full Text of WB Panel's Letter to ACC" [Anti-Corruption Commission], *The Daily Star* (Bangladesh) (15 January 2013), online: <http://www.thedailystar.net/news-detail-265294>.

The INT's investigation, bolstered by the panel's conclusion that Bangladesh's domestic efforts were unsatisfactory, later led to the ten-year debarment of SNC-Lavalin and its affiliates from future World Bank projects,[228] a contextual aspect acknowledged by the Supreme Court of Canada.[229]

As for the Canadian avenue for prosecution, the INT also shared the tipsters' information with the RCMP, which used it to obtain wiretap authorizations in Canada, which in turn led to charges being laid in Canada against four individuals for the bribery of a foreign public official under the *CFPOA*.[230] The issue of immunity arose when the four accused made an application to an Ontario judge to compel the investigators within the World Bank Group to produce their documents, presumably with the intention of testing matters of credibility, knowledge, and motivation. The trial judge granted the application,[231] but, on an expedited appeal by the World Bank to the Supreme Court of Canada, this decision was overturned. In brief, the Court found that Canadian law gives domestic legal effect to the provisions of an international organization's constitutive instrument providing for the bestowal of immunity on its officers and employees and the inviolability of its archives, with inviolability in this context referring to a freedom from unilateral interference by a state in the operations of an international organization.[232]

To explain further, the World Bank Group consists of five organizations, with the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) being the two organizations most relevant to the case given their role in promoting economic development through the provision of financial assistance. The IBRD was created in 1944 to help rebuild Europe after the Second World War, and it has gone on to assist middle-income and credit-worthy countries, while the IDA was created in 1960 to provide assistance to the world's poorest countries. These organizations benefit from immunities conferred by treaty, with both organizations having been created by way of an agreement between states, the terms of which are found in a treaty

[228] The debarment was "part of a Negotiated Resolution Agreement between the World Bank and SNC-Lavalin Group following a World Bank investigation into allegations of bribery schemes, involving SNC-Lavalin Inc. and officials in Bangladesh." World Bank, "World Bank Debars," *supra* note 136.

[229] *Wallace*, *supra* note 36 at para 22.

[230] As noted above, the prosecution of a fifth individual, being a senior Bangladeshi official, was later stayed for want of jurisdiction. *Chowdhury*, *supra* note 103.

[231] *Wallace v R*, 2014 ONSC 7449.

[232] See further *Wallace*, *supra* note 36 at paras 75–80.

text entitled *Articles of Agreement*.[233] When Canada joined the World Bank Group, it made a decision to accept the terms and conditions found in those treaties, including the recognition of personnel and archival immunities. These immunity obligations bind Canada as both a matter of international and Canadian law, with the treaty obligations having been given the force of law in Canada by Parliament's enactment of the *Bretton Woods and Related Agreements Act*.[234] This Act is also capable of conferring immunities through the issuance of Orders in Council, as the Supreme Court of Canada has affirmed.[235]

As for the application of these organizational immunities, the Court has embraced a broad interpretive approach, thus ensuring that the archival records immunity "shields the entire collection of stored documents of the IBRD and the IDA from both search and seizure and from compelled production."[236] The use of the word "archive" does not restrict the immunity to documents of a historical nature. It is also an immunity that is absolute, according to the terms of the organizations' constitutive instruments, with Canada's highest court confirming that the archival immunity bestowed on the IBRD and the IDA is not subject to waiver.[237] As for personnel immunity, the Court accepted the possibility of a waiver, provided it was made express by the organization, with the Court making clear the concern that "exposing the World Bank Group to forms of implied or constructive waiver could have a chilling effect on collaboration with domestic law enforcement."[238] It was also the Court's view, made clear in the opening paragraph of its judgment, that "[w]hen international financial organizations, such as the World Bank Group, share information gathered from informants across the world with the law enforcement agencies of member states, they help achieve what neither could do on their own."[239]

It is sentiments such as this that lend support to the view that the judgment in *Wallace* "paves the way for [the] increased enforcement of Canada's anti-corruption laws" while also creating "interesting challenges for the

[233] *Articles of Agreement of the International Bank for Reconstruction and Development*, 27 December 1945, Can TS 1944 No 37 (entered into force 27 December 1945); *Articles of Agreement of the International Development Association*, 26 January 1960, Can TS 1960 No 8 (entered into force 24 September 1960).

[234] RSC 1985, c B-7.

[235] *Wallace*, *supra* note 36 at para 46.

[236] *Ibid* at para 67.

[237] *Ibid* at para 82.

[238] *Ibid* at para 94.

[239] *Ibid* at para 1.

right to a fair trial."[240] International development banks, in particular, have a role to play in using their access, specialist knowledge, and financial acumen to assist domestic law enforcement authorities to fight corruption, with several such organizations intervening in *Wallace* to make the argument that this information sharing depended on respect for their immunities.[241] The judgment has since been publicized by the INT as reaffirming "the unique role of multilateral institutions in fighting corruption,"[242] with two senior INT officials further opining that, "[i]n the context of INT operations, were cooperation with national authorities to be construed as an implied waiver of all of the Bank's immunities, the institution's ability to report violations of national laws would be constrained."[243]

The INT was also worried that "[i]t would also have had a similarly chilling effect on INT's ability to protect whistleblowers and confidential witnesses against discovery of their identities, exposing them to possible and very serious retaliation."[244] There is, however, a balance to be achieved between facilitating the prosecution of transnational crimes through the use of informants and ensuring respect for basic rights to privacy and a fair trial,[245] with the Supreme Court of Canada having wisely left the door open to alternative remedies for "addressing any prejudice resulting from the World Bank Group's assertion of its immunities."[246] After the judgment, the charge against one of the four accused was dropped, and then, in February 2017, the remaining three individuals were acquitted at the request of the Crown,[247] taking into account the trial judge's ruling in January 2017 that

[240] Gerald Chan & Nader Hasan, "No to Corruption Abroad, but Yes to Ensuring Fair Trial," *Globe and Mail* (19 May 2016). The authors represented the intervener, the BC Civil Liberties Association, in *World Bank Group v Wallace*.

[241] See *World Bank Group v Wallace*, SCC File No 36315, Factum of the Interveners, European Bank for Reconstruction and Development, Organization for Economic Co-Operation and Development, African Development Bank Group, Asian Development Bank, Inter-American Development Bank, and Nordic Investment Bank, at paras 34–38.

[242] *Annual Update: Integrity Vice Presidency (INT): Fiscal Year 2016* (Washington, DC: World Bank Group, 2017) at 12.

[243] Stephen Zimmerman & Giuliana Dunham-Irving, "Canada Supreme Court Rules in Support of World Bank, Strengthens Global Anti-Corruption Fight," *FCPA Blog* (5 May 2016), online: <http://www.fcpablog.com/blog/2016/5/5/canada-supreme-court-rules-in-support-of-world-bank-strength.html>.

[244] *Annual Update*, *supra* note 242 at 12.

[245] An argument for balance that also arises within the context of extradition proceedings. See Joanna Harrington, "The Role for Human Rights Obligations in Canadian Extradition Law" (2005) 43 Can YB Intl L 45.

[246] *Wallace*, *supra* note 36 at para 145.

[247] Jacques Gallant, "Judge Acquits SNC-Lavalin Execs, Says RCMP Relied on 'Gossip,'" *TheStar.com* (10 February 2017); Janet McFarland, "Former SNC Executives, Businessman Acquitted in Corruption Case," *Globe and Mail* (10 February 2017).

the wiretap evidence had been collected on the basis of information from tipsters that was "nothing more than speculation, gossip and rumour."[248]

This end result in Canada matches that in Bangladesh, where authorities had long concluded that there was insufficient evidence to continue an investigation into the same corruption allegations,[249] a finding acknowledged by the INT in a 2016 annual report.[250] But, for parliamentarians considering amendments to the *CFPOA* in 2013, the only assessment then available was that provided by the World Bank, which had stated publicly in mid-2012 that it had "credible evidence corroborated by a variety of sources" that pointed to "a high-level corruption conspiracy" between Bangladeshi government officials, SNC-Lavalin executives, and private individuals.[251] It was on this basis that the World Bank secured a negotiated agreement from SNC-Lavalin to accept debarment[252] and cancelled its loan to Bangladesh, thereby highlighting a different dimension to the link often drawn between corruption and development. The loan would have provided CDN $1.2 billion in assistance for a rail and road connection that would bring economic and social benefits to some thirty million people in a country considered to be one of the world's forty-seven least developed countries.[253]

Conclusion

Canada, alongside many other countries, has accepted that tackling foreign corruption through a prohibition on paying bribes to foreign public officials is a global policy priority worthy of domestic action. Some assess the success of Canada's efforts solely by reference to its record of four convictions. This is too easy, and unfair in my view, with the use of such counts as the indicator of success being methodologically suspect in the field of criminal law since they attribute no value to the law's deterrent effect.

[248] *R v Wallace*, 2017 ONSC 132 at para 71.

[249] "All Padma Bridge Graft Accused Acquitted," *The Daily Star* (Bangladesh) (26 October 2014), online: <http://www.thedailystar.net/all-padma-bridge-graft-accused-acquitted-47466>.

[250] *Annual Update*, *supra* note 242 at 12.

[251] World Bank, "World Bank Statement on Padma Bridge," press release (29 June 2012), online: <http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge>.

[252] World Bank, "World Bank Debars," *supra* note 136.

[253] "World Bank Cancels Bangladesh Bridge Loan over Corruption," *BBC News* (30 June 2012); "Bangladesh Weighs Options after World Bank Pulls Out of Padma Bridge Project," *The Guardian* (17 July 2012). On the categorization of "least developed country," see further UN Department of Economic and Social Affairs (undated), online: <https://www.un.org/development/desa/dpad/least-developed-country-category.html>.

Criminal prohibitions, regardless of prosecution counts, also serve as important statements of Canadian values, with the existence of a prohibition on foreign bribery providing a focal point around which the government and the RCMP can and do organize a variety of educational and preventive efforts. Simple prosecution counts do not measure the impact of these efforts, nor do they attribute any value to the existence of the *CFPOA*'s prohibitions as an incentive for securing cooperation from co-conspirators.

There are, however, challenges to be addressed to improve the effectiveness of the overall scheme, with the complexities entailed in a multi-jurisdictional approach worthy of far more consideration than say the use of nationality, in addition to territory, as a basis for Canada asserting jurisdiction under Canadian law. The speedy passage of both the *CFPOA* and its amendments in 2013 provide a cautionary tale about the Canadian parliamentary process, even in the face of significant cross-party support. Securing the effective enforcement of a new law is always a more difficult task than securing its enactment, with parliamentarians needing time to conduct inquiries, hold hearings, and hear testimony on implementation from a wide array of experts and interested parties, regardless of the good intentions of international inspiration. Reviewing the parliamentary record for the *CFPOA*, alongside a review of Canadian examples of involvement in acts of suspected and proven foreign corruption, suggests that parliamentarians might well have benefited from hearing testimony from prosecutorial authorities in other comparable jurisdictions and from those working within the investigations units of entities such as the World Bank as well as from development and foreign aid professionals, forensic accountants, Crown prosecutors, and criminal defence lawyers. Policy advisers at the pre-Parliament development stage would also have benefited from such wider engagement, with public consultations in focal point cities such as Calgary being one suggestion, rather than having the federal government rely on Ottawa-based meetings with what one might term the "usual suspects" in terms of readily identifiable stakeholders.[254]

Looking ahead, there is a need for the demand side of foreign bribery to receive further attention as well as a need to consider whether greater transparency obligations with respect to the beneficial ownership of corporations would serve to prevent corrupt officials from hiding their illegal activities behind a corporate veil.[255] A future stock-taking exercise will

[254] See note 78 above.

[255] It was recently announced that Canadian finance ministers would take measures to improve the transparency of beneficial ownership information. Department of Finance, "Finance Ministers Reach Agreement on Behalf of All Canadians," press release (11 December 2017), online: <https://www.fin.gc.ca/n17/17-122-eng.asp>.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press

also need to assess the role for deferred prosecution agreements, labelled "remediation agreements" in Canada, following their introduction in 2018 as a means to address corporate wrongdoing.[256] It is worth noting that the new law on remediation agreements expressly states that one of their purposes is "to provide reparations for harm done to victims or to the community," defining "victim" to include persons outside Canada, while also imposing a duty on a prosecutor to "take reasonable steps to inform any victim." However, any funds collected by way of the victim surcharge are still directed to provincial coffers.[257]

There is, however, an immediate need for Canada to review its mechanisms for securing cooperation with other states, and with the multilateral development banks, in support of both the prosecution of foreign bribery and the seizure and confiscation of its proceeds. Making cooperation with prosecutorial authorities in key partner states dependent on the signing of non-disclosure agreements, as arose in the demand-side proceedings in the *Griffiths Energy* saga, suggests that there are obstacles within that need to be overcome. The multi-jurisdictional nature of foreign bribery also suggests value in cooperation at the investigative stage, with the 2013 creation of an International Foreign Bribery Taskforce to encourage real-time information sharing between the RCMP and counterparts in Australia, Britain, and the United States being worthy of further study, both with respect to its benefits as well as its practices for the protection of the rights to privacy and fair trial.[258] At the international level, the confiscation and return of ill-gotten gains and the need to prevent the laundering of the proceeds of corruption are current policy priorities, with the World Bank

[256] From September to December 2017, the government of Canada carried out a public consultation on the role for deferred prosecution agreements to address corporate wrongdoing. See further *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion Paper for Public Consultation: Deferred Prosecution Agreement Stream* (Ottawa: Government of Canada, 2017); see also *Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada* (Transparency International Canada, July 2017). The feedback received was largely positive, as noted in a government of Canada update published in February 2018, and, in March 2018, amendments to the *Criminal Code* were tucked within a budget bill to enable prosecutors to negotiate remediation agreements in respect of certain offences. *Budget Implementation Act, 2018, No 1*, SC 2018, c 12, s 404, adding a new "Part XXII.1" to the *Criminal Code* on "Remediation Agreements."

[257] *Criminal Code, supra* note 41, ss 715.3 ("Definitions"), 715.31 ("Purpose"), 715.36 ("Duty to Inform Victims") and 715.37(5): "[T]he victim surcharge … is payable to the treasurer of the province."

[258] "RCMP Joins International Task Force against Foreign Bribery," *CBC News* (22 June 2013); see also Australian Federal Police, "Global Effort to Tackle Foreign Bribery and Corruption Strengthened by International Taskforce Partnerships," media release (12 May 2017), online: <https://www.afp.gov.au/news-media/media-releases/global-effort-tackle-foreign-bribery-and-corruption-strengthened>.

and the United Nations Office on Drugs and Crime working together to improve both national policies and national capacities and to provide a platform for collaboration on specific cases.[259]

Lastly, there is a need to consider how to put into practice the mantra that "corruption is not a victimless crime" and how to make the victims of foreign corruption a clearer concern of the *CFPOA*. To date, plea deals that secure the corporate entity's continuing viability, as well as the retention of its most valuable assets, have been made without reference to corruption's wider impacts on the governance practices and delivery of public services in the foreign state. There is also a pressing need for further discussion on how to identify a victim of foreign corruption and the role for victim surcharges, particularly with respect to the question of to whom one should return the benefits gained by the bribery of a foreign public official.

[259] See further Stolen Asset Recovery Initiative, online: <http://star.worldbank.org/star/>.

https://doi.org/10.1017/cyl.2019.3 Published online by Cambridge University Press